SARBANES-OXLEY EVIDENCE DESTRUCTION STATUTE HAS MUCH WIDER IMPACT THAN ON JUST BUSINESS CASES

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The provisions of the Sarbanes-Oxley Act dealing with the destruction of evidence, 18 U.S.C. § 1519, is widely perceived as a government check on corporations, but circuit and district courts have used it to permit prosecution of obstructive conduct in cases that do not involve business. Unlike other statutes related to the obstruction of justice, the broad language of § 1519 permits prosecution of obstructive acts done in contemplation or anticipation of a federal investigation. Practitioners should be aware of the far-reaching scope of this statute and be prepared to advise clients on compliance with its provisions.

Introduction

The Sarbanes-Oxley Act (the "Public Company Accounting Reform and Investor Protection Act)[1] was enacted in July 2002 on the heels of the highly publicized Enron and WorldCom financial scandals. Accordingly, the act is generally regarded as the federal government's attempt to regulate the financial practices of corporations. In fact, its purpose clause provides that it is "[a]n [a]ct [t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. … "[2] However, the purpose clause goes on to state that the act serves "other purposes,"[3] indicating that the Sarbanes-Oxley Act can be applied to cases that are beyond the sphere of corporate governance.

Several circuits have applied the provision of § 1519[4] that deals with the destruction of evidence to circumstances that are generally perceived as being outside the corporate governance arena.[5] For example, § 1519 has been used to prosecute (1) a police officer who made a false entry in an incident report with the intent to obstruct a federal investigation,[6] (2) a corrections officer who lied about an altercation with a prison inmate in a "use of force" report with the intent to obstruct a federal investigation,[7] and (3) a woman who destroyed her boyfriend's compact disc that contained child pornography with the intent to obstruct a federal investigation.[8]

Such a broad application of § 1519 has been challenged under the Fifth Amendment's Due Process Clause on the grounds of lack of fair notice. In *U.S. v. Hunt,* Jason Hunt, police officer, was convicted under § 1519 for falsifying an incident report.[9] Hunt appealed his conviction on the grounds that "he was not placed on fair notice that his conduct was criminal."[10] Hunt's argument was squarely rejected by the Eleventh Circuit, which held that the "plain text" of the

statute placed Hunt on notice that his conduct was unlawful.[11] Even though the *Hunt* court acknowledged that "§ 1519 was passed as part of the Sarbanes-Oxley Act, which was targeted at corporate malfeasance," it asserted that there is "no hint of any limiting principle cabining § 1519 to corporate fraud cases. ... "[12]

The circuit court's reasoning in *Hunt* is in keeping with the congressional intent underlying the Sarbanes-Oxley Act. Sen. Patrick Leahy (D-Vt.), then chair of the Committee on the Judiciary and the one who drafted the provisions of the act that dealt with obstruction of justice, characterized § 1519 as a "general anti-shredding provision ... [that] is meant to apply broadly. ..."[13] Indeed, the plain text of the statute compels a broad application:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ... or *in relation to or contemplation of* any such matter or case, shall be fined under this title or imprisoned not more than 20 years, or both.[14]

The intent requirement is satisfied by a mere showing that the defendant attempted to interfere with a federal investigation.[15] Therefore, § 1519 does not require defendants to have knowledge of a pending investigation when they engage in the obstructive conduct because the language "in relation to or contemplation of" (which is unique to § 1519 of the act) eliminates any requisite link or nexus between the obstructive conduct and the obstructed investigation. Obstructive acts committed long before the onset of a federal investigation are fair game under the statute.[16] Thus, criminal culpability is established even when the defendant engages in obstructive conduct in anticipation of a federal investigation.[17]

The broad language of § 1519 does not contain the technicalities that make it difficult to prosecute a case under other statutes related to the obstruction of justice.[18] For example, to convict a defendant under the "omnibus" obstruction provision, codified at 18 U.S.C. § 1503,[19] the government must show that (1) a federal investigation was pending at the time of the defendant's obstructive conduct and (2) the defendant had knowledge of the investigation.[20] Similarly, under the provision dealing with witness tampering, codified at 18 U.S.C. § 1512(b),[21] the government must show that the defendant had knowledge of the proceeding when he or she engaged in the obstructive conduct.[22] However, under § 1519, savvy individuals who would otherwise avoid conviction by engaging in obstructive misconduct long before the start of a federal investigation are subject to the penalties defined in the statute.[23] Accordingly, § 1519 has been described as a "significant new weapon in the arsenal of a federal prosecutor."[24]

Beyond Business Governance and the Judicial "Nexus" Requirement

Application of § 1519 in Nonbusiness Cases

Several courts have recognized that § 1519 can be applied to cases beyond the business realm. Those courts have embraced a broad reading of § 1519 that permits prosecution of any obstructive conduct, irrespective of the context in which it occurred.

In *U.S. v. Hunt,* for example, the Eleventh Circuit held that police officer Jason Hunt violated § 1519 when he made a false entry into a police report with the intent to impede, obstruct, or influence an FBI investigation.[25] While patrolling a neighborhood, Hunt observed James Woodard engaging in suspicious activity and stopped and questioned him.[26] When Woodard became agitated and resisted detainment, Hunt grabbed Woodard in a bear hug and threw him to the ground.[27] Woodard's head hit the concrete and he was hospitalized for eight days and suffered a permanent loss of hearing.[28] Hunt filled out a "use of force" report in which he lied and stated that Woodard had initiated the contact.[29] The FBI launched an investigation.[30] Initially, Hunt stuck to his story that Woodard grabbed him first but later admitted that he (Hunt) had lied after witnesses reported a different version of events.[31]

Hunt was convicted of violating § 1519.[32] The jury found that Hunt had acted with the requisite intent because (1) he knew that the federal government would investigate and prosecute "willful uses of excessive force" and (2) he changed his story only after he was confronted with conflicting statements made by witnesses.[33] Hunt appealed the conviction, arguing that "his conduct is not the type contemplated by Congress when it passed the statute" and, therefore, prosecution under § 1519 violated his Fifth Amendment due process right to fair warning.[34]

The notion of fair warning turns on whether a statute is unreasonably vague such that "'men of common intelligence must necessarily guess at its meaning and ... application.'"[35] The *Hunt* court found that no guesswork was needed to understand the meaning of the plain language of § 1519 of the Sarbanes-Oxley Act. On its face, the statute "plainly criminalizes the conduct of an individual who (1) knowingly (2) makes a false entry in a record or document (3) with intent to impede or influence a federal investigation."[36] As the *Hunt* court explained, "A person of ordinary intelligence would understand a police report to be a 'record' or 'document,' and … the language 'any matter within the jurisdiction of [a] department … of the United States' to include an FBI investigation. Moreover, there is nothing ambiguous or unclear about the word 'false' or the requirement that the statement be made knowingly and with the intent to impede said investigation."[37]

Although the basis for the ruling was contrary to the original purpose of the statute, the *Hunt* court emphasized that "Congress is free to pass laws with language covering areas well beyond the particular crisis *du jour* that initially prompted legislative action."[38] Accordingly, the *Hunt* court held that "§ 1519 covered Hunt's behavior [and that] the context of passage is of no moment."[39]

The Eleventh Circuit was recently confronted with similar

circumstances in *U.S v. Fontenot* and reached the same conclusion in that case. In *Fontenot*, a corrections officer, William Fontenot, and his subordinate, Clyde Daniel, entered the cell of a prison inmate to perform an inspection when an altercation ensued.[40] In a "use of force" report, Fontenot stated that he had been attacked by the inmate through the feeding slot in his cell door.[41] Daniel wrote a "use of force" report that verified Fontenot's version of events but subsequently admitted that he had falsified his report at Fontenot's request.[42] Daniel told investigators that Fontenot had entered the inmate's cell and initiated the altercation by punching the inmate in the head before choking him into unconsciousness with a plastic trash bag.[43]

Fontenot was convicted for violating § 1519 "by knowingly making false entries in a report with the intent to obstruct an investigation within the jurisdiction of a federal agency."[44] Fontenot appealed his conviction, contending that there was insufficient evidence to convict him because the government had failed to prove that he knew the report would be part of a *federal* investigation.[45] The *Fontenot* court rejected that argument on the grounds that the jurisdictional element under § 1519 is independent of the defendant's intent or knowledge[46]—that is, Fontenot's knowledge that his actions will obstruct an investigation was sufficient to establish his intent to obstruct justice.

The *Fontenot* court's reading of § 1519 is consistent with the legislative history of the Sarbanes-Oxley Act.[47] Leahy's remarks noted that "[t]he fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant."[48] Moreover, in *Hunt*, the Eleventh Circuit rejected the argument that knowledge of federal jurisdiction is necessary to violate § 1519. In that case, Hunt's knowledge that the FBI could investigate his conduct was only used circumstantially to establish his intent to obstruct justice.[49]

In *U.S. v. Wortman*, the Seventh Circuit also applied § 1519 in a case that did not involve a business when the court upheld the conviction of Amanda Wortman for the destruction of a compact disc containing child pornography. The CD belonged to her boyfriend, Ryan McDonald, who was under investigation by the FBI for the possession of child pornography.[50] During the investigation, McDonald admitted to viewing child pornography on the Internet and gave FBI agents printed pages and CDs of child pornography, with the exception of one CD, which was in the possession of his friend, Stanley Tuttle.[51] The agents told McDonald not to "retrieve," "tamper," or "destroy" the CD in Tuttle's possession.[52] However, McDonald and Wortman went to Tuttle's apartment to retrieve the CD, and Wortman "snapped it in her fingers."[53]

Wortman was convicted for violating § 1519 of the Sarbanes-Oxley Act and was sentenced to one year and one day in prison.[54] Wortman appealed the conviction, claiming that she lacked the requisite intent to obstruct justice because McDonald took the lead in their plan to destroy the CD.[55] However, her argument was rejected based on the following facts:

- Wortman had knowledge that the FBI was investigating her boyfriend at the time she destroyed the CD.
- She destroyed the CD after being told by FBI agents not to "retrieve," "tamper," or "destroy" the CD.
- She knew that McDonald wanted to destroy the CD when she accompanied him to Tuttle's apartment.
- She asked Tuttle's girlfriend to lie to FBI agents to conceal what she had done.[56]

Accordingly, the Seventh Circuit affirmed the jury's finding that Wortman had intended to obstruct the FBI's investigation of her boyfriend.[57]

In another case—*U.S. v. Jensen*—the district court held that Larry Jensen, an employee at a community corrections center, had violated § 1519 "by ... falsifying a record with the intent to impede, obstruct or influence the ... proper administration of a matter within the jurisdiction of the Bureau of Prisons."[58] Jensen provided an inmate with a negative urine sample and completed official paperwork falsely, stating that the inmate had provided the sample in his presence.[59] Because Jensen had interfered with a "matter" (monitoring drug use among federal inmates) "within the jurisdiction of an agency of the United States," his conduct clearly violated § 1519 of the Sarbanes-Oxley Act.

Anticipatory Obstruction of Justice

Both the plain text of § 1519 and the congressional intent behind the statute reject any "nexus requirement" between the obstructive act and the obstructed investigation. The congressional record indicates that the statutory language "in relation to or contemplation of" was added to broaden the scope of § 1519 to include anticipatory obstruction of justice.[60] As Leahy noted, the statute was "intended to provide prosecutors with an alternative option in the absence of proof that the defendant was aware of a pending proceeding."[61] Nonetheless, in *United States v. Russell,* the district court read a "nexus requirement" into § 1519. The *Russell* court reasoned that, because the U.S. Supreme Court had read a "nexus requirement" into other statutes dealing with obstruction of justice (18 U.S.C. § 15(b)(2) and 18 U.S.C. § 1503), "there appears to be little doubt" that a nexus requirement applies to § 1519.[62]

In *United States v. Aguilar*, the Supreme Court defined the nexus requirement (with regard to § 1503[63]) as a two-prong test[64]—that is, a nexus exists when the defendant's conduct (1) has "a relationship in time, causation, or logic" with the federal investigation and (2) has the "natural and probable effect of interfering with the due administration of justice."[65] However, the *Aguilar* Court's interpretation of the test suggested that a third prong, requiring proof that the defendant had *knowledge* that his conduct would have the "natural and probable effect" of obstructing the federal investigation, also had to be met.[66] The *Aguilar* Court reasoned that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[67] Accordingly, a nexus requirement was deemed necessary to give fair notice to defendants as well as to show that the defendant had knowledge of the pending investigation.[68]

In a dissenting opinion, Justice Scalia, joined by three members of the Court, accused the majority of "importing extratextual requirements in order to limit the reach of a federal criminal statute."[69] Scalia argued that the defendant's knowledge of a pending proceeding is only relevant to establish the defendant's intent to obstruct.[70] "I think an act committed with intent to obstruct is all that matters; and what one can fairly be thought to have intended depends in part upon what one can fairly be thought to have known."[71] The Eleventh Circuit adopted that reasoning in its ruling in *Hunt,*[72] which held that Hunt's knowledge was not an element of the offense but was, rather, merely probative of his intent to obstruct.[73]

However, as if heeding Justice Scalia's concerns, the *Russell* court's application of the nexus requirement was a significant departure from the opinion handed down by the *Aguilar* Court. Indeed, the nexus requirement that was applied in *Russell* appeared to be consistent with the broad language of § 1519. Although the *Russell* court applied the same two-prong test as in the one used in *Aguilar*, it stopped short of applying the third prong which, in effect, required a pending investigation as well as knowledge of such an investigation.[74] Instead, proof that an investigation was "foreseeable" or "anticipated" by the defendant was sufficient to establish a nexus in *Russell*.[75] In the words of the court, a nexus exists "where an official investigation was foreseeable or anticipated so that it could be said that the destructive act had the 'natural and probable effect' of obstructing the due administration of justice."[76]

In *Russell*, the FBI began an investigation of Robert Tate, a choirmaster and church organist, for possession of child pornography and exploitation of children.[77] The day after the investigation began, the church discovered a substantial number of images of naked boys on Tate's computer.[78] Phillip Russell, an attorney representing the church, confronted Tate about the images.[79] Tate acknowledged that the images were his and resigned his position with the church.[80] Russell gave Tate the name of a criminal defense attorney and Tate contacted the attorney later that day.[81] Russell took possession of the computer and took it apart.[82] Thereafter, Russell was charged with violating § 1519 of the Sarbanes-Oxley Act.[83] In a motion to dismiss the indictment, Russell claimed that he should not be subject to § 1519 because "no nexus existed between his obstructive conduct and the federal proceeding or investigation."[84]

The *Russell* court denied the motion, finding that a jury could reasonably find that a federal investigation of Tate's criminal activities was foreseeable.[85] The indictment alleged numerous facts, including the following details:

- The church sealed and wrapped Tate's computer, treating it as evidence, prior to retaining Russell.
- Russell knew that Tate's computer contained images of naked boys.
- Russell gave Tate the name of a criminal defense attorney.
- Tate contacted the attorney.
- Russell specialized in criminal law.[86]

In light of the facts of the case, the *Russell* court held that a jury could find that an investigation of Tate's criminal activities was foreseeable and, in turn, that Russell had violated § 1519[87] and was subject to the statute because he engaged in obstructive conduct in anticipation of a federal criminal investigation. The *Russell* decision is significant because it demonstrates both the futility of reading the *Aguilar* nexus requirement into a statute as broad as § 1519[88] and the redundancy of a nexus requirement (as applied in *Russell*) because the *Russell* court would have reached the same decision had it relied on the plain text of the statute.

With regard to the issue of fair notice, which the Supreme Court raised in *Aguilar*, the *Russell* decision is equally helpful. In its ruling, the *Russell* court claimed that the statutory language "in relation to or contemplation of" was too vague.[89] As previously noted, the test for vagueness is "whether the statute gives a person of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[90] The *Russell* court asserted that § 1519 passed the test because the terms "in relation to" and "in contemplation of" are frequently used in criminal statutes and have ordinary meaning.[91] The phrase "in relation to" is commonly understood to mean "with reference to" or "as regards."[92] "Similarly," the court claimed, "'in contemplation of' is commonly understood as meaning something that is envisioned or anticipated."[93] Thus, "a person of ordinary intelligence is given a reasonable opportunity to understand that destroying tangible objects with the intent to obstruct a federal investigation, or doing so with reference to ... a federal investigation, or in anticipation of, or envisioning, such an investigation, is prohibited, but that doing so *coincidentally* is not."[94]

Legislative History of § 1519

The legislative history of the statute removes any doubt that § 1519 was intended to apply broadly and without limitation, particularly judicially imposed limitations that have narrowed the scope of other statutes related to obstruction of justice.[95] Sen. Leahy referred to the *Aguilar* decision as being contrary to the intent of the statute and asserted that § 1519 was "meant not to include any technical requirement … to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise."[96] The legislative history is clear that anticipatory obstruction of justice is within the statute's reach.[97] Leahy stated that the statute "extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is … not a bar to prosecution."[98] In other words, defendants who commit obstructive acts without knowledge of a specific investigation, but upon the assumption that there will be an investigation in the future, are criminally liable under § 1519.

Moreover, the *Congressional Record* does not indicate that the statute should be limited to business cases only. On the contrary, Sen. Leahy explicitly stated that § 1519 applies to the obstruction of "any government function."[99]

"The intent of the provision is simple," he said, "people should not be destroying, altering, or falsifying documents to obstruct any government function."[100]

Implications

Some commentators are concerned that a broad reading of § 1519 of the Sarbanes-Oxley Act may impose criminal liability on "innocent" businesses that engage in routine document destruction. However, these concerns are unfounded. A consistently applied document retention policy could exculpate a defendant who destroys documents as a matter of routine, without contemplating an investigation[101]—that is, routine document destruction shows a lack of the specific intent to obstruct as required by federal law.[102]

Nevertheless, there is cause for concern when document retention policies are enforced in bad faith, as was the case in the infamous Arthur Andersen accounting scandal.[103] Arthur Andersen LLP provided both internal and external auditing work for Enron. On Aug. 28, 2001, the Securities and Exchange Commission (SEC) opened an informal investigation of Enron.[104] On Oct. 8, 2001, Arthur Andersen retained outside counsel in anticipation of an investigation by the SEC.[105] Operating under the theory that criminal liability arises at the moment a person gains knowledge of an actual investigation,[106] Arthur Andersen urged its employees to continue to destroy documents, pursuant to the company's document retention policy, until Nov. 8, 2001, when the SEC served Arthur Andersen with subpoenas for its records.[107] Even though Arthur Andersen avoided criminal liability under § 1512(b) (which requires actual knowledge of a pending investigation),[108] the company's destruction of documents after it anticipated an investigation by the SEC is precisely the type of conduct § 1519 penalizes.

So, how can a business avoid the administrative costs of retaining documents without exposing itself to criminal liability under the broad language of § 1519? The answer: a foolproof document retention policy. To create such a policy, a business should take the following steps:

- Create and implement the policy at a "neutral time"—when an investigation is not pending or contemplated.[109] This is important for two reasons: (1) to avoid the inference of bad faith (that is, that the policy was merely designed to purge documents relating to the pending or contemplated investigation); and (2) to demonstrate the lack of intent to obstruct justice.[110]
- Describe the policy clearly and in sufficient detail to ensure that employees understand what to do with the documents they create and receive.[111]
- Arrange documents into categories, each of which has a designated retention period consistent with applicable federal laws (industry regulations may require retention of certain documents for a longer period of time).[112]
- Follow the policy consistently and meticulously. A document retention policy that is enforced selectively or haphazardly may support a finding of intent to obstruct justice.
- Suspend the policy immediately upon learning that an investigation is pending or contemplated.[113] Employers must communicate the suspension to all employees to ensure widespread preservation of evidence, thereby limiting the potential for criminal liability under § 1519.[114] Although an employer is not required by law to suspend its document retention policy when an investigation is pending or contemplated, it is best to err on the side of caution, given the broad reach of § 1519.[115]

Conclusion

Considering its broad statutory language and clear congressional intent, there is no denying that § 1519 of the Sarbanes-Oxley Act was intended to be applied in more than just business cases and to prohibit anticipatory obstruction of justice. A contrary reading of the statute flies in the face of its plain text and can only be described as judicial activism. Moreover, a broad reading of § 1519 should not discourage businesses from engaging in routine document destruction. Quite the reverse: A document retention policy that is consistently and meticulously followed and suspended when an investigation is pending or contemplated is a strong defense against prosecution under § 1519 of the statute. **TFL**

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Endnotes

[1]Pub. L. No. 107-204, 116 Stat. 745 (2002).

[2]*Id.*

[3]*Id.*

[4]18 U.S.C. § 1519 (2002).

[5]*See* Michael G. Considine and Caroline Bersak Hyde, *Obstruction of Justice Under Sarbanes-Oxley: A Broad Reach*, Newsletter of the ABA Criminal Justice Section's

White Collar Crime Committee ¶ 1 (Aug. 2008) available at www.abanet.org/crimjust/wcc/aug08considine.htm (accessed Aug. 29, 2010).

[6]*U.S. v. Hunt*, 526 F.3d 739, 741 (11th Cir. 2008).

[7]*U.S. v. Fontenot*, 2010 WL 2730659, at *1 (11th Cir. July 13, 2010).

[8]*U.S. v. Wortman*, 488 F.3d 752, 753 (2007). *See also* Considine and Hyde, *supra* note 5, at ¶ 2.

[9]*Hunt*, *supra* note 6, at 739, 743.

[10]*Id.*

[11]*Id.*

[12]*Id.* at 744; *United States v. Russell*, 639 F. Supp. 2d 226, 232–333 (D. Conn. 2007) ("Nothing in the legislative history supports a conclusion that the drafters intended to narrowly circumscribe its application to the destruction of business records and documents.").

[13]Sen. Patrick Leahy, Statement, 148 Cong. Rec. S7418-19 (daily ed. July 26, 2002).

[14]18 U.S.C.A. § 1519 (2002) (emphasis added).

[15]Dana E. Hill, *Anticipatory Obstruction of Justice: Preemptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519, 1566 (2004).

[16]*Id.*

[17]*Id.*

[18]*Id.* at 1529.

[19]18 U.S.C. § 1503(a) (2002).

[20]Hill, *supra* note 15, at 1530.

[21]18 U.S.C. § 1512(b) (2002).

[22]Hill, *supra* note 15, at 1533; *Arthur Anderson LLP v. United States*, 125 S. Ct. 2129, 2131 (2005) (The "knowingly corrupt" language of § 1512(b) requires contemplation of a particular official proceeding).

[23]Hill, *supra* note 15, at 1521–22.

[24]*Id.* at 1532.

[25]*Hunt*, *supra* note 6, at 741.

[26]*Id.*

[27]*Id.*

[28]*Id.*

[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*Id.* at 743.

[33]*Id.* at 742.

[34]*Id.* at 743.

[35]*See id.*, *citing United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir. 1989) (quoting *Connaly v. Gen. Constr. Co.*, 46 S. Ct. 126, 127 (1926)).

[36]*Hunt*, *supra* note 6, at 743.

[37]*Id.*

[38]*Id.* at 744. *See also United States v. Russell*, 639 F. Supp. 2d 226, 237 (D. Conn. 2007) ("Even if § 1519 was passed to penalize document destruction in the context of corporate financial fraud, this would not prevent the government from using it to prosecute the destruction of evidence in connection with the investigation of other crimes.").

[39]*Hunt*, *supra* note 6, at 744.

[40]*Fontenot*, *supra* note 7, at *1.

[41]*Id.*

[42]*Id.*

[43]*Id.*

[44]*Id.*

[45]*Id.* at *2.

[46]*Id.*

[47]*See id.*

[48]*Id.* at *4 (Barkett, J., specially concurring) (*citing* Sen. Leahy, *supra* note 13.

[49]*Hunt*, *supra* note 6, at 745.

[50]*Id.* at 753.

[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]*Id.* at 754.

[55]*Id.*

[56]*Id.* at 755.

[57]*See id.*

[58]*U.S. v. Jensen*, 248 Fed. Appx. 849, 850 (10th Cir. 2007).

[59]*Id.*

[60]Hill, *supra* note 15, at 1560.

[61]*Id.* at 1562.

[62]*Russell*, *supra* note 38, at 234.

[63]*United States v. Aguilar*, 515 U.S. 593, 598, 115 S. Ct. 2357, 2361 (1995), which provides, in relevant part: "Whoever … corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.").

[64]*Id.* at 599-600.

[65]*Id.*

[66]*Id.* at 599, 613.

[67]*Id.* at 599. *See also* Hill, *supra* note 15, at 1546 ("Such a requirement protects the actor who disposes of evidence before it is established that he knows of the proceeding seeking it, and contradicts the expressed congressional intent in drafting the measure.").

[68]Hill, *supra* note 15, at 1535–1536 (citing *Aguilar*, 515 U.S. at 599).

[69]*Aguilar, supra* note 63, at 612 (Scalia, J., dissenting).

[70]*Id.* at 613.

[71]*Id.*

[72]*Hunt*, *supra* note 6, at 745.

[73]*Id.*

[74]*Russell*, *supra* note 38, at 239. *See also* Considine and Hyde, *supra* note 5, at ¶ 9.

[75]*Russell*, *supra* note 38, at 239.

[76]*Id.*

[77]*Id.* at 231, 239.

[78]*Id.*

[79]*Id.* at 231–232.

[80]*Id.* at 232.

[81]*Id.*

[82]*Id.*

[83]*Id.*

[84]*Id.* at 234.

[85]*See id.* at 236–237.

[86]*Id.* at 236

[87]*See id.*

[88]The broad statutory language "in relation to or contemplation of" is unique to § 1519 of the act.

[89]*Russell*, *supra* note 38, at 239.

[90]*Id.* (citing *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006)).

[91]*Russell, supra* note 38, at 239.

[92]*Id.*

[93]*Id.* at 239–240.

[94]*Id.* at 240 (emphasis added). *See also* Hill, *supra* note, 15, at 1566–67 ("An actor who destroyed documents as a matter of routine, truly without contemplating an investigation would not be held criminally liable.").

[95]*See* Sen. Leahy, *supra* note 13.

[96]*Id.*

[97]*See id.*

[98]*Id.*

[99]*Id.*

[100]*Id.*

[101]Hill, *supra* note 15, at 1567.

[102]*Id.* at 1566. *See also* Christopher R. Chase, *To Shred or Not To Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L 721, 722 (2003) ("the best argument a corporation can make ... is that because of a consistently applied and routinely followed retention policy, the corporation did not have the specific intent to obstruct justice as required by federal law.").

[103]*Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2136 (2005).

[104]*Id.* at 2132.

[105]*Id.*

[106]*Id.* at 2132–2133. On Oct. 10, 2001, Michael Odom, a partner in the firm, stated that, "if it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great ... [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable."

[107]*Id.* at 2133.

[108]*Id.* at 2137. The Supreme Court held that "[a] 'knowingly ... corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."

[109]Chase, *supra* note 102, at 753.

[110]*Id.* at 723.

[111]*Id.* at 754.

[112]*Id.* at 753.

[113]*Id.* at 754.

[114]*See id.*

[115]*See id.*

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occasions. He convinced Bobby Kennedy to make one of his first public appearances, following the assassination of his brother, at a 1964 Friends of St. Patrick dinner in Scranton. At the conclusion of his talk, Kennedy quoted the moving Irish ballad on the assassination of Chieftain Owen Roe O'Neill by Cromwell's agents, a lament evocative of the recent death of JFK. "There were 1,200 Irishmen, and not a dry eye in the room," Nealon remembers.

In his career, Nealon has presided over many significant cases, but one in particular stands out for him. "The local school board adopted a program encouraging the formation of school clubs. Twenty-one clubs were formed, one of which was a Bible Club and the board refused to recognize it. The case was filed by a man who sat on the board and whose son attended a local high school." Nealon found it was discriminatory to eliminate that one club, arguing for equal access. He was reversed by the Court of Appeals, but the Supreme Court granted cert in the case. Meanwhile, Congress passed legislation providing equal access.

Nealon, now 87, was 36 years old when he began his judicial career as a Lackawanna County judge. He is quick to point out that his district court bench includes a still active 96-year-old (Judge Malcolm Muir, a Nixon appointee) and three 85-year-old senior judges (Judges William Caldwell, Richard Conaboy and Edwin Kosik). "We keep busy and enjoy the work. And when you reach an advanced age, it is helpful to be around younger people. They help strengthen the spirit." He has needed that energy for an ever-increasing caseload. For example, in 1963, when he began on the federal bench, there were 450 civil case filings in the district. Last year, there were over 2,500. From five motions to vacate a criminal sentence, the number of motions has risen to 57 in 2010.

But Nealon may speak for all judges who accept their President's nomination to serve. "All our judges work hard," he said. "Sometimes there isn't enough time in the day. But we face challenging problems and there is a satisfaction in solving them." **TFL**

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