days, after the opportunity for public comment, regarding the retention of categories of electronic and non-electronic audit records which contain opinions, conclusions, analysis or financial data, in addition to the actual work papers. Willful violation of such regulations would be a crime. Neither the statute nor any regulations promulgated under it would impose any independent legal obligation under state or federal law to maintain or refrain from destroying such records. In Conference language we are asked to clarify that the rulemaking called for under the (b) provision was mandatory, and gave the SEC authority to amend and supplement such rules in the future, after proper notice and comment.

Section 803.—Debts nondischargeable if incurred in violation of securities fraud laws

This provision would amend the federal bankruptcy laws to authorize the bankruptcy court to declare certain debts nondischargeable if such debts were incurred in violation of securities fraud laws. The section defines “debt” as any claim that would be a claim for damages, costs, fines, or other monetary relief with respect to a violation or alleged violation of any federal law or state law, administrative order or settlement with the SEC involving securities fraud.

Section 804.—Statute of limitations

This section would set the statute of limitations for civil and criminal actions arising out of violations of any provision of the securities laws. It states that the statute of limitations for any violation of the securities laws is three years from the date of the violation, unless the violation involves a pattern or course of conduct that is intended to defraud, and the individual or entity is able to demonstrate that the statute of limitations was tolled for a substantial portion of that period due to a good-faith claim of entitlement to indemnification or other defenses.

Section 805.—Review and enhancement of criminal sentences in cases of fraud and evidence destruction

This provision would require the United States Sentencing Commission, in consultation with the Department of Justice, to review and consider enhancing, as appropriate, criminal penalties in cases involving obstruction of justice and in serious fraud cases. The Commission is also directed to generally review the U.S. Sentencing Guidelines relating to sentencing organizations for criminal misconduct, to ensure that such guidelines are sufficient to punish and deter criminal misconduct by corporations. The Commission is asked to perform such reviews and make such enhancements as soon as practicable, but within 180 days of the date of enactment.

Subsection 1 requires that the Commission generally review all the base offense level and sentencing enhancements under U.S.S.G. §2B1.2. Subsection 2 specifically directs the Commission to consider including enhancements specific to offenses involving the destruction of evidence, the amount of evidence destroyed, the number of participants, or otherwise extensive nature of the offense. The subsection also sets the selection of evidence that is particularly probative or essential to the investigation and whether the offenses involved more than minimal planning or the abuse of a special skill or position of trust. Subsection 3 requires the Commission to establish appropriate punishments for obstruction of justice offenses created in this Act.

Sections 4 and former section 5 of the Senate passed bill, which was moved to Title 11 in Conference, require the Commission to review guideline offense levels and enhancements under U.S.S.G. §2B1.1, relating to fraud. Specifically, the Commission is requested to review the fraud guidelines and consider enhancements for cases involving significantly greater than 50 victims and cases in which the solvency or financial security of a substantial number of victims is endangered. New Subsection 5 requires a comprehensive review of sentencing guidelines relating to sentencing organizations. It is specifically intended that the Commission establish new sentencing guidelines for offenses that involve cover and areas in addition to monetary penalties, additional punishments such as super- vision, compliance programs, probation and administrative action, which are often extremely important in deterring corporate misconduct.

Section 806.—Whistleblower protection for employees of publicly traded companies

This provision would extend whistleblower protection to employees of publicly traded companies. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. If the employer does not take illegal action in retaliation for lawful and protected conduct, subsection (b) allows the employee to file a complaint with the Department of Labor, which is governed by the same procedures and burdens of proof now applicable in the whistleblower area. An employee who brings a case can bring the matter to federal court only if the Department of Labor does not resolve the matter in 180 days (and there is no showing that such delay was with (or for) the Department of Labor), or parties in a judicial proceeding. The employee's case is governed by the same procedures and burdens of proof as a normal case in law or equity, with no amount in controversy requirement. Subsection (c) governs remedies and provides for the reinstatement of the whistleblower, backpay, and compensatory damages to make a victim whole, including reasonable attorney fees and costs, as remedies if a complainant prevails. Subsection (d) sets procedures for the bringing of the initial administrative action before the Department of Labor is also included.

Section 807.—Criminal penalties for securities fraud

This provision would create a new 10-year felony for defrauding shareholders of public companies, which would supplement the patchwork of existing technical securities law violations with a more general and less technical provision, with enhanced penalties, and would be comparable to current bank fraud and healthcare fraud statutes. It is meant to cover any scheme or artifice to defraud any person in connection with any public offering. The acts terms are not intended to encompass technical definition in the securities
laws, but rather are intended to provide a flexible tool to allow prosecutors to address the wide array of potential fraud and misconduct which can occur in companies that are public, private or institutional investors, or other investor or consumer protection groups be excluded from the SEC rulemaking process.

Questions of criminal intent are, as in all criminal law, a critical consideration. Criminal intent is also not a bar to prosecution. The in- tent of the provision is simple; people should not be destroying, altering, or falsifying doc- 

ments to obstruct any government func- tion. Finally, this section could also be used to prosecute a person who actually destroys the records himself in addition to one who destroys for the purpose of concealing evidence so long as they are done with the in- tent to obstruct, impede or influence the in- 

vestigation or proper administration of any 

Aguillar, 115 S. Ct. 593 (1995), to apply only to pending or imminent proceeding or matter—there is no time limit. In short, the current laws regarding destruction of evidence are full of ambiguities and technical limitations that should be corrected. This provision is meant to address those ends.

Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the in- 

tent to obstruct, impede or influence the in- 

vestigation or proper administration of any 

matter, and such matter is within the jurisdic- 

tion of an agency of the United States, or such acts done either in relation to or in con- 

templation of such a matter or investiga- 

tion. The fact that a matter is within the jurisdic- 

tion of an agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant. Rather, the intent required is the intent to obstruct, impede or influence the agency processes of the precise nature of the 

agency of court’s jurisdiction. This statu- 

ute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter by inadmissibility. It is also sufficient that the act is “in contemplation of” or in relation to a matter or investigation. It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, in- 

vestigations, regulatory or administrative proceedings (whether formal or not), and less formal governmental inquiries, regardless of their title. Destroying or falsifying doc- 

ments to obstruct any of these types of mat- 

ters or investigations, which in fact are 

proving to account within those definitions of a federal agency are covered by this statute.

Questions of criminal intent are, as in all cases, appropriately decided by a jury on a case-by-case basis. This provision will not rest in the judgment of the prosecution. As with many other technical distinction which burdens successful prosecution of wrongdoers. Section 1519 provides that it is not intended that the SEC be prohibited from consulting with other governmental agencies, such as the Department of Justice, which have primary responsibility for the enforce- 

ment of federal criminal law or pertinent state regulatory agencies. Nor is it the in- 

tention of this provision that the general public, private, or institutional investors, or other investor or consumer protection groups be excluded from the SEC rulemaking process.

This section not only penalizes the willful failure to maintain specified audit records, but also creates a new general anti shredding provision, 18 U.S.C. § 1519, with a 10-year maximum pris- 

on sentence. Currently, provisions governing the destruction of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts. For instance, certain current provisions make it a crime to persuade another person to de- 

stroy documents, but not a crime to actually destroy the same documents yourself. Other provisions, such as 18 U.S.C. § 1593, 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 done by intent or otherwise. It is also sufficient to give to an engagement is not important. Documents pertinent to the substance of such financial audits or review should be pre- 

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Two new felonies to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial records. First, it creates a new general anti shredding provision, 18 U.S.C. § 1519, with a 10-year maximum pris- 

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ties fraud actions and three upholding this short statute of limitations in Bertson, 111 S. Ct. 2773 (1991), the 5
Kennedy said in their dissent in Lampf, committee in 1995 that the last two SEC Chairmen supported ex-
needed measure to protect investors.

expected to file suit within three years after standard of fairness or practicality can be
years.

petrator of a fraud, who successfully con-
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As Justices O
vestments which they can never recover.

1998. In Washington state alone, the short
based on alleged securities fraud in 1997 and
some states to forgo claims against Enron
in 2001, the SEC was directed by the
Harkin led the effort to pass a law that would

To the extent that the United States
stricter than common law standards, the

The Act is not intended as criticism of the
current law, which were based on the
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Act, if the employer does take illegal action to
prevent employees from whistleblowing, the

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Act, if the employer does take illegal action to
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Should such a case be brought in federal court, it is
intended that the same burdens of proof
which would have governed criminal cases
in the past be applicable. Section 807 creates a
new 25 year felony

Chapter 8 corporate mis-

Finally this provision requires a complete
review of the Chapter 8 corporate ins-
ruptcy procedures to determine
whether they may be treated the same as a case with 5,000
victims. As the Enron matter demonstrates, serious
frauds, especially in cases where pub-
licly traded securities are involved, can af-
fact thousands of victims.

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The experts have long agreed on that point,
but unfortunately they have been proven
right again. As recent experience shows, it
only takes a few seconds to warm up the
shredder, but unfortunately it will take
years to put this complex problem back together again. It is time that the law is
changed to give victims the time they
too poor to prove fraud cases. 

Section 805 of the Act ensures that those
who destroy evidence or perpetrate fraud are
appropriately punished. It would require the
Commission to consider enhancing criminal
penalties in cases involving obstruction of
justice and serious fraud cases where a
large number of victims are injured or when the
victims face financial ruin.

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those statutes, with their five year maximum penalties.

This bill, then, would create a new 25 year felony for securities fraud—a more general and bipartisan provision comparable to the bank fraud and health care fraud statutes in Title 18. It adds a provision to Chapter 63 of Title 18 at section 1348 which would criminalize the execution or attempted execution of any scheme or artifice to defraud persons in connection with securities of publicly traded companies or obtain their money or property. The provision should not be read to require proof of technical elements from the securities laws, and is intended to provide needed enforcement flexibility and, in the context of publicly traded companies, protection against all the types schemes and frauds which inventive criminals may devise in the future. The intent requirements are to be applied consistently with those found in 18 U.S.C. §§1341, 1343, 1344, 1347.

By covering all “schemes and artifices to defraud” (see 18 U.S.C. §§1344, 1341, 1343, 1347), new §1348 will be more accessible to investigators and prosecutors and will provide needed flexibility and, in the context of publicly traded companies, protection against all the types schemes and frauds which inventive criminals may devise in the future.

VOTE EXPLANATION

Mr. BIDEN. Mr. President, I arrived in Washington this morning after the vote to invoke cloture on the nomination of Julie Smith Gibbons, to be United States Circuit Judge for the Sixth Circuit.

It was my intention to be here in time to vote in favor of this cloture motion.

Unfortunately, the catenary wire providing power for Amtrak was knocked down in Elkton, MD. This delayed the train on which I was traveling and regretfully prevented me from being present to vote.

THE FEDERALIST SOCIETY: SETTING THE RECORD STRAIGHT

Mr. HATCH. Mr. President, I also take this opportunity today to right a wrong. Over the past 2 years, members of The Federalist Society have been much maligned by some of my Demo- crat colleagues, no doubt because they see political advantage in doing so. The Federalist Society has even been presented as an ‘evil cabal’ of conservative lawyers. Its members have been subjected to questions which remind one of the McCarthy hearings of the early 1950’s. Detractors have painted a picture which is surreal, twisted and untrue.

The truth is that liberal orthodoxies reign rampant and often unchecked in a majority of this countries law schools and in the legal profession, and that the left is shocked that an association of constitutionalist lawyers would exist, much less include the notables of legal minds it does.

During the mid-1990’s, Professor James Lindgren of Northwestern University Law School conducted a survey of law school professors and came to the following conclusion. At the faculties of the top 100 law schools 80 percent of law professors were Democrats, or leaned left, and only 13 percent were Republicans, or leaned right. These liberal professors promulgate their ideology in law school campuses or law schools knows that nonliberal views are regularly stifled and those espousing those views are often publicly shunned and ridiculed. It is this hostility to an open exchange of ideas that set the stage for the formation of the Federalist Society.

And given my Demo- crat colleagues’ reaction to the Soci- ety, it appears to be fighting against liberal narrow-mindedness still.

In 1982, the Federalist Society was organized, not to foster any political agenda, but to encourage debate and public discourse on social and legal issues. The Fed- eralist Society has accomplished just that. It has served to open the channels of discourse and debate in many of America’s law schools.

The Federalist Society espouses no official dogma but its members share acceptance of three universal ideas: 1. that government’s essential purpose is the preservation of freedom; 2. that our Constitution embraces and requires separation of governmental powers; and 3. that judges should interpret the law, not write it.

For the vast majority of Americans, these are not controversial issues. Rather, they are basic Constitutional assertions that are essential to the survival of our republic. They are truths that have united Americans for more than two centuries. Recently we have seen the emergence of some groups that seek to undermine the third of these ideas—that judges should not write law—have attempted to use the judiciary to circumvent the democratic process and impose their minority views on the American people.

This judicial activism is a nefarious practice that seeks to undermine the principle of democratic rule. It results in an unelected oligarchy, government by a small elite. Judicial activism imposes the will of a small group of po- liticized lawyers upon the American people and undermines the work of the people’s representatives.

Indeed, if the radical left is successful, if we continue to appoint judges that are committed to writing law and not interpreting it, than all of us can just go home. We can resign ourselves to live under the oligarchical rule of lawyers. I happen to know a few lawyers, and please trust me when I say, this is not a good idea.

Beyond acceptance to its three key ideas, freedom, separation of powers, and the rule of law, the Society seeks to accomplish its goal? Not by lobbying Congress, writing amicus briefs, or issuing press releases. The Federalist Society seeks only to sponsor fair, serious, and open debate about the need to enhance individual freedom and the role of the courts in saying what the law is rather than what it should be. The Society believes that debate is the best way to ensure principles that have not been the subject of sufficient attention for the past several decades receive a fair hearing.

The Federalist Society’s commitment to fair and open debate can be seen by a small sampling of some participants in its meetings and sympos- iums. They have included scores of liberals like Justices Ruth Bader Gins- burg and Stephen Bryer, Michael Dukakis, Barney Frank, Abner Mikva, Alan Dershowitz, Andrew Tribe, Aaron Stein, Steve Shapiro, Christopher Hitchins and Ralph Nader, just to name a few.

I would like to include for the RECORD a list of 60 participants in Fed- eralist Society events that demonstrates the remarkable diversity of thought of Federalist Society events. One of them is Nadine Strossen, Presi- dent of the ACLU, who has participated in Federalist Society functions regu- larly and constantly since its founding. She has praised the fundamental prin- ciple of individual liberty, its high-pro- file on law school campuses, and its in- tellectual diversity, noting that there is frequently strenuous disagreement among members about the role of the courts. Strossen has even said that she cannot draw any firm conclusion about a potential judicial nominee’s views based on the fact that he is a Fed- eralist Society member.

It seems to me that an organization that includes such a diverse array of opinion serves this nation well and does not deserve the vilification it gets from the usual suspects.

There are many notable conserv- ativies that also affiliate with the Fed- eralist Society. But as the members of the Senate demonstrate, even amongst those that are often labeled “conserv- ativies” there is a much disagreement on most social and political issues. Some often portray the Federalist Soci- ety as a tightly-knit, well-organized cabal of conservative lawyers who are united by their right-wing ide- ology. This is far from true. Allow me to illustrate further.