

20 Years for Clearing Your Browser History?

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In today’s world, average people create and delete massive amounts of digital data every single day. And most of the time people can do so without expecting the Department of Justice to come knocking. But deleting digital data—including clearing browser history—can result in federal felony obstruction of justice charges under 18 U.S.C. § 1519, the federal anti-shredding statute, which carries a 20-year maximum penalty. It is thus vital that citizens understand what is and is not illegal under § 1519.

Unfortunately, understanding what the statute prohibits is a difficult task. Indeed, this Article will argue that § 1519 has a vagueness problem. That is, the statute arguably fails “to provide a person of ordinary intelligence fair notice of what is prohibited” and “is so standardless that it authorizes or encourages seriously discriminatory enforcement.”¹ This Article brings attention to § 1519’s vagueness problem and suggests possible solutions. Specifically, it recommends that the courts either impose a “nexus requirement” on § 1519 or limit enforcement to the corporate crime context.

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¹ United States v. Williams, 553 U.S. 285, 304 (2008).

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I. INTRODUCTION

Imagine that a friend has been arrested for possession of marijuana. You have smoked marijuana with her before. Thinking you should distance yourself from your friend’s drug use, you open Google Chrome and clear your browser history, which showed that you watched videos about how to make a homemade bong. With that action you have—it seems from recent cases—committed the commonly charged crime of federal obstruction of justice under 18 U.S.C § 1519. This statute imposes a 20-year maximum sentence² on anyone who “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 any case filed under title 11, or in relation to or contemplation of any such matter or case.”³

² Under the federal sentencing guidelines, a first-time offender would be more likely to receive 15-21 months in custody than 20 years; 20 years is simply the statutory maximum. *See* U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 (Base offense level 14).

³ 18 U.S.C. § 1519 (2002).

The above scenario mirrors what happened to Khairullozhon Matanov.⁴ He was a friend of the Boston Marathon bombing brothers, though the government never alleged that Matanov knew about the attack in advance.⁵ After going to the police to report on his friends, Matanov cleared his browser history and deleted videos stored on his hard-drive that the government alleged demonstrated that he sympathized with Islamist terrorism.⁶ For this, the government charged him with obstruction of justice under 18 U.S.C. § 1519.⁷

But the federal government does not reserve § 1519 prosecutions for terrorism cases. In 2010 David Kernell—then a University of Tennessee student—was prosecuted under § 1519 after he destroyed electronic information that showed he had accessed Sarah Palin’s Yahoo email account without her authorization.⁸

Presumably these kinds of cases will continue to arise as more and more data is stored online and on computer hard-drives. For regular computer-users it is therefore vital to know what portion of the massive troves of digital data we create on a daily basis the government expects us to store for its investigative purposes.

When can you delete your Tweets? Could encrypting your emails violate the statute under certain circumstances? Can you delete a digital diary entry that described a dream where you killed your partner? What if you delete an Instagram picture of yourself underage drinking at the Lincoln Memorial? The sheer volume of digital data that individuals accumulate and delete daily means we should all be concerned with a statute such as § 1519, which applies to digital data and arguably lacks basic clarity.

Indeed, understanding what the statute prohibits is a difficult task. This Article will argue that § 1519 as currently applied may violate criminal defendants’ due process rights under the void for vagueness doctrine. There is an argument that the statute fails “to provide a person of ordinary intelligence fair notice of what is prohibited”⁹ by the law. It could leave jurors with a lack of clarity about what is prohibited. And it

⁴ Juliana DeVries, *You Can Be Prosecuted for Clearing Your Browser History*, THE NATION ONLINE (June 2, 2015), <http://www.thenation.com/article/you-can-be-prosecuted-clearing-your-browser-history/>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *United States v. Kernell*, 667 F.3d 746, 748 (6th Cir. 2012).

⁹ *Williams*, 553 U.S. at 304.

gives prosecutors broad discretion, which can lead to discriminatory and selective enforcement, and contribute to delegitimization of the rule of law.

To address the statute's vagueness problem, this Article will argue that the courts should consider imposing a nexus requirement on § 1519, as they have done with other obstruction statutes. A nexus requirement for § 1519 would require the government to prove (1) that the destructive act had a relationship in time, causation, or logic with an official proceeding or investigation and (2) that the act had the natural and probable effect of interfering with that proceeding or investigation.

Alternatively, this Article will argue that courts could consider whether prosecutions under § 1519 should apply only in the corporate crime context, since the statute was enacted as part of the Sarbanes-Oxley Act, which was passed in the wake of the Enron scandal to prevent corporate fraud. Either of these two changes would help alleviate some of the problems with § 1519 and give guidance to the everyday computer user.

Part I gives a short history of obstruction of justice, the Sarbanes-Oxley Act, and the imposition of nexus requirements on obstruction statutes. Part II analyzes § 1519 under the void for vagueness doctrine. It addresses whether § 1519 has a *mens rea* requirement and whether the statute adequately specifies what a defendant must know about an investigation in order to trigger potential liability. It also explains how § 1519 could lead to discriminatory enforcement and raise policy concerns by encouraging encryption. Part III proposes solutions to the problems analyzed in Part II. It suggests that courts could impose a nexus requirement on § 1519 or limit prosecutions to the financial fraud context.

II. OBSTRUCTION OF JUSTICE: A HISTORY

This section will outline the history of federal obstruction of justice in general and of § 1519 in particular. Next, it will review the debate over whether obstruction of justice statutes should require that the accused's conduct have a nexus in time, causation, or logic with an official proceeding. Last, it will present a selection of recent cases that demonstrate how the government has prosecuted individuals under § 1519 since the law was enacted in 2003.

A. A Textual Outlier

The United States has long criminalized obstruction of justice in some form. Obstruction of justice refers to any “interference with the orderly administration of law and justice.”¹⁰ In the federal system, obstruction is governed by 18 U.S.C. §§ 1501-1521.¹¹ Obstruction generally includes false statements to government officials, jury interference, and destroying or falsifying documents.¹² These crimes are commonly charged because they are often easier for the government to prove than substantive crimes such as murder, theft, or fraud.¹³ The government charges individuals and corporations alike with obstruction.¹⁴

There are a host of different federal obstruction statutes. Courts give the most expansive treatment to §§ 1503, 1505, 1510, 1512, 1519, and 1520.¹⁵ Section 1503, commonly referred to as the “Omnibus provision,” applies where the defendant knew about a pending judicial proceeding and acted or attempted to act to corruptly obstruct the administration of justice.¹⁶ Section 1512 outlaws the use of physical force, murder, or attempted murder when committed to prevent evidence from coming to light.¹⁷ And § 1519, the focus of this Article, states, in full:

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 any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.¹⁸

The statutory text of § 1519 is notable for two reasons. First, the most grammatical reading of the statute is that it does not require intent with respect to the “in relation to or contemplation of” prong of the test. In other words, the statute prohibits two types of conduct: (1) knowingly destroying documents with intent to impede an investigation and (2)

¹⁰ BLACK’S LAW DICTIONARY (9th ed. 2009).

¹¹ Matthew Harrington, Amanda McGinn & Evan Ottaviani, *Obstruction of Justice*, 52 AM. CRIM. L. REV. 1385, 1386 (2015).

¹² *Id.*

¹³ JEROLD H. ISRAEL, ELLEN S. PODGOR, PAUL D. BORMAN & PETER J. HENNING, WHITE COLLAR CRIME 168 (2013).

¹⁴ *Id.*

¹⁵ *Obstruction of Justice*, *supra* note 11, at 1387.

¹⁶ *Id.* at 1388.

¹⁷ 18 U.S.C. § 1512 (2008).

¹⁸ 18 U.S.C. § 1519.

knowingly destroying documents *in relation to or in contemplation of* an investigation.¹⁹ This is a normal reading of the text of the statute, as the phrase “with the intent to impede, obstruct, or influence” does not appear to modify the “in relation to or contemplation of” clause.²⁰

Second, a person can violate the statute by deleting records in contemplation of “any such matter or case.” “[A]ny such matter or case” here refers to the previous clause and therefore should be understood to mean that a person violates the statute by deleting records in contemplation of any “matter within the jurisdiction of any department or agency of the United States or any case filed under title 11.” The pairing of the word “contemplation” with this expansive definition of federal matter or case appears to mean that the statute may not require that the deleting party have any specific investigation in mind. That is, a person could violate the statute by deleting data while simply contemplating a potential investigation that would never happen, an unlawful investigation, or an entirely hypothetical investigation. Take, for example, the true crime journalist who routinely deletes her source material so as not to get caught up in any hypothetical future investigation—she would, it seems, violate the statute as written.

B. Sarbanes-Oxley

Section 1519 is also notable in its origins. Congress enacted § 1519 as part of the Sarbanes-Oxley Act of 2002.²¹ Congress passed Sarbanes-Oxley in the wake of the Enron Corporation’s massive accounting fraud and subsequent revelations that Arthur Anderson, Enron’s auditor, allegedly destroyed potentially incriminating documents.²² Congress designed Sarbanes-Oxley to protect investors and restore trust in financial markets following the scandal. Its stated purpose was to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.”²³ The other purposes are not explicitly specified. Section 1519 in particular closed a loophole in § 1512 that seemed to make it a crime

¹⁹ *Kernell*, 667 F.3d at 752 (reasoning that “[g]rammatically, Kernell has an argument” that there is no *mens rea* element that applies to the in contemplation prong, but presuming that Congress meant to enact a constitutional statute and thus reading an intent element into the in contemplation).

²⁰ *Id.*

²¹ *Obstruction of Justice*, *supra* note 11, at 1422.

²² *Yates v. United States*, 135 S.Ct. 1074, 1081 (2015).

²³ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

to persuade another person to destroy documents, but not a crime for a person to destroy the documents herself.²⁴

C. *Yates v. United States*

In 2015, the Supreme Court released what is to date its only opinion interpreting § 1519. That case, *Yates v. United States*, involved a commercial fisherman, who caught undersized grouper fish in federal waters.²⁵ The fisherman then ordered a member of his crew to throw the undersized fish overboard, thereby destroying the evidence of his crime.²⁶ The federal government charged him under § 1519 for knowingly destroying a “tangible object” with intent to impede a federal investigation.²⁷

The defense argued that a fish is not a tangible object under § 1519, and, surprisingly, the Court agreed.²⁸ The Court recognized that a fish is, indeed, an object that is tangible.²⁹ But, according to the Court, “it would cut §1519 loose from its financial-fraud mooring to hold that [§ 1519] encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent.”³⁰ This is because, “in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups,” and therefore a tangible object under § 1519 “must be one used to record or preserve information.”³¹

The Court also pointed to § 1519’s position within Title 18, Chapter 73, “following immediately after pre-existing specialized provisions expressly aimed at corporate fraud and financial audits.”³² This, the Court reasoned, signaled that, “§ 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence.”³³ Instead, “[t]his placement accords with the view that Congress’ conception of § 1519’s coverage was considerably more limited than the Government’s.”³⁴ The Court therefore held that it went beyond the power of the government to charge the defendant under § 1519 for throwing

²⁴ S. REP. NO. 107-146, 107th Cong., (2002).

²⁵ *Yates*, 135 S.Ct. at 1078.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1079.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1083.

³³ *Id.* at 1077.

³⁴ *Id.*

undersized fish overboard.

D. Requiring A Nexus in Time, Causation, or Logic

The Supreme Court's limited discussion of § 1519 in *Yates* left many key questions about the statute unresolved. One important question is whether there needs to be a nexus between the obstructive action and an official proceeding. Such a "nexus requirement" would obligate the government to prove that the accused's act has a relationship in time, causation, or logic with an official proceeding or investigation.³⁵ That is, the evidence-destroyer would have to have a specific proceeding or investigation, not just a hypothetical investigation, in mind. The act would also have to have the natural and probable effect of interfering with the proceeding or investigation.³⁶

The Supreme Court has applied a nexus requirement to other broad obstruction statutes. The Court first considered the issue in the 1893 case of *Pettibone v. United States*.³⁷ There, the Court considered the predecessor statute to § 1503, the Omnibus statute. The Court found that a person must have "knowledge or notice" of an official proceeding in order to obstruct it, because "without such knowledge or notice the evil intent is lacking."³⁸

The Court reiterated that § 1503 requires a nexus between the obstructive conduct and a federal investigation in the 1995 case of *United States v. Aguilar*.³⁹ The Court noted that a nexus requirement must be read into § 1503 "out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'"⁴⁰ There, the Court said that uttering false statements to an investigating agent who may or may not testify before a grand jury was insufficient to satisfy the § 1503 prohibition on "corruptly . . . influenc[ing], obstruct[ing], or imped[ing] . . . the due administration of justice."⁴¹

Similarly, in *Arthur Anderson v. United States*, the Court read a nexus requirement into an obstruction statute because otherwise the

³⁵ *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

³⁶ *Id.* at 601.

³⁷ *Pettibone v. United States*, 148 U.S. 197 (1893).

³⁸ *Id.* at 206-07.

³⁹ *Aguilar*, 515 U.S. at 599.

⁴⁰ *Id.* at 593.

⁴¹ *Id.* at 600.

statute would have ensnared innocent conduct.⁴² There, the statute in question was § 1512, which makes it illegal to knowingly use intimidation or force with intent to persuade a person to “withhold” or “alter” documents for use in an “official proceeding.”⁴³ Enron’s auditor instructed its employees to destroy documents pursuant to its document retention policy, but it was unclear whether the defendant did so with any particular investigation in mind in which the documents would be material.⁴⁴ The Court noted that restraining the reach of a statute is particularly important “where the act underlying the conviction . . . is by itself innocuous.”⁴⁵ The Court said, if not for a nexus requirement, the law would ensnare such innocuous conduct as that of a mother who suggests her son invoke his Fifth Amendment right, of a wife who persuades her husband not to reveal her secrets, or of an attorney who gives his client Upjohn Warnings.⁴⁶ Based on these concerns, the Court read a nexus requirement into the statute.

The lower courts have split on whether § 1519 similarly requires that the government show that the accused’s act of destroying documents had a relationship in time, causation, or logic with an official proceeding or investigation, though only a few circuits have considered the issue. In 2007, the District of Connecticut in *United States v. Russell* stated in dicta that § 1519 has a nexus requirement.⁴⁷ The Middle District of Pennsylvania reached the same conclusion.⁴⁸ The courts decided these cases on the basis of *Pettibone*, *Aguilar*, and *Arthur Anderson*, reasoning that the “nexus mandate is precisely designed to restrain broad, catch-all provisions like that in § 1519 from overreaching,”⁴⁹ and that “[w]ithout the [nexus] requirement, the danger of both the lack of notice and criminalization of innocent actions which was contemplated by *Aguilar*

⁴² 544 U.S. 696 (2005).

⁴³ 18 U.S.C. § 1512.

⁴⁴ *Arthur Anderson*, 544 U.S. at 707-08.

⁴⁵ *Id.*

⁴⁶ *Id.* at 704. Upjohn warnings originated in the case *Upjohn Company v. United States*, 449 U.S. 383 (1981), and are routinely provided by corporate counsel to employees, warning them that the company has discretion over attorney-client privilege and that the company may choose to waive this privilege and disclose employee statements.

⁴⁷ 639 F.Supp.2d 226, 233-34 (D.Conn. 2007).

⁴⁸ *United States v. Moyer*, 726 F.Supp.2d 498, 505 (M.D. Penn. 2010), *overruled by* *United States v. Moyer*, 674 F.3d 192 (3d Cir. 2012); *United States v. Hayes*, 2010 WL 2696894 (M.D. Penn. 2010) (unpublished decision); *United States v. Nestor*, 2010 WL 2696776 (M.D. Penn. 2010) (unpublished decision).

⁴⁹ *Moyer*, 726 F.Supp.2d at 505.

and *Arthur Andersen* is present in § 1519.”⁵⁰ In other words, without a nexus requirement, § 1519 ensnares too much innocent conduct and fails to give adequate notice as to what the statute criminalizes, making it similar to § 1512 and § 1503.

On the other hand, the Second Circuit in *United States v. Gray* determined that § 1519 did not have a nexus requirement.⁵¹ There, a correctional officer assaulted an inmate and then falsified a report about the incident.⁵² In an opinion authored by Judge Katzmann, the Second Circuit reasoned that reading a nexus requirement into § 1519 conflicts with the plain meaning of the statute, which ““makes no specific reference to a judicial or official proceeding.””⁵³ It wrote, “The words of the statute are unambiguous, and, thus, ‘judicial inquiry is complete.’”⁵⁴ The court also pointed to the legislative history as evidence that Congress intended not to include a nexus requirement in § 1519.⁵⁵ The Senate Report from the Committee on the Judiciary does reference *Aguilar*, seemingly to criticize the nexus requirement imposed in that case:

[P]rovisions, such as 18 U.S.C. S 1503, have been narrowly interpreted by courts, including the Supreme Court in *United States v. Aguilar*, 115 S. Ct. 593 (1995), to apply only to situations where the obstruction of justice can be closely tied to a pending judicial proceeding . . . current laws regarding destruction of evidence are full of ambiguities and technical limitations that should be corrected. This provision is meant to accomplish those ends.⁵⁶

The Report then distinguishes § 1519 from those statutes that have been more “narrowly interpreted by the courts” and says:

Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation. This statute is specifically meant not to include any technical requirement, which some courts have read into other

⁵⁰ *Id.* at 506.

⁵¹ 642 F.3d 371, 378 (2d Cir. 2011).

⁵² *Id.* at 373.

⁵³ *Id.* at 373, 376-77.

⁵⁴ *Id.* at 373, 377.

⁵⁵ *Id.*

⁵⁶ S. REP. 107-146, *supra* note 24 (emphasis added).

obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter.⁵⁷

Thus, because the words “official proceeding” do not appear in the statute, and because the Senate Report appears to eschew the nexus requirement, the Second Circuit found that such a requirement does not apply to § 1519. Under almost exactly the same logic, the Third, Sixth, and Eighth Circuits have also decided that § 1519 does not include a nexus requirement.⁵⁸

E. David Kernell

The lack of a nexus requirement for § 1519 can impact actual defendants, such as David Kernell. Kernell was a University of Tennessee student during the 2008 presidential election. On September 16, 2008, he gained access to Sarah Palin’s Yahoo email account through Yahoo’s forgotten password feature. Kernell used publicly available information to answer Palin’s security questions, and then he changed Palin’s account password to the word “popcorn.”⁵⁹ He then logged into 4chan.org—an online bulletin board site—and shared the password and bragged about how he had gained access to Palin’s account. An anonymous 4chan user replied that he had informed the FBI about Kernell’s posts. Site administrators took the thread down soon thereafter.⁶⁰

At some point between Kernell’s first 4chan post and the evening of September 18, when the FBI contacted Kernell’s father to determine Kernell’s location, Kernell took steps to remove data from his computer. He cleared his browser history. He uninstalled his Firefox web browser, and he ran a disk defragmentation program on his computer.⁶¹ He also

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Moyer*, 674 F.3d at 209-10 (“We decline to extend the reasoning of §§ 1502 and 1512(b)(2) because ‘the language of § 1519 is materially different from [those] statutes’ The legislative history further confirms this interpretation”); *United States v. Yielding*, 657 F.3d 688, 712-13 (8th Cir. 2011) (“The language of § 1519 is materially different from the statutes considered in *Aguilar* and *Arthur Andersen* . . . therefore . . . § 1519 does not require a nexus of the kind articulated in *Aguilar* and *Arthur Andersen*); *Kernell*, 667 F.3d at 754-55 (“[T]he nexus requirement is derived from the language of other obstruction-of-justice statutes, wording that is not found in § 1519 In addition, the legislative history of § 1519 shows that Congress designed the provision to be more expansive than earlier obstruction of justice statutes by dispensing with some of these collateral requirements”).

⁵⁹ *Kernell*, 667 F.3d at 748.

⁶⁰ *Id.* at 749.

⁶¹ *Id.* “Defragmentation” is a process that rearranges files stored on a computer to increase access speed.

deleted images that he had downloaded from Palin's account.⁶² On September 20, the FBI seized Kernell's computer, which still contained potentially incriminating data, including a draft of a 4chan post Kernell had posted to the site.⁶³ That post read:

THIS internet was serious business, yes I was behind a proxy, only one, if this sh** ever got to the FBI I was f****, so I panicked, i still wanted the stuff out there but I didn't know how to rapidsh** all that stuff, so I posted that pass on /b/, and then promptly deleted everything, and unplugged my internet and just sat there in a comatose state.⁶⁴

The federal government prosecuted Kernell for identity theft in violation of 18 U.S.C. § 1028(a)(7), wire fraud in violation of 18 U.S.C. § 1314, improperly obtaining information from a protected computer in violation of 18 U.S.C. § 1030(a)(2), and obstruction of justice in violation of 18 U.S.C. § 1519. The jury deadlocked on the identity theft charge and acquitted on the wire fraud charge. In the end, the 22-year-old was convicted of misdemeanor computer intrusion and only one felony count—the § 1519 obstruction count for deleting his computer data.⁶⁵ The convictions carried a maximum sentence of 20 years in custody and a possible fine of up to \$250,000.⁶⁶ The court sentenced Kernell to one year and one day in custody and three years probation.⁶⁷

Kernell challenged his obstruction of justice felony conviction in the Sixth Circuit. He argued that § 1519 is void for vagueness, because the structure of the statute creates an ambiguity with regard to the application of *mens rea* to the various elements of the statute, and because the “in contemplation” prong does not specify what a defendant must know or believe about an investigation to trigger liability.⁶⁸

Though the court noted that “[g]rammatically, Kernell has an argument” on the *mens rea* issue, the court nevertheless chose to parse the language of § 1519 to apply an intent to obstruct requirement to every element of the statute, thus making it constitutional in the court's view.⁶⁹

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 755.

⁶⁵ Kim Zetter, *Sarah Palin E-mail Hacker Sentenced to 1 Year in Custody*, WIRED (Nov. 12, 2010, 11:43 AM), <http://www.wired.com/2010/11/palin-hacker-sentenced/>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Reply Brief of Defendant-Appellant at 5-6, *United States v. Kernell*, 667 F.3d 746 (2012) (No. 10-6450), 2011 WL 2677178; *Kernell*, 667 F.3d at 752, 755.

⁶⁹ *Kernell*, 667 F.3d at 753.

The Sixth Circuit also rejected Kernell's argument that the "in contemplation of an investigation" element was vague as applied to Kernell's conduct. The Court rejected Kernell's plea that the court read a nexus requirement into the statute, reasoning that "the nexus requirement is derived from the language of other obstruction-of-justice statutes" and that "the legislative history of § 1519 shows that Congress designed the provision to be more expansive" than other obstruction statutes.⁷⁰

Having refused to read a nexus requirement into the statute, the court then noted that, "[c]ourts considering the question have consistently held that the belief that a federal investigation directed at the defendant's conduct might begin at some point in the future satisfied the 'in contemplation' prong."⁷¹ Though the Sixth Circuit said that this interpretation "makes 'in contemplation' under § 1519 very broad," the court accepted this result because "it is consistent with the legislative history and other cases to consider the question."⁷² Therefore, even though there was no investigation into Kernell's conduct at the time he deleted digital data, Kernell's awareness of a *potential* investigation was enough to uphold his felony obstruction of justice conviction.⁷³

The court also pointed to Kernell's 4chan post saying "if this sh** ever got to the FBI I was f***" as evidence that Kernell recognized that "his conduct might result in a Federal investigation."⁷⁴ Because of the language of this 4chan post, the Court reasoned, there was "no doubt" that Kernell "'contemplat[ed]' that an investigation would occur when he took his action, since he specifically referenced the possibility of an FBI investigation in his post."⁷⁵ Even though, earlier in its opinion, the court recognized that "statements made on 4chan have no indicia of reliability" and that "a key component of the culture of 4chan consists of anonymous posters making claims that are not in fact true,"⁷⁶ the court nevertheless rested its finding that the "in contemplation" prong was not vague as applied to Kernell on the text of Kernell's 4chan post. Thus, the Sixth Circuit upheld Kernell's conviction under § 1519.

⁷⁰ *Id.* at 754.

⁷¹ *Id.* at 755.

⁷² *Id.* at 746.

⁷³ *Id.*

⁷⁴ *Id.* at 755.

⁷⁵ *Id.*

⁷⁶ *Id.* at 751-52.

F. Khairullozhon Matanov

Like Kernell, Khairullozhon Matanov was charged with obstruction under § 1519 for deleting digital data. Matanov was a taxi driver from Quincy, Massachusetts.⁷⁷ He was also a friend of Tamerlan and Dzhokhar Tsarnaev.⁷⁸ On April 15, 2013, the Tsarnaev brothers set off two pressure cooker bombs at the Boston Marathon, killing three people and injuring 264.⁷⁹ That same evening, after the bombings, Matanov ate dinner with the Tsarnaev brothers at a kabob restaurant in a Boston suburb. However, the government never alleged that Matanov knew about his friends' plan before the bombings or during this dinner.⁸⁰

Four days later, once the Tsarnaev brothers became the main suspects in the bombing, the FBI released pictures of the brothers to the public. Matanov saw pictures of the brothers on the CNN and FBI websites and went to the local police station.⁸¹ There, he gave information about the brothers, but he also lied about a series of details, seemingly to downplay his friendship with the suspects.⁸² He told the police that he mostly knew the Tsarnaevs through a common place of worship and through soccer, he said that he did not know whether Tamerlan Tsarnaev's wife and daughter lived with Tamerlan, he said he had not seen the photographs of the brothers released the previous night, and he said he had not "participated with" Tamerlan at a house of worship since 2011.⁸³ According to the indictment, these were all false statements, for which the federal government charged Matanov with three counts of making false statements in a federal investigation involving terrorism.⁸⁴

After his interview with the local police, Matanov returned home and cleared his Internet browser history.⁸⁵ He also deleted videos stored

⁷⁷ DeVries, *supra* note 4.

⁷⁸ *Id.*

⁷⁹ Bev Ford, Greg B. Smith & Larry McShane, *Police narrow in on two suspects in Boston Marathon Bombings*, N.Y. DAILY NEWS (April 18, 2013, 7:01 PM), <http://www.nydailynews.com/news/national/injury-toll-rises-marathon-massacre-article-1.1319080>; Deborah Kotz, *Injury toll from Marathon bombs reduced to 264*, BOSTON GLOBE (April 24, 2013), <http://www.bostonglobe.com/lifestyle/health-wellness/2013/04/23/number-injured-marathon-bombing-revised-downward/NRpaz5mmvGquP7KMA6XsIK/story.html>.

⁸⁰ DeVries, *supra* note 4.

⁸¹ United States v. Matanov, Indictment, (May 29, 2014), *available at* <https://www.justice.gov/sites/default/files/usao-ma/legacy/2014/05/30/Indictment.pdf>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; 18 U.S.C. § 1001(a)(2) (2006).

⁸⁵ Matanov Indictment, *supra* note 81.

on his hard-drive that the government alleged demonstrated that he sympathized with Islamist terrorism.⁸⁶ For clearing his browser history and deleting the videos, the government charged him with obstruction of justice under 18 U.S.C. § 1519.⁸⁷ They considered Matanov's browser cache and videos to be records or documents that he had destroyed "in contemplation" of a federal investigation into either Matanov himself or into the Tsarnaev brothers.⁸⁸ The government did not present its theory as to what investigation Matanov was obstructing, and they were never asked to do so.

In March 2015, Matanov pled guilty to all charges. If he had gone to trial, Judge William G. Young explained at the plea colloquy, he would have faced the real possibility of over 20 years in prison.⁸⁹ The § 1519 charge alone carried up to 20 years.⁹⁰ Judge Young further explained that sometimes people who believe in their innocence nevertheless take plea deals in order to have reduced prison time. "Is that what's going on here?" Judge Young asked. "Yes, sir," Matanov answered.⁹¹ Judge Young nevertheless imposed a 30-month prison sentence on the 24-year-old defendant, telling him, "All we asked you was to give us a hand. All we wanted was for you to help us out, and you didn't do that."⁹²

III. DUE PROCESS AND PUBLIC SAFETY

This section will outline the potential for a constitutional challenge to § 1519 under the Due Process Clause. It will then describe, apart from the statute's constitutional infirmities, why the statute might not be good for public policy.

⁸⁶ DeVries, *supra* note 4.

⁸⁷ *Id.* The federal government did not arrest Matanov until over a year after he cleared his browser history. In the mean time, the government tracked Matanov with a surveillance plane. Patrick Ronan, *Sources: Mystery Quincy plane followed Matanov*, PATRIOT LEDGER (May 31, 2014, 9:11 PM), <http://www.wcvb.com/news/source-mystery-quincy-plane-followed-matanov/26265206>.

⁸⁸ Matanov Indictment, *supra* note 81.

⁸⁹ Jon Kamp, *Cabdriver Pleads Guilty in Boston Bombing Case*, WALL STREET JOURNAL (March 24, 2015, 5:11 PM), <http://www.wsj.com/articles/cabdriver-pleads-guilty-in-boston-bombing-case-1427231508>.

⁹⁰ 18 U.S.C. § 1519.

⁹¹ Kamp, *supra* note 89.

⁹² Harvey Silverglate, *What Happens When A Judge Decides He's On The Prosecution's Side?* WGBH NEWS (June 29, 2015, 8:48 PM), <http://wgbhnews.org/post/what-happens-when-judge-decides-hes-prosecutions-side> (pointing out that Judge Young's use of the word "us" here appears to indicate bias against the defendant).

A. Vagueness

There is a credible argument that § 1519 is void for vagueness. The U.S. Constitution states that “No person shall . . . be deprived of life, liberty, or property, without due process of law.”⁹³ A statute is void for vagueness, and thus a violation of the due process clause of the U.S. Constitution, if it fails “to provide a person of ordinary intelligence fair notice of what is prohibited, or if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁹⁴

Notice is vital to the criminal law. In *United States v. Brewer*, the Supreme Court put it thus: “Laws which create crime ought be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.” If persons cannot know what is illegal, or know when they have been accused of violating the law, it is unfair to hold them accountable for the violation. There is a colorable argument that § 1519 does not give fair warning of what the law prohibits and thus could raise due process concerns under the void for vagueness doctrine in some applications of the statute.

Without sufficient notice in criminal statutes, “there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated.”⁹⁵ Where laws are vague, they do not inform juries regarding when they are to find guilt, and they thus violate the right to due process. Additionally, vague laws encourage discriminatory enforcement by prosecutors who acquire excessive discretion in applying an unclear law.

1. *Intent to Obstruct*

The statutory text of § 1519 is unclear with respect to a *mens rea* requirement. Section 1519 states that “[w]hoever knowingly . . . destroys . . . any record . . . 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 any case filed under title 11, or in relation to or contemplation of any such matter or case . . . is guilty of obstruction.”⁹⁶ A grammatically sound reading of the statute is that it does not require intent with respect to the “in

⁹³ U.S. CONST. AMEND. V.

⁹⁴ *Williams*, 553 U.S. at 304.

⁹⁵ *Louisville & N.R. Co. v. R.R. Comm’n of Tennessee*, 19 F. 679, 691 (M.D. Tenn. 1884).

⁹⁶ 18 U.S.C. § 1519.

contemplation of an investigation” prong.⁹⁷

This normal reading of the statute would make § 1519 vague as to state of mind and would allow the statute to seemingly encompass a copious amount of innocent conduct. It would mean that the statute would criminalize deleting information in good faith if done in contemplation of a federal investigation. That is, the government could charge people under § 1519 for deleting records the government wanted even if they did so simply to keep their office clean.

Some courts have constructed the statute to require the intent element to apply to the “in contemplation” prong. In order to do this, courts have resorted to the constitutional avoidance doctrine, which requires courts to assume that “Congress did not intend” any meaning of a statute that “raises serious constitutional doubts.”⁹⁸ Based on this reading, the statute then does require specific intent,⁹⁹ though it does not require that the obstruction be done “corruptly,” as do some other obstruction statutes.¹⁰⁰ Thus, under § 1519, to convict the government must prove that a person has deleted documents in relation to or in contemplation of a federal investigation *with intent to impede, obstruct, or influence* an investigation. However, even if prosecutors must demonstrate intent with respect to the in contemplation prong, it is still unclear what the accused must know about a proceeding or investigation in order to intend to obstruct it.

2. What Investigation?

The statutory text of § 1519 arguably has a vagueness problem with respect to the “in contemplation” prong, in that, as the Sixth Circuit said in *Kernell*, the statute perhaps “does not specify what a defendant must know or believe about an investigation in order to trigger potential liability.”¹⁰¹ Indeed, under § 1519, a person can seemingly be convicted for deleting documents as long as she did so in contemplation of some potential interest of an unspecified federal agency. This means, for example, that a person could seemingly violate the statute (and face the

⁹⁷ *Kernell*, 667 F.3d at 752 (“Grammatically, *Kernell* has an argument” that there is no intent element that applies to the in contemplation prong).

⁹⁸ *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

⁹⁹ *See, e.g., Yielding*, 657 F.3d at 711; *Kernell*, 667 F.3d at 753.

¹⁰⁰ ISRAEL ET. AL., *supra* note 13, at 165.

¹⁰¹ *Kernell*, 667 F.3d at 755. Despite this concession, the court avoided finding the statute void because “even if this element is potentially vague as it related to hypothetical defendants, it is not vague as it relates to *Kernell*.” *Id.*

possibility of 20 years in federal prison) by throwing out photographs of herself together with someone because she thinks they might later get into trouble with the law. The required definitiveness of the allegedly obstructed investigation is unclear.

Section 1519 also does not appear to require that an investigation have commenced when the documents were deleted.¹⁰² For this reason, David Kernell could be (and was) prosecuted for uninstalling his Chrome browser after he entered Sarah Palin's email account, even though there was no investigation into his conduct at the time when he uninstalled the browser. According to the Sixth Circuit, the belief that a federal investigation directed at the defendant's conduct might begin at some point in the future is enough to satisfy the "in contemplation" prong.¹⁰³ This raises additional questions, as it is unclear whether an investigation *ever* has to commence for a person to be charged under § 1519 for obstructing that non-existent investigation.

One can imagine a scenario where it might be desirable to criminalize pre-investigation destruction of evidence. If, for example, a person commits a robbery and then gets rid of the gun immediately after the robbery and before law enforcement learns about it, perhaps the law should punish the destruction of evidence even though it occurred before the investigation commenced. Punishing the pre-investigation gun-destruction could deter people from destroying evidence. It would also treat similarly situated defendants similarly in that post-investigation destruction of the gun. On the other hand, the robbery itself would be criminalized already. It also seems a little unrealistic to think that criminals will stop destroying evidence of their crimes just to avoid an obstruction of justice count, when they are likely destroying the evidence because they might avoid liability altogether for the underlying crime.

There is an additional argument that it is not a problem to criminalize pre-investigation destruction of evidence because people can protect themselves from prosecution by destroying their documents at regular intervals. But is it fair to expect ordinary people to have regular document-retention policies? If so, the law might favor the organized, which seems rather arbitrary.

¹⁰² *Yielding*, 657 F.3d at 711.

¹⁰³ *See id.*

While the pre-investigation destruction of the gun seems the best case for pre-investigation liability under § 1519, an alternative hypothetical demonstrates the other side of the argument. Imagine a twenty-year-old, who drinks alcohol on federal land. She takes a photograph of herself doing so on the phone, but then thinks twice about it and deletes the photograph, hoping to avoid possible arrest for underage drinking. She would arguably have violated § 1519 in deleting the photograph in contemplation of a federal investigation. One reason such a scenario might strike the reader as unfair is because this person is unlikely to know—that is, to have notice—that she committed a federal felony in deleting the photograph. The young woman’s conduct also seems particularly innocuous since the underlying crime is quite minor and because the “document” deleted—an image taken on the phone camera—is easily and normally deleted and is obviously different in kind from a gun.

The question of what a person must know about an investigation is further complicated in that § 1519 seems to leave the door open to prosecution of those who delete documents that could be relevant to a not-yet-existing investigation *into a third party*. In the Matanov case, for example, it appears that the investigation the defendant contemplated was not an investigation into the defendant himself, but into his friend. Taking the get-rid-of-the-gun scenario from above, it might make sense to criminalize destroying a friend’s gun with intent to cover up their robbery. On the other hand, it seems that the average person would have even less notice that they could face federal felony charges for destroying digital evidence of *their friend’s* underage drinking on federal property. There appears to be a lack of clarity as to what § 1519 criminalizes, even if the question as to whether it *rightfully* criminalizes pre-investigation deletion of evidence of third party guilt is complex.

It is also unclear whether the potential investigation contemplated might be an unlawful investigation, such as an investigation into the defendant’s First Amendment protected activity. From the text of § 1519, it does not seem that the government would have to prove that the investigation the defendant allegedly obstructed (or attempted to obstruct) was a lawful investigation. This is particularly concerning in a world where some Americans, particularly people believed to be Muslims, are trailed and profiled by the federal government on a daily basis.¹⁰⁴ If a

¹⁰⁴ *Factsheet: The NYPD Muslim Surveillance Program*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/factsheet-nypd-muslim-surveillance-program> (last visited

person intends to obstruct an investigation that should not have occurred in the first place, it seems they could still be prosecuted under § 1519.

3. *Only for Corporate Crime?*

Additionally, Sarbanes-Oxley was originally about corporate crime, so it would not be unreasonable for average people to assume that its application would be at least somewhat limited outside the financial fraud context.¹⁰⁵ The Supreme Court was clearly concerned with this issue in the *Yates* case, where the Court held that a fish is not a tangible object under § 1519.¹⁰⁶ The Court said, “it would cut §1519 loose from its financial-fraud mooring to hold that [§ 1519] encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent.”¹⁰⁷ This is because, “in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups.”¹⁰⁸

Although the *Yates* case is a rather narrow holding about how courts should interpret the words “tangible object,” the Court’s reasoning applies to the statute more broadly. Sarbanes-Oxley focused on corporate crime, specifically financial fraud, not on other kinds of crime. It would therefore be reasonable for individuals to think the statute only applies to financial fraud situations and not to crimes far afield from corporate crime.

4. *Discrimination*

If a law is unclear to the extent that a large portion of the population at least appears to regularly violate it,¹⁰⁹ the federal government will inevitably have to make choices about whom to prosecute. Vague laws are thus dangerous in that they encourage discriminatory enforcement. This is one of the arguments the Ninth Circuit, in an opinion written by Judge Kozinski, made in *United States*

Mar. 19, 2017).

¹⁰⁵ Indeed, when the author of this Article wrote about the phenomenon of prosecution under Sarbanes-Oxley for individuals deleting browser history for *The Nation*, the first comment on the op-ed said, “Isn’t Sarbanes-Oxley only for prosecuting corporations?” DeVries, *supra* note 4 n. 1.

¹⁰⁶ *Yates*, 135 S.Ct. at 1079.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 1* (2011) (arguing that the proliferation of broad and vague laws makes everyone a criminal, giving prosecutors too much discretion and encouraging discriminatory enforcement).

v. Nosal, where the Ninth Circuit adopted a narrow reading of the notoriously vague Computer Fraud and Abuse Act.¹¹⁰ “Ubiquitous, seldom-prosecuted crimes invite arbitrary and discriminatory enforcement,” the court opined.¹¹¹ Vague statutes can also encourage defendants to plead guilty, as they make going to trial even more risky and unpredictable.¹¹² This is a particularly salient concern in the terrorism context, where defendants may feel it is difficult to get a fair trial, at least before a jury, given the emotional response that terrorism charges tend to invoke.

Following the Trump campaign’s promise to ban Muslim immigration to the United States,¹¹³ and his administration’s January 27, 2017 Executive Order¹¹⁴ that many felt followed through on that promise,¹¹⁵ potential federal government targeting of Muslims under the guise of fighting terrorism may seem like a more realistic scenario to many Americans than it did before Donald Trump became president. From that perspective, an arguably vague law such as § 1519, constrained almost exclusively by federal prosecutorial discretion, could raise legitimate concerns about whether the federal government has the tools to target certain groups if it wished to do so.

5. Legitimacy

Vague laws can also raise legitimacy concerns. This issue arose with respect to aspects of the Hillary Clinton email scandal. In 2015, the *Wall Street Journal* ran an op-ed arguing that Clinton violated federal § 1519 when she deleted more than 30,000 emails from her private

¹¹⁰ 676 F.3d 854 (9th Cir. 2011).

¹¹¹ *Id.* at 860. The court also noted that, “[t]his concern persists even if intent . . . is required.” *Id.* at n.7.

¹¹² Kamp, *supra* note 89 (describing Matanov’s plea colloquy, where he told the judge that, despite his belief that he was innocent, he was pleading guilty out of fear that he would get 20 years if he were to go to trial).

¹¹³ David A. Graham, *The Trump Promise Tracker*, THE ATLANTIC (Jan. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-promises-cheat-sheet/507347/> (“Early in the campaign, Trump said he would ban all Muslim immigration to the United States, and that statement remains on his website”).

¹¹⁴ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

¹¹⁵ See, e.g., Andrew Ryan, *Trump’s Backers See Immigration Crackdown as Promise Kept*, BOSTON GLOBE (Feb. 1, 2017), <https://www.bostonglobe.com/metro/2017/01/31/trump-supporters-see-immigration-crackdown-promise-kept/NV45d7uh803Bx9yBAXq2bM/story.html>.

server.¹¹⁶ Although the Department of Justice stated otherwise,¹¹⁷ there is an argument that Clinton did violate § 1519, since she deleted at least some of these records seemingly to avoid involvement in future hypothetical investigations.¹¹⁸ If Kernell and Matanov can be prosecuted under § 1519, then Clinton's actions likely satisfy the statute as well. But whether or not a jury would find that she violated the law, the exercise of discretion in this case likely diminished faith in the Justice Department among Republicans, who could see this as partisan enforcement of the law by the executive branch.

6. First Amendment

Statutory clarity is also particularly important in the speech context. First Amendment doctrine concerns itself with not “chilling” speech, which can occur when speech is not actually illegal but when the line between what is and what is not illegal is unclear. When this occurs, persons avoid speaking because they fear prosecution. It is not worth it to them to speak and risk criminal sanctions, even though their speech might be beneficial for society at large. Section 1519 could have a chilling effect on speech in that, for example, journalists may be nervous about researching and reporting on topics that require use of search terms that tend to trigger federal investigation, such as stories about terrorism or child pornography, because they could be criminally prosecuted for improperly disposing of their research materials if they do so with intent to avoid some future hypothetical prosecution.¹¹⁹ Section 1519 could also

¹¹⁶ Ronald D. Rotunda, *Hillary's Emails and the Law*, WALL STREET JOURNAL (Mar. 16, 2015), <http://www.wsj.com/articles/ronald-d-rotunda-hillarys-emails-and-the-law-1426547356> (“Mrs. Clinton was worried that communicating through email would leave a trail that might be subject to subpoena” and then “When Congress subpoenaed Mrs. Clinton’s official communications . . . the State Department could not turn over her emails because it did not have them”).

¹¹⁷ *Hillary Clinton Did Not Break Law In Deleting Emails, DOJ Says*, HNGN (Sept. 10, 2010, 12:20 PM), <http://www.hngn.com/articles/128198/20150910/hillary-clinton-break-law-deleting-emails-doj.htm>.

¹¹⁸ Meghan Keneally and Liz Kreutz, *What Hillary Clinton Said About Email in 2000*, ABC NEWS (March 5, 2015, 10:37 AM), <http://abcnews.go.com/Politics/hillary-clinton-email-2000/story?id=29396854> (““As much as I’ve been investigated and all of that, you know, why would I—I don’t even want—why would I ever want to do e-mail?” she’ seen on tape telling Peter Paul on home video captured at a fundraiser. ‘Can you imagine?’ she said”).

¹¹⁹ Take, for example, journalist Susan Zalkind, who investigated the story “Dead Men Tell No Tales” for the radio podcast *This American Life*, about the FBI fatal shooting of Ibragim Todashev and the subsequent deportation of his girlfriend, Tatiana Gruzdeva.

chill the speech of attorneys, who could be reasonably afraid of being charged for obstruction for destroying evidence of advice they give to clients.¹²⁰

Some might believe that a vague statute like § 1519 is a good thing because prosecutorial discretion allows the government to go after criminals who it cannot prove committed other crimes or because it allows prosecutors to allow for leniency in appropriate cases. Certainly prosecutorial discretion, within reason, can promote justice. But executive authority must be doled out within reasonable limits. Section 1519 gives prosecutors the power to bring charges against a tremendous portion of the population.¹²¹ This can perpetuate discrimination.¹²² It can also encourage bad judgment, as in the case of Aaron Swartz, where prosecutors used the Computer Fraud and Abuse Act to go after a young computer programmer and activist for downloading too many documents from the academic website JSTOR.¹²³ Ultimately, the law must balance

See Dead Men Tell No Tales, THIS AMERICAN LIFE (March 7, 2014), <https://www.thisamericanlife.org/radio-archives/episode/519/transcript>. Ms. Zalkind's research and contacts might be useful to the federal government some time in the future, and, if she clears her search history, she might be opening herself up to prosecution under § 1519, if she were to do so in order to avoid involvement in a future, hypothetical investigation. Criminalizing such conduct might encourage Ms. Zalkind to keep meticulous records in case the government ever wants to look at them. On the other hand, it is likely to discourage journalists from pursuing investigative work, especially crime and terrorism stories, and such work benefits the public and the democracy as a whole.

¹²⁰ It would be reasonable for an attorney to be nervous about this type of speech, since the courts have allowed convictions of attorneys for activity intended to help their clients. *See, e.g., Russell*, 639 F.Supp.2d 226 (finding attorney guilty of obstruction for destroying a laptop computer that belonged to his client and contained child pornography).

¹²¹ *See* Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 103 (2013).

¹²² *See* Tracey L. McCain, Note, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J. L. & SOC. PROBS. 601 (1992).

¹²³ Tim Wu, *How the Legal System Failed Aaron Swartz—And Us*, NEW YORKER (Jan. 14, 2013), <http://www.newyorker.com/news/news-desk/how-the-legal-system-failed-aaron-swartzand-us#ixzz2I09P51KL>. Swartz killed himself while his case was pending, setting off a firestorm of criticism of untamed prosecutorial discretion and vague statutes. *See, e.g.,* Harvey A. Silverglate, *The Swartz Suicide and the Sick Culture of the Justice Dept.*, MEDIA NATION (Jan. 24, 2014), <https://dankennedy.net/2013/01/24/the-swartz-suicide-and-the-sick-culture-of-the-justice-dept/>; Marcia Hoffmann, *In the Wake of Aaron Swartz's Death, Let's Fix Draconian Computer Crime Law*, ELECTRONIC FRONTIER FOUNDATION: DEEPLINKS BLOG, <https://www.eff.org/deeplinks/2013/01/aaron-swartz-fix-draconian-computer-crime->

some prosecutorial flexibility against the need to tamper unchecked power. Section 1519 arguably strikes the wrong balance.

B. Policy Concerns

Beyond its potential constitutional infirmity, Section 1519 is bad policy. As currently applied and interpreted, the statute creates perverse incentives that fail to align with the goals of law enforcement and public safety.

Charging people not accused of other felonies for obstruction of justice could discourage people from going to the police with useful information. The Matanov case exemplifies this problem. Matanov went to the police on his own volition, informed them that he knew the Boston Marathon bombers, and provided substantial true information. In return, he was trailed for over a year and then went to prison. His case thus sends a clear message to others not to go to the police. ACLU of Massachusetts Legal Director Matthew Segal wrote as much to the *Boston Globe*. “[P]rosecuting Matanov,” Segal wrote, “imperils public safety by discouraging cooperation with the federal government.” “The message to this community is clear: If you talk to the government, you may become its next target.”¹²⁴

The rejoinder would be: as long as the individual has nothing to hide and does not lie to the police, she has nothing to fear in going to the police. That argument might seem sound in theory, but in reality regular people lie often,¹²⁵ and they might be unaware that doing so opens them up to criminal liability.¹²⁶ People are unlikely to want to risk speaking to the police if other members of their community have seemingly faced penalties for doing so. This would be especially true for those already prone to skepticism of the government.

law.

¹²⁴ Matthew R. Segal, *Matanov Charges Send a Chilling Message to Those Who Would Aid Investigators*, BOSTON GLOBE (June 16, 2014), <https://www.bostonglobe.com/opinion/editorials/2014/06/15/charges-against-matanov-send-chilling-message-those-who-would-aid-investigators/6PVZTh6At9DetlxjAHXdtN/story.html>.

¹²⁵ ROBERT FELDMAN, *THE LIAR IN YOUR LIFE: THE WAY TO TRUTHFUL RELATIONSHIPS* (2009).

¹²⁶ SILVERGLATE, *supra* note 109, at 301 n.22 (“Because the typical reasonably educated citizen knows that it is a crime (perjury) to lie under oath (such knowledge of the law being common and intuitive, given the formality of the administration of the oath), that same citizen would likely find it counterintuitive that the oath is in fact largely irrelevant, and that it is a felony to lie to government officials even when not sworn to tell the truth”).

Hanni Fakhoury, a senior staff attorney at the Electronic Frontier Foundation (EFF), says that the government's broad interpretation of Sarbanes-Oxley in the digital age is part of a wider trend of federal agents' feeling "entitled" to digital data.¹²⁷ Fakhoury compares the broad application of Sarbanes-Oxley in the digital age to the federal government's resistance to cellphone companies that want to sell encrypted phones that would prevent law enforcement from being able to access users' data.¹²⁸ For example, when the new encrypted iPhone came out, Former FBI Director James Comey told reporters he didn't understand why companies would "market something expressly to allow people to place themselves beyond the law."¹²⁹ Similarly, Fakhoury says, "At its core, what the government is saying with § 1519 is, 'We have to create a mechanism that allows everybody's data to be open for inspection on the off-chance that one day in the future, for whatever random circumstance, we need to see that data.'"¹³⁰

Especially in the digital context, the government's stance on these issues is likely hurting public safety overall. Indeed, prosecutions for deleting digital data encourage encryption. If people understand that they can be prosecuted for deleting their browser history, wise criminals will use incognito windows, encryption, and other ways of making their data non-existent from the start. For law enforcement, this is the worst outcome, as they cannot ever gain access to data that does not exist, whereas often when people think they are destroying metadata they have not succeeded and the government can eventually recover the data.

IV. SOLUTIONS

This Section will suggest ways to combat some of the problems with § 1519 identified in the previous sections. It will recommend that courts consider adding a nexus requirement to § 1519 or limiting enforcement to the corporate crime context. Congress could also address the problems with the statute with new legislation.

¹²⁷ DeVries, *supra* note 4.

¹²⁸ *Id.*

¹²⁹ Brian Taylor, *Apple Says iOS Encryption Protects Privacy; FBI Raises Crime Fears*, NPR (Oct. 9, 2015), <http://www.npr.org/sections/alltechconsidered/2014/10/08/354598527/apple-says-ios-encryption-protects-privacy-fbi-raises-crime-fears>.

¹³⁰ DeVries, *supra* note 4.

A. Imposing A Nexus Requirement

If the courts are unwilling to declare § 1519 void for vagueness, they could consider instead imposing a nexus requirement under the doctrine of constitutional avoidance. Under this doctrine, courts assume that “Congress did not intend” any meaning of a statute that “raises serious constitutional doubts.”¹³¹ Thus, when courts are deciding between competing interpretations of a statute, they read the statute to eliminate constitutional doubts, so long as doing so is not “plainly contrary to the intent of Congress.”¹³² Many courts have already read a specific intent requirement into the “contemplation” prong of § 1519 under the doctrine of constitutional avoidance. A nexus requirement may also be necessary to avoid some unconstitutional applications of the statute.

A nexus requirement for § 1519 would require the government to prove two additional elements. First, that the destructive act had a relationship in time, causation, or logic with an official proceeding or lawful investigation.¹³³ Second, that the act had the natural and probable effect of interfering with that proceeding or investigation.¹³⁴ This would mean that the government would have to prove not only intent to obstruct, but also that the obstructive activity was linked to a specific investigation rather than to a hypothetical investigation that existed only in the defendant’s own mind.

With a nexus requirement, a person who deleted her online diary where she described a dream in which she killed her partner would not have violated the statute. Even though she may have deleted the diary with intent to obstruct some hypothetical future investigation into herself if, for example, her partner were ever killed, there would be no relationship in time, causation, or logic to an official investigation there, so her conduct would not be criminal under § 1519.

On the other hand, a bank robbery suspect who shredded her copy of the bank floor plan would likely be found guilty. In that case, the destruction would have had (1) a relationship in time, causation, or logic with the bank robbery investigation and (2) shredding her copy of the bank floor plan would have had the natural and probable effect of interfering with that investigation. The tough case is where the robbery

¹³¹ *Clark*, 543 U.S. at 381.

¹³² *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *Clark*, 543 U.S. at 384 (holding that courts must adopt any “plausible” construction to avoid serious constitutional concern).

¹³³ *See Aguilar*, 515 U.S. at 599

¹³⁴ *See id.*

suspect shreds the floor plan before an investigation has commenced. If the statute has a nexus requirement, there is an argument that pre-investigation destruction of evidence of this kind would be still criminal, as it would have a relationship in “logic” to an investigation of the robbery.

In the *Kernell* case, if the Sixth Circuit had chosen to impose a nexus requirement, it would likely have overturned the conviction under § 1519. When Kernell deleted his data, any investigation into his conduct was purely speculative. The only evidence that Kernell was even aware of a *potential* investigation into his conduct came from 4chan,¹³⁵ an exceedingly unreliable source.¹³⁶

The Matanov case is a closer question. Matanov indicated to the judge at sentencing that he believed in his innocence but was taking the plea to avoid a potential 20-year sentence, were he to go to trial.¹³⁷ Would Matanov have declined to plead guilty if § 1519 had a nexus requirement? The timing of Matanov’s deletions indicated intent to obstruct,¹³⁸ but the indictment does not make clear whether the government was alleging that Matanov intended to obstruct the investigation into the Tsarnaev brothers or into Matanov himself.¹³⁹ If the government meant to allege that Matanov intended to obstruct the investigation into the Tsarnaev brothers, then the nexus requirement was met because the investigation was ongoing (although the intent requirement in that scenario may have been satisfied). However, if the investigation Matanov allegedly obstructed was an imagined investigation into Matanov’s own protected First Amendment activity (looking at online videos) then the government would lose because there was no nexus to a lawful investigation. One can only speculate as to whether a nexus requirement would have changed Matanov’s plea, but it would have at least encouraged more clarity from the government on what investigation Matanov allegedly obstructed.

Adding a nexus requirement would seem to alleviate the due process problems with § 1519 because, if obstructive activity has a nexus

¹³⁵ *Kernell*, 667 F.3d at 755 (noting that Kernell “‘contemplat[ed]’ that an investigation would occur when he took his action, since he specifically referenced the possibility of an FBI investigation in his post”).

¹³⁶ *Id.* at 751-52 (finding that “statements made on 4chan have no indicia of reliability” and that “a key component of the culture of 4chan consists of anonymous posters making claims that are not in fact true”).

¹³⁷ Kamp, *supra* note 89.

¹³⁸ Matanov Indictment, *supra* note 81 (charging that Matanov returned home from his police interview and deleted his browser history and some videos on his computer).

¹³⁹ *Id.*

with an official proceeding or investigation, then the defendant would likely know or have reason to know about that proceeding or investigation and would, therefore, be on notice not to destroy relevant information. A nexus requirement would also clarify the meaning of “in relation to or contemplation of” and, therefore, remedy potential jury confusion.¹⁴⁰

Reading a nexus requirement into § 1519 also lines up with Supreme Court precedent. Since there is no Supreme Court precedent on § 1519 other than *Yates*, which does not address the nexus issue, the next best place for courts to look in interpreting § 1519 is Supreme Court precedent on similar statutes. And in *Pettibone*,¹⁴¹ *Aguilar*,¹⁴² and *Arthur Anderson*,¹⁴³ the Court read a nexus requirement into obstruction statutes similar to § 1519, indicating that obstruction statutes in general should be read to have nexus requirements. In *Aguilar*, the Court articulated its concern “that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’”¹⁴⁴ The same concern is present in § 1519, and the same solution would be appropriate.

Though, as the Court pointed out in *Gray*, § 1519 “‘makes no specific reference to a judicial or official proceeding,’”¹⁴⁵ that does not mean that the text of the statute does not support a nexus requirement. Section 1519 does not specifically refer to an official proceeding, but it does reference an “investigation” or a “matter within the jurisdiction” of the United States.¹⁴⁶ Thus, the nexus requirement for this statute would be between the defendant’s allegedly obstructive conduct and an official proceeding *or investigation*.

The Second Circuit, as well as the other courts¹⁴⁷ that have refused to read a nexus requirement into § 1519, have looked to the statute’s

¹⁴⁰ Kyle Taylor, *The Obstruction of Justice Nexus Requirement after Arthur Andersen and Sarbanes-Oxley*, 93 CORNELL L. REV. 401, 426-27 (2008). See also Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 CORNELL L. REV. 1519, 1540 (2004).

¹⁴¹ *Pettibone v. United States*, 148 U.S. 197, 206-07 (1893).

¹⁴² *Aguilar*, 515 U.S. 593.

¹⁴³ 18 U.S.C. § 1512.

¹⁴⁴ *Aguilar*, 515 U.S. at 600.

¹⁴⁵ 642 F.3d at 373, 376-77.

¹⁴⁶ 18 U.S.C. § 1519.

¹⁴⁷ *Moyer*, 674 F.3d at 209; *United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011); *Kernell*, 667 F.3d at 754-55.

legislative history for support.¹⁴⁸ But legislative history is inherently suspect. The role of the judiciary is not to give effect to the legislature's unenacted desires, but, rather, to give effect to the statutory language that the legislature actually enacted.¹⁴⁹ Legislative history is not subject to the formal constitutional procedures necessary for statutory enactment, and it would therefore arguably be unconstitutional to read legislative history as law.¹⁵⁰ Furthermore, legislative intent is incoherent, and it is difficult to determine whether committee writings represent the Legislature in its entirety.¹⁵¹ Legislative history is not determinative when the text of the statute, Supreme Court precedent, and policy support an alternative reading.

B. Limiting Prosecutions to Financial Fraud Cases

Even if the courts refuse to entertain nexus requirement challenges to § 1519, they should consider whether some prosecutions under § 1519 cut the statute “loose from its financial-fraud mooring.”¹⁵² Although the stated purpose of the Sarbanes-Oxley Act as a whole was to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, *and for other purposes*,”¹⁵³ the law does not indicate whether § 1519 was meant to apply outside the corporate crime context. Indeed, the Supreme Court pointed out that § 1519's position within Title 18, Chapter 73, “following immediately after pre-existing specialized provisions expressly aimed at corporate fraud and financial audits,”¹⁵⁴ tends to indicate that the most obvious textual reading of the statute is that it applies narrowly to the financial fraud context.

Applying § 1519 only to financial fraud cases would also alleviate some of its unfairness, since corporations tend to be better prepared for § 1519 prosecutions with complex document retention policies led by informed counsel.¹⁵⁵ These retention policies have required complex

¹⁴⁸ *Gray*, 642 F.3d at 373, 377.

¹⁴⁹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 29-30 (2012).

¹⁵⁰ CHRISTIAN E. MAMMEN, *USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION* 4 (2002).

¹⁵¹ *Id.*

¹⁵² *Yates*, 135 S.Ct. at 1079.

¹⁵³ Sarbanes-Oxley Act, *supra* note 23.

¹⁵⁴ *Yates*, 135 S.Ct. at 1083.

¹⁵⁵ *See, e.g.* Andrew Lee, *Feature: Keep or Toss? Document Retention Policies in the Digital Era*, 55 LA. BAR J. 240 (2008). *See also* Warren L. Dennis and Susan Brinkerhoff,

updates for the digital age.¹⁵⁶ This may be a viable solution for companies, but it seems outlandish to expect individuals to have complex document retention policies, as everyday people do not have the time to invest in developing and periodically updating such policies. Therefore, the courts should consider limiting § 1519 to the corporate crime context as an alternative solution to the statute's constitutional infirmities.

C. What About Congress?

If the courts are unwilling to step in to narrow the scope of § 1519, Congress should act to limit the statute. This may include repealing the statute or deleting the “in contemplation” prong. Congress could, alternatively, limit § 1519 to those entities that have a pre-existing duty to retain records or documents. This would make the statute fairer, as it would only apply to those with the resources to retain documents and the knowledge that they need to do so. Kernell made the argument that the Sixth Circuit should have interpreted § 1519 to only apply to such entities, but the court there specified that it could not impose such a requirement without direction from Congress.¹⁵⁷ That said, Congress—at least if the current climate continues—seems unlikely to act to make any of these changes.¹⁵⁸ Therefore, it seems at least more realistic to turn to the courts

Document Management Policies in the Post-Enron Environment, 17 Washington Legal Foundation: Legal Backgrounder 48 (2002) (“[T]he most effective tool for minimizing charges of spoliation . . . is a well-constructed, reasonable document retention/destruction policy, adhered to with consistency.”).

¹⁵⁶ See, e.g., LEE, *supra* note 155. In a radio interview, Robert Brownstone (an attorney from Fenwick & West) expressed how difficult it can be, even for major companies, to handle the massive amounts of digital data they create and destroy daily. “Some companies start chasing their tail because they say, ‘well wait a minute, we have all this old information that’s kind of stacked up—whether it’s in paper form or electronic form—then we have everything we’re creating day-to-day, then we have everything that’s happening in the future.’” He helps companies prioritize their data in a way that he hopes will help them avoid criminal charges under § 1519. Jessica Leibrock, *Info. Mgmt. & eDiscovery Preservation/Spoliation*, Thomson Reuters’ Legal Current, podcast (Mar. 7, 2012) (interview of Robert Brownstone).

¹⁵⁷ *Kernell*, 667 F.3d at 755-56.

¹⁵⁸ See, e.g., Sam Brodey, *People Say Congress Doesn’t Get Anything Done; What Do the Numbers Say?* MINNPOST (Dec. 24, 2015), <https://www.minnpost.com/dc-dispatches/2015/12/people-say-congress-doesn-t-get-anything-done-what-do-numbers-say> (demonstrating graphically how unproductive Congress has been in recent years in comparison to the 1990s); Chris Cillizza, *How Congress Became the Most Polarized and Unproductive it’s Ever Been*, WASHINGTON POST (Feb. 2, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/02/03/how-congress-became-the-most-polarized-and-unproductive-its-ever-been/?utm_term=.ee15e54b934c

for a solution.

V. CONCLUSION

In today's world, the average person creates and destroys massive amounts of data every single day. The federal government has made it clear that it intends to prosecute individuals for deleting digital data—including for clearing their browser history—under 18 U.S.C. § 1519. Thus citizens must understand what is and is not illegal under § 1519.

But understanding what the statute prohibits is not easy. Indeed, the statute arguably fails “to provide a person of ordinary intelligence fair notice of what is prohibited” and “is so standardless that it authorizes or encourages seriously discriminatory enforcement.”¹⁵⁹ The statutory text itself is ambiguous in that it does not make clear whether an intent element applies to the in contemplation prong. And even if § 1519 does have an intent element, the courts have interpreted it as not requiring that an investigation have begun when the accused allegedly deletes the documents in question.¹⁶⁰ Furthermore, the courts have interpreted § 1519 as not requiring that the government show a nexus in time, causation, or logic between the document destruction and an official proceeding. This lack of clarity in § 1519 thus raises due process concerns under the void for vagueness doctrine.

These concerns would be lessened if the courts imposed a nexus requirement on § 1519. But even if the courts refuse to entertain vagueness or nexus requirement challenges to § 1519, they could consider whether some prosecutions under § 1519 cut the statute “loose from its financial-fraud mooring.”¹⁶¹ Applying § 1519 only in the corporate crime context would make the statute fairer to defendants, since corporations tend to be better prepared for these types of prosecutions, through better access to resources and information.¹⁶² Enterprising civil libertarians might also explore whether there might be technical solutions to some of the problems with the statute. Organizations such as EFF or the ACLU, for example, might want to encourage individuals, especially those who

(blaming decreased productivity on increased ideological polarization); Scott Detrow, *Deal or Disrupt? Congressional Democrats Weigh 2017 Choices*, NPR (Dec. 30, 2016) (discussing whether or not democrats in Congress will aggressively attempt to block Republican leaders during the Trump presidency).

¹⁵⁹ *Williams*, 553 U.S. at 304.

¹⁶⁰ *Yielding*, 657 F.3d at 711.

¹⁶¹ *Yates*, 135 S.Ct. at 1079.

¹⁶² See, e.g., LEE, *supra* note 156.

fear government targeting, to have clear personal digital data retention policies.

Laws such as § 1519 that arguably fail to give adequate notice can encourage discriminatory and selective enforcement, as well as delegitimize the rule of law. As Hanni Fakhoury of EFF puts it, “The idea that you have to create a record of where you’ve gone or open all your cupboards all the time and leave your front door unlocked and available for law enforcement inspection at any time is not the country we have established for ourselves more than 200 years ago.”¹⁶³ In the interest of due process, fairness, and public safety, the courts should therefore consider narrowing the scope of § 1519.

¹⁶³ DeVries, *supra* note 4.