IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR ANDERSEN LLP, :

Petitioner, :

v. : No. 04-368

UNITED STATES :

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Washington, D.C.

Wednesday, April 27, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O In T E In T S

P R O C E E D I In G S

[10:07 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Arthur Andersen v. United States.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF PETITIONER

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

The Government concedes that the destruction of documents in anticipation of a proceeding was not a crime in the fall of 2001 based upon a statutory rule that Congress had preserved for over a century. The central question in this case is whether Congress, nevertheless, intended to make a polite request to engage in that lawful conduct, a form of witness tampering punishable by ten years in prison. We ask this Court to reject that interpretation of the statute and to hold that Arthur Andersen did not commit a crime.

I'd like to turn first to the term "corruptly persuade" as it's used in Section 1512 and explain why Arthur Andersen's interpretation represents not only a reasonable reading, but the best reading of the language in the statute.

The first thing that we see when we look at the

statutory context is that Congress did not prohibit -- did not prohibit -- all persuasion to destroy documents for the specific purpose of making them unavailable for use in an official proceeding. It did not, because it did not simply say, "Anyone who persuades a witness to do this has violated the statute." It added a very important limitation, and that is the word "corruptly" -- "corruptly persuades."

So what kinds of requests are excluded from the definition? When is it that it's okay to persuade someone to destroy a document for use in an official proceeding? And the answer, we think, based on the traditional meaning of the term "corruptly," is that "corruptly" means that you have persuaded someone in a fashion that uses improper means, such as bribery, or you've asked the witness to violate duties imposed by other law, whether that's the duties imposed by contempt or the duties imposed by a whole range of statutes that govern the obligations of people in our society.

JUSTICE KENNEDY: But suppose you persuaded -- and I know that is not this case -- suppose you persuaded the person to destroy the documents in order to conceal a fraud. Would that be corrupt?

MS. MAHONEY: If -- Your Honor, if it was a crime, then, yes --

JUSTICE KENNEDY: Well, in order to -- let's say it's a revenue audit, and you know that it's a fraud, and you persuade somebody to destroy the documents in order to conceal the fraud.

MS. MAHONEY: Okay, if this is in a -- in the course of a proceeding, of course, it's obviously going to be a crime, it's obviously going to be prohibited by Section 1512. If it is in advance of a proceeding -- and let's assume that you know that a proceeding --

JUSTICE KENNEDY: Yes.

MS. MAHONEY: -- is likely, then the answer depends on whether you know that you are concealing -- that you know a crime has been committed. And if you know that a crime has bee committed, then you are violating a federal statute, 18 U.S.C. --

JUSTICE KENNEDY: My question is, Does that give -- would that give some content to the meaning of "corruptly," in your view?

MS. MAHONEY: Well, in that case, if the witness knows that you have committed a crime, and you are asking them to violate, they have a duty, under those circumstances, not to assist you in concealing your offense. That's a duty that's imposed by criminal law. So if you ask them to violate that duty, then you are corrupting that witness; and, very definitely, that would

fall within the interpretation of the statute that Arthur Andersen is advancing here.

And it fits, Your Honor, with what Congress really did for a hundred years before 2002. What it did is, it said that -- under the Pettibone rule, that it is not a crime to simply destroy documents in anticipation of a proceeding. But if you know that -- if you know that a crime has been -- a crime has been committed and you destroy documents, that is a crime.

JUSTICE O'CONNOR: May I --

MS. MAHONEY: That's a crime --

JUSTICE O'CONNOR: -- may I ask you about another provision, Section 1515(c)? And that says, this chapter -- and it -- and it's referring back to Section 1512 -- "does not prohibit or punish the providing of lawful bona fide legal representation services in connection with, or anticipation of, an official proceeding."

Now, how -- did Ms. Temple invoke that provision in this case?

MS. MAHONEY: Your Honor, the -- that section was not argued to the District Court, but it was invoked in the following way, in two ways. First of all, there was evidence introduced in the case that she was providing legal advice. And since it is not in affirmative defense,

it really was the Government's burden at all times, at least once there was evidence introduced that she was providing legal advice, to get a finding from the jury that she was not engaged in bona fide and lawful services, particularly in this case, Your Honor, where the Government argued, told the jury, that Nancy Temple was the, quote, "central figure," end quote, in this -- in this episode. And in addition --

JUSTICE SCALIA: How do you know it's not an affirmative defense?

MS. MAHONEY: Well, it doesn't read like an affirmative defense, Your Honor. It doesn't say "affirmative defense." It simply -- and in -- when it was introduced, it was listed in the legislation as a Rule of Construction. And I think that's exactly how it reads. It doesn't purport to put the burden of proof on Andersen, or on Nancy Temple.

And, Your honor, I think, actually --

JUSTICE SCALIA: Well, of course, it has the word "lawful," "the providing of lawful bona fide legal representation services." So, you know, it could be argued that if she violating the other provisions, she's still in violation.

MS. MAHONEY: Well, Your Honor, under the Government's definition of "corruptly," she couldn't have

been providing lawful bona fide services.

JUSTICE O'CONNOR: Well, that's what I want to know, is, in light of the Government's position and the way this case was resolved, how does that fit, and what does it do to, that so-called safe-harbor provision? I'm just curious how it all plays out.

MS. MAHONEY: Your Honor, I think it negates it in its entirety, because what the jury was instructed in this case was that any intent to impede the fact-finding ability of a possible future proceeding, even if the Andersen employee had a good-faith and sincere belief that their conduct conformed to the law, was corrupt. They were instructed that they must find that.

JUSTICE O'CONNOR: Well, does that have the effect of negating the safe-harbor provision, in your view?

MS. MAHONEY: Absolutely. But I think, Your Honor -- because I think it would be impossible to satisfy it under this instruction. In addition, I also think that the -- that this provision really just demonstrates that the Government's interpretation of "corruptly" is wrong, to begin with.

JUSTICE O'CONNOR: What's the effect, in 1512(b), of the word "knowingly"?

MS. MAHONEY: I think, Your Honor, that

"knowingly" means, in this context -- just as it means "knowingly intimidate," "knowingly threatened," "knowingly corruptly persuade" -- that means that you have to know that your persuasion is asking the witness to violate their duties, to violate the law. You have to know that it's corrupt.

JUSTICE SOUTER: Isn't that satisfied at least by the part of the definition that refers to "subverting an official proceeding"? I mean, that certainly carries, to me, the implication that you realize that you're doing something wrong. An official proceeding is, prima facie at least, lawful, and you are subverting it. Doesn't that satisfy the "knowingly" requirement?

MS. MAHONEY: I don't think so, Your Honor, because the definition that was given to this jury was "subvert, undermine, or impede," and not just the integrity of the proceeding; but, rather, the fact-finding ability of a future proceeding --

JUSTICE SOUTER: I --

MS. MAHONEY: -- including a governmental inquiry.

JUSTICE SOUTER: -- I think I would go far in agreeing with you if the -- if the instruction had been "merely to impede" or "merely to undermine." Now, I guess that gets to a question I wanted somebody to answer, and

you can probably do it. Did the -- did the Court, in giving the instructions, ever refer -- in defining the term, ever refer to any of these three possibilities, separately, or did it do it simply as "subvert, undermine, or" -- what was the third? -- impede"?

MS. MAHONEY: Impede. I believe -- I believe it was done as a -- as a -- as a group.

JUSTICE SOUTER: Okay. It did --

MS. MAHONEY: But it says "or."

JUSTICE SOUTER: I -- one other question. In anticipation of that instruction -- I assume the counsel new what was coming -- did the Government ever argue to the jury that "merely impeding," alone, or "merely undermining," alone, would be sufficient, as distinct from saying, "If he subverts, undermines, and impedes"?

MS. MAHONEY: Your Honor, I'm not certain of the answer, except that I do know that the Government did argue that simply -- the mere idea that David Duncan testified that, you know, he thought that the -- somebody at the SEC might want to look at this information someday was sufficient to satisfy the instructions. And so, I think it is a fair inference that the way that they argued this case to the jury was that any intent to keep any kind of information away from the SEC was enough to satisfy the definition in this case. And, in fact, Your Honor, when

the instructions were being debated, the pattern instruction for the Fifth Circuit for "corruptly," under 1503, actually is -- includes the words "knowingly or dishonestly to subvert the integrity of the proceeding." The Government insisted that the word "dishonestly" not be used, that the word "impede" be added, and they changed "fact-finding" a bit -- changed it from "subverting the proceedings" to "the fact-finding ability." They did everything they could to strip this instruction of any mens rea, and then went beyond that and said, "And in addition, even if the Andersen employees had a good-faith and sincere belief that their conduct did not violate the law, it's still a crime."

So, what we have here is an array of testimony from people who say, "We honestly believed that this was permissible conduct," but the jury was told that they had to convict anyway if there was any possible partial motivation to impede possible future fact-finding --

JUSTICE GINSBURG: How does --

MS. MAHONEY: -- of an inquiry.

JUSTICE GINSBURG: -- how does -- how does David Duncan's guilty plea -- he entered a plea of guilty to a charge of obstruction, and he confessed the intent to impede the SEC investigation by shredding documents. So, what were the elements of that offense that are absent in

this one?

MS. MAHONEY: Your Honor, he plead guilty to the offense, as described to him and agreed upon between him and his lawyer; in other -- and the Government -- which is basically the instruction that was given in this case. When he testified in this proceeding, he repeatedly said, despite his guilty plea, that he did not believe, at the time, that he had done anything unlawful or improper. He said, "I thought my conduct was perfectly appropriate. I plead guilty because I was persuaded that it didn't matter what I thought at the time."

JUSTICE SCALIA: What sentence did he get, by the way?

MS. MAHONEY: He's not been sentenced yet, Your Honor.

And he was explicit throughout. He also said -- he never testified that he even thought that an SEC proceeding was probable at the time; he just thought it was possible. Nor did he say that he ever consciously tried to hide the truth or hide the facts. What he did say is that, "Yes, part of what was on my mind at the time that I asked for compliance with this policy was that the SEC and others might want to look at these files someday, and I'd better get them in compliance with our retention policy, because I know that drafts and notes are the kinds

of things that could be misused and misconstrued at some point in the future." That was the basis of his guilty plea, that was the basis of his testimony in this case. And the Government's interpretation, the instructions that were given to this jury, deprived the term "corruptly persuade" of any of its ordinary and traditional meaning.

Under the Government's view, for instance, of "corruptly," bribery becomes irrelevant under this statute. I mean, if you look at this statute, and you say, "What was Congress trying to prohibit here when it says" -- it's a got a list of wrongful means of interfering with witnesses. It says "intimidate" and "threaten" and "use of physical force," and it says "corruptly persuades." The first thing that would come to your mind is bribery. But bribery is irrelevant under the Government's interpretation, and let me explain why. Because they say that, "Well, yes, it's true, it says 'corruptly persuade,' but all that means if you -- is if you had any intent to impede the fact-finding ability of a proceeding, then you're guilty, just for asking. It doesn't matter whether you used any money -- monetary compensation in order to extract this behavior; you're automatically guilty. But if you use bribery --

JUSTICE SCALIA: I assume it also would make "intimidate," and so forth, quite superfluous.

MS. MAHONEY: It absolutely would, Your Honor, because it would basically cover any kind of request.

But, in addition, they say that under their definition what it really means is that if you did it for some other motive, if you got them to destroy the document so that it couldn't be used in an official proceeding -- and that was your intent, that it couldn't be used in an official proceeding -- and you bribed them to do it, but your motive was to avoid embarrassment, it would not be a crime. Under Andersen's interpretation, it would still be a crime, because of course you have corruptly persuaded them to destroy a document for use in an official proceeding, even if -- at the appropriate time, if there is a nexus -- because it doesn't matter whether you were trying to avoid embarrassment; if you were bribing them to keep it out of the -- of the proceeding, of course that would be covered by the traditional definition of "corruptly persuade."

JUSTICE KENNEDY: Suppose you're anticipating a revenue audit from the Internal Revenue Service or from the SEC, and you destroy certain documents that you're not required to keep, but that would make the officials' task easier; he you could perform the audit in just a couple of days, instead of -- it's going to take him a week. Can you make it harder for him?

MS. MAHONEY: Your Honor, under Section 1519, now, it may well be that that is criminal behavior, because it -- Congress has now, basically, required you to preserve documents. But, at the time, no, that would not have been a crime. And if you could do it yourself, then asking your wife to throw them out instead can't be what Congress really had in mind under Section 1512. You know, hypothetical, the man could throw it out himself and not go to jail, but if he asked his wife to do it, then he goes to jail for ten years.

JUSTICE KENNEDY: There is, in the case, this lingering feeling that something's wrong out there. I know that we don't -- we don't convict people on that basis; we require something more specific.

MS. MAHONEY: Well, and I think that this statute, reasonably read, Your Honor, tells you exactly what that specific thing is. If you intimidate them, if you mislead them, if you use physical force, if you corruptly persuade them. And that means either you've used unlawful means, like bribery, or you asked them to violate their independent legal duties. And that definition, Your Honor, is quite consistent with the traditional interpretation of the term "corruptly," even in the obstruction statutes.

And I'd like to just emphasize, for instance, in

a tampering case, a juror tampering case that preceded the congressional adoption of the term "corruptly persuades," the Jackson case, the jury was specifically instructed that "corruptly" means "knowingly and willfully, with the specific intent to influence a juror to violate his duties as a petit juror."

Similarly, in Aguilar, in the District Court, the jury was instructed -- that was a tampering case -- quote, "an act is done corruptly if it is done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method," end quote.

This is exactly parallel to the interpretation that Andersen is asking this Court to adopt. And if that if that interpretation is adopted, it makes sense of this statute. If this statute isn't read in reference to the violation of other legal duties, than it covers a whole range of conduct that is unquestionably innocent --

JUSTICE KENNEDY: Suppose I just don't like the IRS, and I know they're coming. I have some very detailed summaries which will give them the answer they need right away. I throw away those summaries and make them go back to the original records just to make it tough for them. Can I do that?

MS. MAHONEY: Section 1519, I don't think you can. Could you have done that in the -- in the fall of

2001? Yes, Your Honor, you could. What that really reflects is the Pettibone rule. The Pettibone rule, for a hundred years, was that destruction and other kinds of acts of potential obstruction in advance of a proceeding were not a crime.

JUSTICE SCALIA: Ms. Mahoney, we -- you know, we all know that what are euphemistically termed "record-retention programs" are, in fact, record-destruction programs, and that one of the purposes of the destruction is to eliminate from the files information that private individuals can use for lawsuits and that Government investigators can use for investigations. And there has been nothing unlawful about having such a program, even if one of your purposes is not to leave lying around in the file stuff that can be used against you by either the government or a private individual.

So, I would have thought that your argument was very persuasive, except for the fact of 1519. I think that 1519 gives me cause to believe that Congress could, indeed, say, "You can't have record-retention programs." How else do you interpret 1519?

MS. MAHONEY: Well, they certainly hadn't said it in the fall of 2001, Your Honor. And so, for that reason --

JUSTICE SCALIA: Well, but I -- well, yeah, but

--

MS. MAHONEY: But --

JUSTICE SCALIA: -- but your argument is, you know, "It's inconceivable that they would have meant that." But, my -- they said it in 1519 --

MS. MAHONEY: Well --

JUSTICE SCALIA: -- -- in 2002.

MS. MAHONEY: -- let me put it this way. If they're gonna -- if they're going to say it, though, they have to say it with very clear language, because, otherwise, there would be no fair warning. You couldn't conclude from the language of the witness-tampering statute, which is designed to protect witnesses, that Congress had made all record-retention programs unlawful.

I also think, Your Honor, that when it comes time to construe Section 1519, some kind of nexus will have to be, you know, reasonably read in there, because, otherwise, you are correct, all document retention policies, or virtually all of them, are fatally doomed.

CHIEF JUSTICE REHNQUIST: And what is a "document"? I mean, in Justice Kennedy's example, is it just some handwritten notes? Do they become "documents"?

MS. MAHONEY: Absolutely, Your Honor. And, in this case, the evidence was quite clear that, you know, Andersen retained its work papers, and the work papers

were extremely extensive, and they were required to fully document the audit. The only things that were thrown away were notes and preliminary drafts, which had already been incorporated, in effect, into the final conclusions in the work papers; and yet that was the whole theory of this case, is that there were some documents that were destroyed. They were precisely the kinds of documents that document-retention policies are designed to eliminate, in part -- for a variety of reasons, but, in part, because they are preliminary in character and they can be misconstrued.

For instance, Your Honor, the FBI agents, generally speaking, have the practice of not keeping their notes of interviews. They take those notes, they make a file memorandum, they throw away the notes. Why do they do that? Of course they know the defendant would love to have those notes when it comes time for a trial. They do it because they feel that they have written it up in an accurate way, and enough's enough.

That's what we're talking about here, Your Honor. And there was nothing in the language of 1512 that would have put Andersen on notice that its document-retention policy was -- well, in fact, the Government doesn't say its document retention was a crime; it says it wasn't a crime. Instead, the crime was when David Duncan asked his

secretary to throw away documents that he could have thrown away, lawfully, himself. This statute does not give fair warning that that --

JUSTICE O'CONNOR: Was Section 1519 at issue?

MS. MAHONEY: No, Your Honor. Section 1519 did not get passed until the year 2002. It did not exist. Instead, the rule that was in force then was the Pettibone rule, the one that's reflected in the text of Section 1505; and that is, "the proceeding must be pending." That's, no doubt, why the Government didn't charge Andersen with a crime under Section 1505. I mean, they make it sound like the culpability here is the destruction of records. Well, if so, then you would think that they would have charged Andersen with destroying documents --

JUSTICE SCALIA: Wait a minute --

MS. MAHONEY: -- but they didn't.

JUSTICE SCALIA: -- wasn't there another provision in effect that said it doesn't matter whether the -- whether the proceeding is pending? I forget which one it is.

MS. MAHONEY: Well, that -- no, that's just 15-- that's 1512, for witness tampering. But for the act of destroying documents to interfere with a proceeding --

JUSTICE SCALIA: Right.

MS. MAHONEY: -- that's Section 1505, and the

proceeding must be pending. And that is -- that is still the rule today, Your Honor.

JUSTICE KENNEDY: But I -- just to make it clear, I take it you would still have the same objection to the deficiency of the corruption instruction, even if a proceeding were pending, or am I wrong about that?

MS. MAHONEY: Well, if a proceeding is -- yes, we would, in this case. Yes, absolutely. But, you know, if a proceeding is pending, then it changed the -- changes the way that you apply the definition of "corruptly." But you're certainly right that the definition is the same. The question is, under the proper definition of "corruptly," did you induce the witnesses to engage in this activity through improper means, such as bribery, or did you try to get them to violate their independent legal duties? For instance, if they had duties, under Section 1519, not to destroy, then it makes perfect sense, because what you have done is, you have asked the witness to engage in conduct which violates the law, and that corrupts them, it harms them, it fits with the purposes of the statute, it fits with the structure.

JUSTICE GINSBURG: So, it was proper, then, for Michael Odom to tell the Andersen personnel when he's encouraging them to follow the policy -- he said, "If it's destroyed in the course of normal policy and litigation,

and litigation is filed the next day, that's great. We followed our policy, and whatever there was that might have been of interest to somebody, it's gone and irretrievable."

MS. MAHONEY: Yes, Your Honor.

JUSTICE GINSBURG: That's fine for him to make that linkage between, "Destroy it. Maybe there's going to be litigation filed tomorrow." "That's great. It will be gone"?

MS. MAHONEY: Your Honor, at the time that he made that statement, what that statement actually reflects is the Pettibone rule. He was accurate in his -- in his statement about what the law was governing document destruction at the time. That's a good-faith reasonable belief that was absolutely supported by the law.

But, more importantly, Your Honor, if we look at Mr. Odom's remarks, he wasn't working -- he wasn't -- this wasn't in connection with the Enron engagement; there were only, I think, ten people, out of, like, 80, at that training seminar that had anything to do with Enron. He was talking about the firm's document-retention policy. The jury asked to see that videotape. They may have actually convicted Andersen based upon his remarks about the document-retention policy. They, similarly, may have convicted Andersen based upon Nancy Temple's memos that --

one of which was a reminder to the engagement team that they were supposed to applying -- complying with the document-retention policy. That's legal services. This --

JUSTICE GINSBURG: Odom wasn't saying this in the abstract. There were other proceedings, weren't there?

MS. MAHONEY: No, Your Honor, it was just a training session that was just a -- a section of the training session. It has -- literally, I think there were 89 attendees, only about ten of them --

JUSTICE GINSBURG: At the time of that training, were there not other proceedings involving Arthur Andersen?

MS. MAHONEY: No, Your Honor. No, I don't believe so. That's --

JUSTICE SOUTER: There were, involving Enron, at that point, isn't that correct? The -- Enron had gotten the letter?

MS. MAHONEY: No, Your Honor. That was on October the 10th. The letter did not come until October the 17th. Andersen learned about it on October the 19th.

I'd like to save the remainder of my time for rebuttal, please.

CHIEF JUSTICE REHNQUIST: Very well, Ms.

Mahoney.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF RESPONDENT

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

Arthur Andersen's conduct in this case explains why Congress enacted a statute like Section 1512 that protects against the anticipatory destruction of documents when a proceeding is --

JUSTICE O'CONNOR: Well, Section 1519, enacted subsequently, comes closer to the mark, doesn't it, than 1512?

MR. DREEBEN: Justice O'Connor, Section 1519 was enacted after the events --

JUSTICE O'CONNOR: Right.

MR. DREEBEN: -- in this case in order to plug the loophole that Arthur Andersen has pointed out existed in Section 1512 at the time.

JUSTICE SCALIA: So you think it's superfluous. 1519, if you win this case, really is just an exercise in futility, because the law already did what 1519 said.

MR. DREEBEN: No. The law did not already do what 1519 says.

JUSTICE SCALIA: Wherein does it go further?

MR. DREEBEN: It reaches single-actor obstructive conduct. What Ms. Mahoney has said --

JUSTICE O'CONNOR: Well, what about the Pettibone interpretation that has been outstanding for a long time?

MR. DREEBEN: Pettibone applied, Justice O'Connor, to a specific statute, Section 1503, and it's similarly incorporated in 1505. Those statutes protected against obstruction of pending judicial, administrative, and congressional proceedings. The innovation in Section 1512 was to reach beyond the existence of a pending proceeding and to ensure that basically the store doesn't get robbed before the proceeding starts.

If Arthur Andersen is correct, the anticipation of a grand jury investigation that is thought to occur the next day, a corporation can send out a directive to its employees and say, "Shred all the smoking guns." It's the corporate equivalent of seeing something that looks like a crime scene and sending somebody in before the police can get the yellow tape up to wipe down the fingerprints.

JUSTICE SCALIA: When can they do it? When can they do it? You didn't allege here that it was in anticipation of any particular proceeding. You say they can't do it once they know that the investigation is on the way. But your theory in this case is that they can't

do it, whether they know the investigation is on the way or not. They can't destroy any evidence that might be the subject of an investigation.

MR. DREEBEN: No, that's not our theory --

JUSTICE SCALIA: What is your theory?

MR. DREEBEN: Our theory is that a person acts corruptly when anticipating a reasonable possibility of an investigation into a specific matter, directs another person to destroy documents that are potentially relevant.

JUSTICE SCALIA: "A reasonable possibility of an investigation."

MR. DREEBEN: That's right.

JUSTICE SCALIA: And you want criminal liability to turn upon that.

MR. DREEBEN: I think that --

JUSTICE SCALIA: Whether or not there is a reasonable possibility of an investigation. You want somebody to go to jail on how a jury decides that question.

MR. DREEBEN: I don't think there's anything unusual about the decision of that kind of question at all. It's a analogous, but different and quite distinguishable nexus requirement from the kind of nexus requirement that this Court interpreted Section 1503 to have in the --

JUSTICE KENNEDY: Suppose I have a company and I know that the pattern is, I'm going to be audited every five years by the IRS. And in year four, I -- one year -- one year before the investigation, I instruct my bookkeeping staff, "Keep everything you need to document our expenses, but destroy everything that's remotely related to that, or indirectly related to that. Give them just a clean, simple file. Destroy anything that's -- all supporting documentation. Give them what they need and what they're entitled to have, but nothing else. And step up that policy, because they're going to be here next year." Under your -- it seems to me that that violates your rule.

MR. DREEBEN: Justice Kennedy, it turns on whether the intent there is to subvert, undermine, or impede the proceeding. And the answer is, if it is yes, then it would be prohibited by this statute.

JUSTICE SCALIA: Well, it would be prohibited to tell somebody to do it.

MR. DREEBEN: That's right.

JUSTICE SCALIA: But you could do it. The doing of it is perfectly okay.

MR. DREEBEN: That was a --

JUSTICE SCALIA: Doesn't that seem strange to you?

MR. DREEBEN: It seemed strange to Congress, too. And when this case threw a spotlight on that omission in the statute, Congress didn't react --

JUSTICE SCALIA: I would suggest that it throws a spotlight on the fact that your theory is wrong. It doesn't --

[Laughter.]

JUSTICE SCALIA: -- it doesn't make -- it doesn't make any sense to make unlawful the asking of somebody to do something which is, itself, not unlawful, so that the person could do it, but if you asked them to do it, you're guilty, he's not guilty. And that's -- that is weird.

[Laughter.]

MR. DREEBEN: What was weird about it, Justice Scalia, is that it allowed the person to do it himself. And when Congress --

JUSTICE O'CONNOR: Well, let me ask you about this precise thing. Is it Mr. Duncan? If he had, himself, shredded the documents, or destroyed them, that was perfectly okay at the time it was done.

MR. DREEBEN: It wasn't --

JUSTICE O'CONNOR: Is that right?

MR. DREEBEN: -- prohibited by this statute. And when --

JUSTICE O'CONNOR: It would not have been a violation.

MR. DREEBEN: That's right.

JUSTICE O'CONNOR: But the Government got the conviction, got him to plead guilty, apparently, on the basis that if he asked somebody else to do what was perfectly lawful for him to do, it would violate the statute.

MR. DREEBEN: That's right, Justice O'Connor.

JUSTICE O'CONNOR: Well, what -- how do you read that in coordination with the so-called safe-harbor provision for legal advice and so on?

MR. DREEBEN: I don't think that the safe-harbor provision substantially bears on this case at all. First of all, Arthur Andersen never raised the safe-harbor provision, so that the Government would --

JUSTICE O'CONNOR: And the woman lawyer never raised it, is that right?

MR. DREEBEN: Nancy Temple was not a defendant in this case, but her conduct was at issue, because, after having immediately recognized that an SEC investigation was highly probable, Nancy Temple sends out a document reminder saying --

JUSTICE O'CONNOR: Well --

MR. DREEBEN: -- basically, "purge the files."

JUSTICE O'CONNOR: But under this statute, with the safe-harbor provision in it, is it unlawful for her, as a lawyer, to say, "You can destroy these documents"?

MR. DREEBEN: Yes, it is, in this case, if her intent was to subvert, undermine, or impede the --

JUSTICE KENNEDY: But your definition of "subvert, undermine" is, if you destroy any document that might raise a question, say, in the IRS audit. It seems to me that is a sweeping position, which will cause problems for every major corporation or small business in this country. I just -- I just don't understand it.

MR. DREEBEN: I don't think so, Justice Kennedy, because the Government's position here has never been that the mere existence of a document-destruction policy used under routine circumstances is a violation of the statute. What the Government focused on in this case was using a document-destruction policy as a pretext and a cover to clean up and purge files when a government investigation was anticipated and it was perceived that these materials would be relevant.

JUSTICE KENNEDY: Well, that's like in -- the old -- the rule in the Army, "Make two copies of everything you throw out." I mean, that's what they're going to have to do.

[Laughter.]

MR. DREEBEN: I don't think --

JUSTICE BREYER: You used words --

MR. DREEBEN: Under this statute, Justice Kennedy, that's not the issue. I think the timeline here is critical. This was not a company that was routinely exercising a document-destruction policy, or document-retention policy, to maintain only that which was necessary for its ongoing business.

JUSTICE SCALIA: Yes, it was. The training session that you introduced in evidence was precisely that, a general training session for all employees, saying, "This is our document," quote, "retention policy."

MR. DREEBEN: Yes, but that was triggered, in part, by Nancy Temple's recognition -- in the midst of serving on a crisis response team, recognizing that Enron was in the process of imploding, Arthur Andersen, which was basically on probation with the SEC -- because it had been previously sanctioned, twice, during the prior summer, and was under a cease and desist order -- and seeing the SEC coming down the pike, at that moment, she decides to remind the Enron team, which had not been at all compliant with this document-retention policy, "It's time to get the files in line." This wasn't because all of a sudden the company had become preoccupied with neatness; it was so that it could document, in its audit

work papers, those things that supported its conclusions. That's what its document policy said.

JUSTICE SCALIA: He says that occurred before Enron had even gotten a letter.

MR. DREEBEN: But not --

JUSTICE SCALIA: That meeting.

MR. DREEBEN: -- not before Enron's problems had begun to become -- surfacing in the Wall Street Journal, in the financial press, the stock price was sliding. Everybody who was sophisticated in this environment -- and surely Arthur Andersen was -- knew that when a Fortune 500 company is looking at a potential need to restate its income statements because the accountants have been -- proved a black-and-white violation of GAAP, and they all knew that that was true, that SEC proceedings are likely to occur. Even the witness --

JUSTICE KENNEDY: If you -- if you had alleged that they did this in order to cover up a fraud, there would be no problem. But what you're doing is to say it's illegal to do what every other company in the country can do if they don't have an audit immediately on the horizon. I just don't understand it.

MR. DREEBEN: No other company in the country would do this, Justice Kennedy. This is an extraordinary case precisely because --

JUSTICE SCALIA: You say that it would be perfectly okay for this company, or any other one, to destroy their documents. What's bad is telling somebody to destroy the documents.

MR. DREEBEN: But in an organizational context, that's the only way that directives like this can be given out and implemented. This wasn't a case of --

JUSTICE BREYER: I know you know that the -- you've put your finger on a problem for me. You have said, Would it be the case that a person, before the proceeding begins, could simply tell somebody else to destroy the smoking gun? I understand that you fear that Andersen's approach would lead to that result. And it's bothering me. Therefore, I'd like you whether the word "corruptly" could include a person who knows three things: one, that the investigation, which has not yet started, almost certainly will want this document; two, there is no legal right to withhold it; and, three, that if I tell him to do it, it will be destroyed -- I mean, that it's important to the investigation. Important to the investigation, they want it, it's cover-up, and they will, in fact, have no legal right to take it back. Now, would that be "corrupt"?

MR. DREEBEN: Yes, it would --

JUSTICE BREYER: Okay.

MR. DREEBEN: -- be "corrupt."

JUSTICE BREYER: Okay. IF that's "corrupt," then does that cover this case?

MR. DREEBEN: I think that it does cover this case, and --

JUSTICE BREYER: How? Because it seems to me there was quite a lot of -- by the way, the person who's doing the persuading has to know this. They have to know that it will be wanted, that it's important, and there is no legal right to withhold it. So it seems to me that, on the one hand, that does cover your problem, and, on the other hand, it does not cover this case. Now, that's what I'd like you to reply to.

MR. DREEBEN: Well, Justice Breyer, I think that the facts of the case are subsumed within the description that you've given. The jury instructions did not require findings on all of those features; and that is, in large part, because of the kinds of instructions that Arthur Andersen --

JUSTICE BREYER: No. The jury instruction left out the word "corruptly," as far as I can see, in the part that was critical. They define "corruptly" as simply an intent to impede. And the word "impede" goes well beyond what I've said, both because it does not cover the three things, but, most particularly, because it does not say

that it was dishonest or that the person who did the persuading knew that the jury or the grand jury or the investigation would have the legal right to get the material and there was no right to withhold it. The words that Arthur Andersen suggested, while they don't say precisely that, were at least a step in the right direction.

MR. DREEBEN: The jury instruction said less than what you have suggested, Justice Breyer, no question about it, but what they did require was that there be an intent to undermine, subvert, or impede the investigation. I think --

JUSTICE SOUTER: Wasn't -- wasn't that instruction, itself, undermined by what I understand to be the instruction that good-faith belief in the legality of what was being done was no defense? I mean, if you had an instruction that depended upon the word "subvert," I could -- I could understand your argument. But it seems to me that the difficulty with your argument, and the difficulty with your answer to Justice Breyer, is that it went beyond "subvert" to merely "impede," and it included an instruction that good faith was no defense.

MR. DREEBEN: Justice Souter, this is to statute, and the word "corruptly" is not a word, that has been ever construed to require consciousness of

illegality. That is a --

JUSTICE SCALIA: How about "knowingly"?

JUSTICE O'CONNOR: Yeah, the word "knowingly."

JUSTICE SCALIA: How about "knowingly"? Does that -- does that usually connote knowledge of the illegality?

MR. DREEBEN: Definitely not. The word "knowingly" usually connotes knowledge of the underlying facts. And, in this case --

JUSTICE SCALIA: "Knowingly corruptly."

MR. DREEBEN: The word "knowingly" does not travel down the statute to modify "corruptly." It --

JUSTICE SOUTER: I don't see why it doesn't. I mean, there's no grammatical break.

MR. DREEBEN: Well, there is a logical break, because if it travel down the statute and reach all the way to "misleading conduct," what Congress would have written is a statute, when you read the definition of "misleading conduct," that says, "whoever knowingly knowingly makes a false statement," because the definition of misleading conduct includes "knowingly making false statements," "knowingly omitting things," "intentionally engaging in deceptive behavior." And you'd end up with a -- in a redundancy that makes no sense whatsoever.

It makes sense for Congress to have said,

"knowingly used force or intimidation." But then when you get to the word "threat," there is inherent knowledge in it. "Corruptly" inherently embodies knowledge. And the definition of "misleading conduct" inherently --

JUSTICE SOUTER: Well, it's certainly --

MR. DREEBEN: -- embodies knowledge.

JUSTICE SOUTER: I mean, I will -- I will grant you that the definition that the Government asked for, and got, for "corruptly persuades," does have that implication, so far as the "subvert" prong is concerned. But when you get beyond the "subvert" prong, and you get down to the third one, "merely to impede," you're getting pretty thin, so far as the -- as the implication of knowledge of wrongdoing is concerned, and you've still go the problem of the instruction that negated good faith is a defense.

MR. DREEBEN: Let me try to address each of those. First of all, the words were used as a definition of "improper purpose," and they were used together, "subvert, undermine, or impede," and they logically have a relationship to each other. When the Court of Appeals looked at those words and defined them, which it did, it talked about subversion and undermining as being a ruining of the proceedings and an overthrow of the attempt that the Government was anticipated to make. And I think,

"impede" has to be read logically in that group. Now, I will acknowledge that "impeding" can have broader connotations, but it's not a word that's is foreign to the obstruction --

JUSTICE SOUTER: Why did -- if that is so, why did you need it? In other words, you had a -- you had a pattern instruction, apparently, that was -- that was keyed to "subversion," which I think would be an easy argument for you. If the addition of "impede" really wasn't adding that much, why did you ask the Court to put it in there?

MR. DREEBEN: Here is what it adds, Justice Souter. "Undermine" and "subvert" have a connotation of completely preventing the performance of the official duty in the proceeding. "Impede" removes any implication that you need to totally thwart the government activity in order to be guilty of this crime. It's enough to "interfere" with it, which is the word that the Court of Appeals used to define it.

CHIEF JUSTICE REHNQUIST: But you could undermine and be unsuccessful. It's not as though undermine means that you're necessarily going to succeed.

MR. DREEBEN: No, but it was to avoid any connotation that the jurors might put on the linkage of those words that the Government sought the use of the word

"impede." And I should note that it appears, in Section 1503, Section 1505 --

JUSTICE O'CONNOR: But not in 1512.

MR. DREEBEN: That's correct. That's correct. But what --

JUSTICE O'CONNOR: It's not there.

MR. DREEBEN: -- what the Government was doing in this instance was attempting to give content to the word "corruptly" that would enable the jurors to know that they can convict if the purpose that the defendant had in dusting off this document policy and using it as a pretext to destroy documents was to interfere with the fact-finding ability of an anticipated proceeding.

JUSTICE BREYER: Well, but it sounds like -- actually, I'll grant you that it appears in the statute, but that's, in a sense, my problem. The statute talks about "corruptly persuading another person to destroy a paper with the intent to impair that paper's availability for use in an official proceeding." So, then we look at the instruction, and the instruction speaks of "destroying the paper with the intent, at least in part, to impede." Fine. It sounds like it's just the same as the statute, but for one thing, the omission in the instruction of the word "corruptly."

MR. DREEBEN: Justice Breyer, it's a definition

of "corruptly" that --

JUSTICE BREYER: All right. So to define "corruptly" as "doing the same thing that the rest of the statute does" seems a little strange. If I were a juror, I might think that there is missing here any dishonesty of purpose.

MR. DREEBEN: The Court of Appeals addressed the argument, which Petitioner makes, that the definition of "corruptly" that was used in this case is redundant and superfluous in light of the additional intent that --

JUSTICE BREYER: It's not perfectly redundant. One can imagine driving a wedge between making something unavailable, which the jury would find relevant, or the investigator would find relevant, and impeding the fact-finding ability of the investigator. They're not logically identical, but they do strike me as so similar that it's hard to expect a juror to make much of a difference between those two phrases.

MR. DREEBEN: Well, I think that they have a very significant difference, an important function in ensuring that this statute is not applied beyond the scope of protection of the integrity of proceedings, which is what Congress intended it to do.

JUSTICE SCALIA: Mr. Dreeben, would you indulge me to go back to a previous answer you gave? I'm sorry, I

didn't quite get it. In responding to Justice Souter's inquiry concerning the word "knowingly," you said the word "knowingly" appears later, so that it would be -- it would be reduplicative. What later appearance are you talking about, in 1512(b)?

MR. DREEBEN: Justice Scalia, on page 5(a) -- or, I'm sorry, on page 3(a) --

JUSTICE SCALIA: 3(a), right.

MR. DREEBEN: -- of the Government's appendix --

JUSTICE SCALIA: Right.

MR. DREEBEN: -- to its brief, at the bottom of the page, subsection (b) --

JUSTICE SCALIA: Right.

MR. DREEBEN: -- appears, "Whoever knowingly uses intimidation or physical force" --

JUSTICE SCALIA: Right.

MR. DREEBEN: -- et cetera.

JUSTICE SCALIA: Right.

MR. DREEBEN: The last phrase in the sequence is "engages in misleading conduct towards another person." That phrase is, in turn, defined in the statute on page 11(a) and 12(a) of the same appendix, the Government's appendix. It's Section 1515(a)(3). And it says the term "misleading conduct" means "knowingly making a false statement; intentionally omitting information from a

statement; with intent to mislead, knowingly submitting or inviting reliance on a writing; or, with intent to mislead, knowingly submitting or inviting reliance on a sample;" and, finally, "knowingly using a trick scheme or device."

So, "knowingly" is to be read in as if it were part of Section 1512 when it comes to defining the term "engaging in misleading conduct," so you would end up with a statute that Congress have, for some reason, drafted that includes the word "knowingly" at the beginning, and then "knowingly" later as the definition of one of the terms that the initial "knowingly" --

JUSTICE SCALIA: But I don't know how you can avoid that.

MR. DREEBEN: You avoid it --

JUSTICE SCALIA: "Whoever knowingly engages in misleading conduct," which is later defined as --

MR. DREEBEN: No. It's, "Whoever knowingly uses intimidation or physical force." That's what "knowingly" applies to. And then the words "threaten, corruptly persuade, and engages in misleading conduct," have inherent knowledge in them. In other words --

JUSTICE SCALIA: Oh, I see. The "knowingly" only applies to "uses intimidation or physical force."

MR. DREEBEN: That's right, because "corruptly"

is, and always has been, a scienter term, and its appearance in Section 1512 is a direct lineal descendant from the fact that that word appears in Section 1503. When Congress enacted this statute, it had every reason to believe, because it intended to do this, that the definition of "corruptly," that had been fairly widespread in the use of the word in Section 1503, would be applied to 1512.

JUSTICE SOUTER: Why --

MR. DREEBEN: And, in that context --

JUSTICE SOUTER: -- why isn't the answer to your argument that the requirement in (b) -- "knowingly" requirement in (b) doesn't travel all the way down through the series, but it travels at least as far as "corruptly persuades"?

MR. DREEBEN: Well, that's sort of reading the statute just to achieve a result.

JUSTICE SOUTER: No, but we know it --

MR. DREEBEN: I think it's contrary to --

JUSTICE SOUTER: -- applies to something at the beginning of the series. It's got -- it's got some work to do. You've made an argument that it doesn't apply, or it would be logically absurd to apply it, to something at the end of the series, and we're somewhere in the middle. And why isn't the answer to your argument simply to say,

"Okay, it doesn't travel all the way to the end, but it travels up to the end, and it travels as far as this"?

MR. DREEBEN: Because a "threat," itself, which is the third term in the series, and the one that precedes the term that's at issue here, also involves an element of scienter or knowledge. You can use intimidation inadvertently. You could be a very heavy, dangerous-looking guy, standing out in front of the grand jury room, and a witness might come along and see you and realize, to himself, "Uh-oh, I'm in trouble if I testify." If you haven't done that knowingly --

CHIEF JUSTICE REHNQUIST: So that big, heavy guy would violate the statute just by standing there?

MR. DREEBEN: He wouldn't, Chief Justice Rehnquist, precisely because it requires that he knowingly use intimidation. So that --

JUSTICE SCALIA: I don't think you can -- you can use intimidation unknowingly, any more than you can threaten unknowingly. If they felt it necessary to put "knowingly" before "use intimidation," I think they would have felt it necessary to put "knowingly" before "threaten." The two terms are just about identical.

MR. DREEBEN: Well, I think that they're actually quite different in the context of this statute, but even if the Court were to conclude that "knowingly"

did travel down and produce a phrase, "knowingly corruptly," the word "knowingly" generally in the criminal law refers to "knowledge of the facts that make your conduct unlawful." Arthur Andersen here is asking for a very --

JUSTICE BREYER: No, the --- in general terms, when you speak of "general interpretation," I suppose I think it possible to approach ambiguous criminal statutes with the following idea. Congress did not intend to try to make of the statute a highly general weapon for the Justice Department to pick and choose. That's a notification problem. It's also because we don't want one law, "It is a crime to do wrong, in the opinion of the Attorney General." You know, I mean, we want to have narrow criminal statutes.

Now, is it reasonable to start with that frame of mind? And if it is, doesn't that tend to cut against you in this case?

MR. DREEBEN: I don't think that it does, Justice Breyer. There are, of course, contexts where the Court concludes that a statute, after applying all the tools of statutory construction, is ambiguous, and then rules of construction do apply to narrow it; but there is no provision that says that the Court should approach the question of construction with a view to narrow it. I

think --

JUSTICE O'CONNOR: Well, how about the rule of lenity in the criminal statutes? If this thing is so confusing, how's the business person supposed to know what they can do? How's the lawyer supposed to know?

MR. DREEBEN: I don't think that it is that confusing, Justice O'Connor. This is a statute that was enacted against the backdrop of Section 1503 in a well-understood meaning of the word "corruptly." The same word appears in Section 1505. When the D.C. Circuit concluded that that provision was vague, as applied to a particular case, Congress came back with a definition that legislatively overruled the D.C. Circuit decision and said "corruptly" means "acting with an improper purpose." The "improper purpose" in an obstruction-of-justice case has traditionally been "the purpose to obstruct justice."

That definition logically applies to Section 1512, because Congress enacted the corruptly-persuades provision to remedy a deficiency in prior law, because it had not included non-coercive, non-deceptive witness-tampering in the statute, originally. And some courts concluded that it was no longer punishable under Section 1503, either.

To fix that situation, Congress looked to the model of Section 1503 case law, where there had been a variety

of acts that are covered that under Petitioner's test would not be, such as secreting a witness, or sequestering a witness, in anticipation of a subpoena so that the witness would be unavailable to testify, or destroying documents before a subpoena had been issued, but in an anticipation that the subpoena was likely. Those kinds of acts were considered to be unlawful.

Similarly, giving advice, even as a lawyer, to an individual to assert the Fifth Amendment in bad faith, not to protect that individual's own interest, but to obstruct justice by protecting other members of a criminal organization, or, indeed, the lawyer himself, lower courts had recognized could be prosecuted; not uniformly had recognized, but they had uniformly recognized it at the time of the enactment of this statute. And Congress specifically said, "We want 1512 to be able to pick up the kinds of cases that some courts have said are no longer prosecutable under Section 1503, and that had not been included in the original version of 1512." So that there is history here that explains how these terms should be applied.

And as far as Petitioner's contention that the word "corruptly" does nothing and leads to a series of horrible hypotheticals, actually a sensitive and appropriate use of the word "corruptly" solves those

problems. Petitioners talk about how people should be able to urge each other not to cooperate with a voluntary investigation, that it's part of citizenship to be able to engage in those conversations. But if an entity has subpoena authority and it doesn't invoke it, and it simply invites people voluntarily to cooperate, it is not going to be an intent to subvert, undermine, or impede that proceeding to invite them to exercise that right. If the agency wants their testimony, it can get it through compulsion.

Similarly, Petitioners argue that document policies are, per se, made unlawful under the Government's approach. But as the Court of Appeals specifically recognized in this case, a sound application of the word "corruptly" would look to whether there is a threat of some kind of specific proceeding that might trigger an obligation not to destroy the documents before the proceeding gets started.

And, as well, there are intents that are simply not intents to subvert the administration of justice, that may result in rendering certain evidence unavailable. And if a person engages in that conduct, it may well violate another provision of criminal law, but it doesn't have to violate 1512. And a sound use of "corruptly" prevents all of those hypotheticals from materializing and leading to

the conclusion that the statute is unduly broad.

Now, Petitioner in this case, in addition to attacking the word "corruptly," also has advanced a number of arguments that there was inadequate instruction on some connection that had to be required between the Defendant's intent in a possible future proceeding. But the reason that there was no adequate instruction on those issues is largely because Petitioner, itself, deliberately decided to ask for two instructions that were contrary to the statute, and never asked for what it's asked this Court to impose today. It never asked that the Defendant must be shown to believe that some particular proceeding was likely to occur in the near future. Instead, what it did is say that the Defendant had to have an intent to impair an object's availability for use in a particular proceeding. And what the Court of Appeals said is that if there was any problem in that, it's not reversible error; it's harmless, because everybody knew that the proceeding that was anticipated was an SEC investigation of Enron.

And the other instruction that Petitioners asked for in the District Court is that the official proceeding must be ongoing or scheduled to be commenced in the future. But that instruction is flatly contrary to the statute.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Dreeben.

Ms. Mahoney, you have four minutes remaining.

REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF PETITIONER

MS. MAHONEY: Thank you.

I'd like to first address the fact that much of the Government's argument is focused on this nexus, the imminence of the proceeding, that sort of thing, but actually the jury was not required to find any nexus whatsoever, and was told the wrong definition of an "official proceeding," to boot. It was told that the informal inquiry by the SEC staff was an official proceeding, and that an official proceeding was already going on at the time of the events at issue here; in fact, even before Nancy Temple even knew about that informal inquiry, which, in and of itself, is reversible error. And --

JUSTICE SCALIA: What do you think it should have been?

MS. MAHONEY: The "official proceeding," at worst, Your Honor, it was the formal investigation of the SEC, which is commenced by a vote of the Commission and has compulsory process available. It is certainly not a staff person sitting in their office in Houston opening a file and doing some Internet searches. That's the

Government's definition. That's in -- a matter within the jurisdiction of an agency, and that's not the language that appears in this statute.

Also, in terms of whether Andersen raised this argument, of course they did. They asked for an instruction that the proceeding be ongoing or scheduled, because that was Fifth Circuit law at the time. Andersen wasn't supposed to guess that the Fifth Circuit was going to change what it had held in case called Shively. And the Fifth Circuit understood that Andersen had preserved the argument, and expressly says in its opinion that the issue is, What is the concreteness of the Defendant's expectation of a proceeding that should be required under this statute? -- and found that "feared" was enough. That's not enough. "Possible" is not enough, especially if a broad definition, like the one the Government wants to have -- there's got to be a serious nexus.

Nexus problems can be avoided, though, if the more traditional definition of "corruptly" is used in the first place, which is not only required by lenity, but, frankly, is required even by the witness-tampering cases under Section 1503. As I read to you, the definitions of "corruptly" are completely consistent with Andersen's definition.

The Government says, "Oh, no. In fact, all it

meant under 1503 was an intent to obstruct justice." That can't possibly be what Congress intended for Section 1512, because this Court had held, for -- a hundred years ago, that you necessarily lack the evil intent to obstruct if a proceeding is not pending. And 1512 does apply even before proceedings begin, so the definition had to be tailored to the precise circumstances of Section 1512. It couldn't import the precise thing.

Plus, the definition under 1503 has never been any intent to impede the fact-finding ability is a prohibited intent. That would require lawyers and clients all over the country to go to jail. It's that you intend to subvert and undermine the integrity of the due administration of justice. And that term does not mean simply to impede the fact-finding; it means that you intend to disobey those duties that are imposed upon you in the course of a proceeding. And cases, including the Howard case cited in our brief and cited by the Government, make that crystal clear. It is not translated to what this jury instruction was, which is that -- any intent to impede fact-finding.

Just take a look at the examples, if the Government were correct about this. If I were to ask my lawyer to assert, let's say, a reporter's privilege that is debatable, under the Government's -- and I do it,

because I know that that document is harmful, and I want to keep it out of the proceeding -- under the Government's definition, that is corrupt, because I am trying to get another person to withhold a document in order to impede the fact-finding ability of the decision-maker.

It makes no sense to define "corruptly" that way. If you, instead, define it with reference to duties, it makes perfect sense. That's not corrupt, because there is no duty to provide a document when you have a good-faith claim of privilege.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Mahoney. The case is submitted.

[Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.]