

Spring 3-31-2021

Obstruction of Justice: Redesigning the Shortcut

Ellen S. Podgor

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Ellen S. Podgor, *Obstruction of Justice: Redesigning the Shortcut*, 46 BYU L. Rev. 657 (2021).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol46/iss3/5>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Obstruction of Justice: Redesigning the Shortcut

Ellen S. Podgor*

When one looks to accomplish consistency and predictability in the criminal justice system – important goals tied to achieving deterrence – the architecture of obstruction of justice remains important. It is insufficient to suggest that we have consistency in sentencing by using federal sentencing guidelines, when the charging process is undermined by its failure to provide uniformity. Achieving a consistent charging framework for federal obstruction of justice needs to be individualized, remain true to the contextual setting, and provide consideration for the specific processes of a trial, sentencing, or impeachment. But it also needs to have a structure that is not rearranged dependent upon the Attorney General, United States Attorney, the politics of the time, or varying interpretations of government officials.

This Article examines obstruction of justice in the federal system, looking at it in three different contexts: as a criminal offense, as a sentencing enhancement, and as a basis for a judicial or presidential impeachment. It provides a comprehensive picture of the elements of obstruction of justice crimes, the challenges brought to courts, and the constituencies handling these matters. It focuses on the prosecutorial practices in bringing obstruction charges in federal court including its use as a “short-cut” offense that is easily proved in some contexts, while noting the difference in other arenas, such as impeachment inquiries. Like its practice regarding false statements and perjury, and unlike that for corporate criminal liability, the Department of Justice offers little internal guidance when selecting obstruction of justice crimes

* Gary R. Trombley Family White Collar Crime Research Professor and Professor of Law, Stetson University College of Law. The author thanks research assistants Christopher T. Lawson, Megan Marx, and Bradley V. Reed, librarian Wanita Scroggs, and the statistics assistance from Isaac W. Miller and the U.S. Sentencing Commission. Thanks also go to Professor Bruce Green and the members of the Southeast Association of Law Schools (SEALS) discussion group, who provided comments on one aspect of this piece, and also to Professor Douglas Berman. The author also thanks Stetson University College of Law and Cheryl L. Segal.

as the basis for a criminal prosecution. The actual practice, as recently seen in the differing view of Special Counsel Robert Mueller and Attorney General William Barr in examining the allegations of obstruction conduct by President Donald Trump – outlined in the Mueller Report – highlights the inconsistency in this area of the law. This Article provides an empirical and diagnostic lens to study the law and practice of whether federal obstruction of justice crimes require an underlying criminal offense or, alternatively, can be prosecuted as a sole charge or in conjunction with other shortcut offenses such as false statements and perjury.

CONTENTS

INTRODUCTION	659
I. LEGAL ARCHITECTURE OF CRIMINAL OBSTRUCTION PROSECUTIONS.....	663
A. Historical Development – The Peck-Lawless Debacle.....	663
B. Statutory Base	666
1. The statutory framework.....	666
2. Elements of the crime.....	669
3. Judicial oversight.....	670
II. PROSECUTORIAL PRACTICES IN CHARGING OBSTRUCTION CRIMES	677
A. Generally	677
B. The Mueller Investigation & Response.....	680
C. Empirical Analysis of Obstruction Charging Practices	684
1. Generally	684
2. Obstruction charging data.....	687
3. Obstruction sentencing data	688
4. Obstruction court data	692
5. Summary analysis	694
III. OBSTRUCTION AS A SENTENCING ENHANCEMENT	695
A. Sentencing Guideline § 3C1.1	695
B. Statistical Use of Guideline § 3C1.1.....	700
C. Contrasted with Obstruction as a Crime	701
IV. OBSTRUCTION AS AN ARTICLE OF IMPEACHMENT	703
A. Generally	703
B. Obstruction as an Article of Impeachment	708
1. President William Jefferson Clinton	708
2. President Donald J. Trump	710

C. Contrasted with Obstruction as a Crime and Sentencing Enhancement	712
CONCLUSION	715

INTRODUCTION

Obstruction of Justice arises in three different contexts in the federal system.¹ It can be a: 1) federal crime;² 2) sentencing enhancement;³ or 3) basis for an impeachment, most recently seen as the basis for a presidential impeachment.⁴ As a federal offense,⁵ it is premised upon one of the statutes found in the federal code, statutes primarily located in chapter 73 (Obstruction of Justice) of Title 18.⁶ As a sentencing enhancement or impeachment offense it may not be aligned with the statutory criminal structure or restricted by the elements designated in these criminal laws, although there are differing views on the latter.⁷

The legal process and decisionmakers also differ for these three forms of obstruction of justice. As a federal criminal prosecution, the initial determination rests with the Department of Justice (DOJ) and its accompanying United States Attorneys' Offices. After all, it is the government that decides who will be prosecuted and for which charges.⁸ Although both a jury and/or judge are influential

1. It can be argued that witnesses who are held in contempt are yet another example of obstruction conduct. The obstruction statute in its original form included contempt conduct. But that statute was eventually divided and placed in different parts of the U.S. Code. *See infra* notes 37–41 and accompanying text.

2. *See infra* Part I.

3. Separate and apart from obstruction as a crime, the United States Sentencing Guidelines provide that obstruction conduct can increase a sentence. U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018); *see also infra* Part II.

4. *See infra* Part III.

5. Not discussed in this Article are the many state obstruction of justice crimes. *See generally* John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49 (2004) (discussing the breadth of both federal and state obstruction of justice laws).

6. Obstruction of justice statutes are found in 18 U.S.C. §§ 1501–21. *See infra* Section I.B.1–2.

7. Professor Alan Dershowitz argued for the violation of a specific crime as needed for an impeachment conviction on President Trump's Impeachment Article related to abuse of power. *See infra* notes 258–59 and accompanying text.

8. *See generally* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 180 (2007) (discussing discretionary prosecutorial charging).

players in the process, their role is contingent upon the initial decision of the prosecutor to proceed with an obstruction charge.⁹ In contrast, as a sentencing enhancement, the decision of increasing the sentence based on obstruction conduct may have been promoted by the probation officer, the government, or a judge. Finally, a more political posture is found in its use in impeachment trials, with the House of Representatives considering its use as an Article of Impeachment and the Senate next considering its viability as a “high crime or misdemeanor.”¹⁰ But the lines in consideration of the elements of obstruction of justice, the players or constituencies making the decision, and the criteria for that decision oftentimes overlap in the sentencing and impeachment realm. For example, Special Prosecutor Robert S. Mueller and Attorney General William Barr considered the applicable obstruction statutes for their review of presidential conduct, albeit with differing perspectives.¹¹

In addition to the differing context and process used for obstruction conduct, a wide swath of individuals may be accused here, as one sees obstruction charges against those in the organized crime world,¹² white collar offenders,¹³ corporate entities,¹⁴ as well as presidents of the United States. For example, the former accounting firm Arthur Andersen LLP,¹⁵ celebrity Martha

9. The prosecutor’s role is heightened by the fact that 97.4% of the cases employ pleas. U.S. SENT’G COMM’N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl. 11 (2018), <https://www.ussc.gov/research/sourcebook-2018>.

10. See *infra* notes 241–59 and accompanying text.

11. See *infra* notes 148–53 and accompanying text; see also Memorandum from Bill Barr to Deputy Att’y Gen. Rod Rosenstein & Assistant Att’y Gen. Steve Engel, Mueller’s “Obstruction” Theory (June 8, 2018), <https://www.justsecurity.org/wp-content/uploads/2018/12/June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction-Theory-1.2.pdf> (offering the thoughts of Bill Barr, prior to his becoming Attorney General, on the executive function encompassed within presidential powers).

12. See, e.g., *United States v. Russo*, 302 F.3d 37 (2d Cir. 2002) (discussing organized crime family member charged with obstruction of justice); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006) (discussing a Gambino Family member charged with obstruction of justice under 18 U.S.C. § 1512(b)).

13. See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006) (affirming Martha Stewart’s conviction for obstructing an agency proceeding, in addition to other criminal offenses).

14. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (reversing an obstruction of justice conviction against the company).

15. *Id.*

Stewart,¹⁶ and baseball player Barry Bonds,¹⁷ all were indicted on charges of obstruction of justice, although two of these cases were overturned by an appellate tribunal.¹⁸ One also sees a wide array of conduct constituting obstruction of justice, including threatening potential witnesses, retaliating against witnesses who testify, destruction of documents, and false statements that impede the due administration of justice. The victims of the alleged criminal activity can also differ, as they may include individuals specifically targeted by the perpetrator, stockholders of a corporate entity, as well as members of the public generally when there is an allegation of an unfair election.

Thus, when one looks to accomplish consistency and predictability in the criminal justice system—important goals tied to achieving deterrence¹⁹—the architecture of obstruction of justice remains important. It is insufficient to suggest that the sentencing guidelines lead to consistent sentencing when the charging process itself lacks uniformity. Achieving a consistent charging framework for obstruction of justice needs to be individualized, remain true to the contextual setting, and provide consideration for the specific processes of a trial, sentencing, or impeachment. But it also needs to have a structure that is not rearranged dependent upon the United States Attorney, the politics of the time, or the interpretations of government officials.

Part I of this Article examines the landscape of obstruction of justice, looking at its roots, its expansion over time, and its current applications. It synthesizes the vast literature on obstruction of justice, including the elements of the various crimes and the challenges considered by courts throughout the life of the key obstruction statutes.²⁰

Part II moves from the legal framework to examine prosecutorial practices in the federal system of charging obstruction of justice.²¹ It provides important data on the use of obstruction of justice as a sole offense or coupled with other

16. *Stewart*, 433 F.3d at 289.

17. *United States v. Bonds*, 784 F.3d 582 (9th Cir. 2015).

18. The obstruction convictions in the Barry Bonds and Arthur Andersen LLP cases were overturned on appeal. *Arthur Andersen LLP*, 544 U.S. at 708; *Bonds*, 784 F.3d at 590.

19. See *infra* notes 248–62 and accompanying text.

20. See *infra* notes 27–124 and accompanying text.

21. See *infra* notes 125–85 and accompanying text.

charges, and how its use has changed from its historical roots. Noted here is the role of obstruction as a “shortcut” offense by prosecutors to easily proceed against perpetrators of crimes without the need for complicated investigations and trials.²² Like perjury and false statements, obstruction becomes an easily accessible crime in both the organized crime and white-collar worlds. But it is also noted here how solo obstruction charges, without prosecution of the underlying offense, occur routinely in federal prosecutions. It reflects on the unbridled discretion permitted of prosecutors when considering alleged obstruction conduct—discretion that has resulted in prosecutorial stretching of the statute in some instances and a failure to find conduct subject to criminal prosecution in other instances.²³

Part III focuses on the use of obstruction as a sentencing enhancement, noting the differences from its use as a criminal offense.²⁴ Part IV then considers obstruction of justice in the impeachment realm.²⁵ It does not delve into the quagmire of what constitutes a “high crime or misdemeanor” but rather notes the distinguishing factors in the process between a criminal trial’s evaluation of obstruction of justice and that done in the House and Senate in the impeachment process.

This Article concludes by not only noting the importance of a predictable approach to obstruction of justice, but by offering a strategy for rectifying the current inconsistencies in federal criminal law.²⁶ A haphazard use of prosecutorial discretion in bringing obstruction charges diminishes its ability to motivate deterrence. Increasing transparency on obstruction of justice charging practices will allow for heightened accountability and provide a way to assure consistency and predictability with a crime that is the essence of preserving order in our criminal justice process.

22. See generally Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925 (2018) (discussing the government use of charges such as perjury, false statements, and obstruction of justice as “shortcut” offenses because they are more easily proved at trial than a complicated financial or white collar case); see also Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435 (2009) (discussing “process crimes”).

23. See *infra* notes 176–85 and accompanying text.

24. See *infra* notes 186–213 and accompanying text.

25. See *infra* notes 214–59 and accompanying text.

26. See *infra* notes 260–73 and accompanying text.

I. LEGAL ARCHITECTURE OF CRIMINAL OBSTRUCTION PROSECUTIONS

A. *Historical Development – The Peck-Lawless Debacle*

The initial federal obstruction of justice statute came as an outgrowth of the impeachment trial of a judge following his issuing of a contempt ruling against a lawyer representing Louisiana landowners.²⁷ Judge James H. Peck, a federal district court judge in Missouri, issued a court decision pertaining to Louisiana land disputes in an opinion that went against clients of Attorney Lake E. Lawless. Attorney Lawless responded by authoring a newspaper article that was critical of the judge. Judge Peck believed this article was inaccurate and prejudicial to the judicial system, especially since Attorney Lawless had remaining cases in Judge Peck's court. An argument was also made that the article might have been designed to intimidate the judge in these remaining cases. Judge Peck held Attorney Lawless in contempt for his publication of this article that was critical of his judicial decision.²⁸

Judge Peck's contempt finding against Attorney Lawless became the subject of an impeachment action that was filed against the judge.²⁹ The sole offense charged in the Peck Impeachment was that the judge had Attorney Lawless arrested for contempt of court, brought into custody by a Marshal, and imprisoned for twenty-four hours. Judge Peck also suspended Lawless' license to practice law for eighteen months.³⁰ Issues of freedom of the press, scope of contempt powers, and the court's supervisory power were some of

27. See Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States: Since the Federal Contempt Statute*, 28 COLUM. L. REV. 525, 531 (1928) [hereinafter Nelles & King, *Since the Federal Contempt Statute*] (examining the passage of the federal contempt statute following the Peck-Lawless controversy).

28. Judge Peck sentenced him to one day imprisonment and suspended him from the practice of law for eighteen months. See Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States: To the Federal Contempt Statute*, 28 COLUM. L. REV. 401, 429 (1928) [hereinafter Nelles & King, *To the Federal Contempt Statute*].

29. See *Washington, April 24*, BURLINGTON WKLY. FREE PRESS (Burlington, Vt.), May 7, 1830, at 2 (discussing the hearings for impeachment in the House of Representatives and the vote of "ayes 113" for impeachment).

30. See *The Trial of Judge Peck*, BURLINGTON WKLY. FREE PRESS (Burlington, Vt.), May 14, 1830, at 3 (discussing the articles of impeachment and the managers' issuance of the articles to the Senate).

the considerations in this impeachment action. The trial of Judge Peck was considered “tedious and expensive,” but reports at this time also called it “necessary and proper.” As noted in one news reporting, “Mr. Lawless may have deserved punishment—but the *manner* of its infliction is not conformable to our notions of right.”³¹

In the end, the judge was acquitted in the Senate by a single vote.³² The unusual circumstances of the case and the predicament that Judge Peck was placed in proved to be a factor in this acquittal.³³

The legislature, however, overseeing the impeachment trial of Judge Peck, did recognize the need to clarify the contempt law. At the time of the impeachment hearing, section 17 of the Judiciary Act of 1789 allowed courts “to punish by fine or imprisonment . . . all contempts of authority in any cause or hearing before the same.” But the issue was whether this statute covered alleged contempt conduct that occurred outside of the courtroom. Further complicating this situation were the legal implications of when the alleged contemptuous conduct involved something published, as was the case in the Lawless-Peck controversy.³⁴ The failure of the 1789 Judiciary Act to explain the contours of contempt, and whether it included this form of conduct, was the direct impetus of the initial federal obstruction statute.

Following the impeachment of Judge Peck, Congress passed the Act of March 2, 1831,³⁵ that provided in section 1 power for judges to issue a summary contempt of court for in-court misconduct and

31. See *Judge Peck*, ARK. GAZETTE (Ark. Post, Ark.), Mar. 16, 1831, at 2.

32. See *United States v. Williams*, 874 F.2d 968, 978 (5th Cir. 1989) (discussing the history of § 1503 of the federal criminal code).

33. *Judge Peck*, *supra* note 31 (noting that the Judge’s action may have been “excusable, because of some peculiar condition in which he was placed[,] concerning which we have heard many rumors, years ago—though not *personally* applicable to the principal accuser, Mr. Lawless”).

34. See Nelles & King, *To the Federal Contempt Statute*, *supra* note 28, at 422 (noting that “[t]wo inferior Federal courts” found that the statute allowed for punishment of out of court conduct).

35. Act of Mar. 2, 1831, ch. 99, 4 Stat. 487–88. Professor Walter Nelles and Attorney Carol Weiss King traced the motivations for this statute in their two 1928 articles, noting initially how there were controversies arising in state courts in Pennsylvania and New York, but that the Peck-Lawless impeachment hearing was the eventual cause of the codification of the statute. See Nelles & King, *To the Federal Contempt Statute*, *supra* note 28, at 409–30 (discussing the use of contempt for the production and dissemination of a publication); Nelles & King, *Since the Federal Contempt Statute*, *supra* note 27, at 423–31 (examining the passage of the federal contempt statute as a result of the Peck-Lawless controversy).

in section 2 a law to punish individuals both for in-court and out-of-court obstructions that were against the “due administration of justice.”³⁶ It is section 2 that mirrors the language used in today’s original obstruction of justice statute found in 18 U.S.C. § 1503.

In 1948, these two provisions were split into two distinct offenses. Thus, currently there is 18 U.S.C. § 401³⁷ for courtroom or nearby contempt conduct and § 1503³⁸ for conduct outside the courtroom.³⁹ Since its enactment, there have been several

36. Act of Mar. 2, 1831, ch. 99, 4 Stat. 487–88. It was believed that § 2 was needed to cover obstruction conduct not provided for in § 1.

37. The current statute provides:

A court . . . shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as —

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401.

38. The current statute provides:

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is —

- (1) in the case of a killing, the punishment provided in sections 1111 and 1112;
- (2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and
- (3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

Id. § 1503.

39. See generally ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, *WHITE COLLAR CRIME* 169 (2d ed. 2018) (providing an overview of § 1503).

modifications to the obstruction of justice statute in § 1503, but for the most part it has remained constant in its terminology and requirements.⁴⁰ The most significant change has been an increased penalty for violation of the offense.⁴¹ Today § 1503 serves as a central obstruction statute in the framework of other later federal obstruction laws.

B. *Statutory Base*

Prior to examining prosecutorial discretion in proceeding with an obstruction charge, it is important to consider the outer limits of what is considered criminality by the explicit language in the statute. But it is also necessary to see how prosecutors may sometimes stretch these statutes to prosecute what they consider to be egregious conduct. In this regard we see the courts providing guidance to reign in prosecutorial abuses.⁴² Thus the obstruction statutes, followed by judicial interpretation, are considered next.

1. *The statutory framework*

Today in chapter 73 of the criminal code (Title 18), there are twenty-two different obstruction of justice related statutes.⁴³ Although other obstruction of justice statutes exist within the federal code, such as in the tax code,⁴⁴ nineteen of the statutes in

40. In 1982 the statute was amended to cover witnesses. *See* Act of Oct. 12, 1982, Pub. L. No. 97-291, § 4(c)(1)–(3), 96 Stat. 1253. In 1994 amendments included an increased penalty, use of the term magistrate judge instead of commissioner, and the addition of subsection (b), which designates penalties for killing, attempted killing, and imprisonment for other obstruction conduct. *See* Act of Sept. 13, 1994, Pub. L. No. 103-322, title VI, § 60016, title XXXIII, § 330016(1)(K), 108 Stat. 1974, 2147. Finally, in 1994 the statute was amended, adding an increased possible term if the obstruction conduct related to a criminal case that involved the threat or use of physical force. *See* Act of Oct. 1, 1996, Pub. L. No. 104-214, § 1(3), 110 Stat. 3017.

41. Currently it is possible to receive the death penalty for obstruction conduct resulting in a killing. *See* 18 U.S.C. § 1503; 18 U.S.C. § 1111.

42. *See generally* Ellen S. Podgor, “What Kind of a Mad Prosecutor” Brought Us This White Collar Case, 41 VT. L. REV. 523 (2017) (discussing cases where the Court reigned in prosecutors who stretched statutes to cover conduct that was beyond the statutory language or content).

43. The statutes can be found in 18 U.S.C. §§ 1501–21. The reason for twenty-two statutes as opposed to twenty-one is that in addition to 18 U.S.C. § 1514, there is also 18 U.S.C. § 1514A.

44. For example, the tax code (Title 26) has an obstruction statute that criminalizes conduct that “in any . . . way corruptly or by force or threats of force . . . obstructs or impedes,

chapter 73 are at the heart of obstruction of justice criminal prosecutions. The remaining three statutes in the twenty-two federal statutes include two focused on civil conduct and one that serves as a definition of terms used in other obstruction statutes. The key focus of many of the criminal-related statutes is the protection of government and court proceedings.

Some of the statutes are narrowly tailored to protect specific government proceedings,⁴⁵ such as legislative bodies and agencies.⁴⁶ One also finds statutes criminalizing obstruction that occurs in specific types of investigation, such as obstruction of a criminal investigation of health care offenses,⁴⁷ destruction, alteration, or falsification of records in a federal investigation,⁴⁸ and destruction of corporate audit records.⁴⁹ Conduct that may not fit within the generic obstruction of justice conduct in § 1503 may be prosecuted using these other obstruction statutes.⁵⁰

In 1982, Congress added two key statutes as part of the Victim and Witness Protection Act, §§ 1512 and 1513, that focused on

or endeavors to obstruct or impede, the due administration of this title.” 26 U.S.C. § 7212(a). This tax statute does not require a proceeding or investigation for a prosecution, and a broader range of conduct is prohibited here as the Internal Revenue Service “duly administer[s] the tax laws even before initiating a proceeding.” *United States v. Westbrook*, 858 F.3d 317, 324 (5th Cir. 2017) (quoting *United States v. Sorensen*, 801 F.3d 1217, 1232 (10th Cir. 2015)); see also John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS’s Job Harder Enough?*, 9 HOUS. BUS. & TAX L.J. 260 (2009) (analyzing tax crimes).

45. See, e.g., 18 U.S.C. § 1501 (prohibiting assault on a process server); 18 U.S.C. § 1502 (resistance to an extradition agent); 18 U.S.C. § 1504 (influencing a juror through a writing); 18 U.S.C. § 1506 (theft or alteration of a record or process); 18 U.S.C. § 1507 (picketing, parading, using sound equipment, or demonstrating in or near a courthouse or “a building or residence occupied or used by such judge, juror, witness, or court officer”); 18 U.S.C. § 1508 (“[r]ecording, listening to, or observing proceedings of grand or petit juries while [they are] deliberating or voting”); 18 U.S.C. § 1509 (obstruction relating to court orders); 18 U.S.C. § 1510 (obstruction relating to criminal investigations); 18 U.S.C. § 1511 (obstruction pertaining to state and local law enforcement); 18 U.S.C. § 1521 (retaliating against a federal judge or federal law enforcement officer by false claim or slander of title).

46. See 18 U.S.C. § 1505 (obstruction relating to proceedings before departments, agencies, and committees).

47. 18 U.S.C. § 1518.

48. 18 U.S.C. § 1519.

49. 18 U.S.C. § 1520.

50. For example, 18 U.S.C. § 1516 allows for the prosecution of federal audit and prohibits conduct that obstructs the “[f]ederal auditor in the performance of official duties relating to a person, entity, or program receiving in excess of \$100,000, directly or indirectly, from the United States in any 1 year period.”

obstructions involving witnesses.⁵¹ These heavily used statutes allow the government to avoid proceeding using the more open-ended language of “due administration of justice” found in § 1503,⁵² and focus instead on conduct involving tampering with a witness, victim, or informant,⁵³ or conduct involving retaliating against a witness, victim, or informant.⁵⁴ These witness tampering statutes are used in a wide array of cases including those pertaining to violent street crimes as well as white collar economic crimes. Of recent vintage is a newer retaliation statute that criminalizes “retaliating against a [f]ederal judge or [f]ederal law enforcement officer by false claim or slander title.”⁵⁵

In addition to these nineteen criminal statutes, there are two statutes that concern civil remedies: one that provides for the government to obtain a civil remedy to restrain harassment of a victim or witness,⁵⁶ and another for a civil action to protect whistleblowers who are employees of publicly traded companies when they come forward to assist in a fraud investigation.⁵⁷ Individuals who are retaliated against have protection in § 1514A, which allows an individual to file a complaint with the Secretary of Labor and bring a civil action in court for relief from this form of retaliation.⁵⁸

The obstruction statutes in chapter 73 also include a definition statute in 18 U.S.C. § 1515, which provides definitions for terms used in other obstruction statutes.⁵⁹ For example, it provides a definition for what will be considered an “official proceeding”⁶⁰ and that the term “corruptly” as used in one statute means “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other

51. See generally PODGOR ET AL., *supra* note 39, at 181–85 (discussing the obstruction of justice statutes found in §§ 1512 and 1513).

52. 18 U.S.C. § 1503.

53. 18 U.S.C. § 1512.

54. 18 U.S.C. § 1513.

55. 18 U.S.C. § 1521.

56. 18 U.S.C. § 1514.

57. 18 U.S.C. § 1514A.

58. 18 U.S.C. § 1514.

59. 18 U.S.C. § 1515.

60. 18 U.S.C. § 1515(a)(1). The definition is limited to the obstruction statutes found in §§ 1512 and 1513.

information.”⁶¹ This statute also specifies that the obstruction statutes in this chapter do “not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.”⁶² This provision offers an important protection to attorneys in their lawful representation of clients.⁶³

2. *Elements of the crime*

As one might suspect, the elements necessary for proof of an obstruction crime are dependent upon the specific obstruction statute being used by the prosecutor.⁶⁴ That said, there are certain generic elements that are encompassed in the key obstruction statutes, although the list may be controversial. For example, as discussed in greater detail below, the *Report on the Investigation into Russian Interference in the 2016 Presidential Election (Mueller Report)* used three basic elements as “common to most of the relevant obstruction statutes: (1) an obstructive act; (2) a nexus between the obstructive act and an official proceeding; and (3) a corrupt intent.”⁶⁵ In contrast, the prosecution of baseball player Barry Bonds required an element of “materiality.” Irrespective of how one lists the elements of these crimes, there is strong consensus that obstruction operates as an “attempt” crime, as the statutes use the term “endeavored.”⁶⁶

In reflecting on the elements of obstruction of justice under § 1503, one can dissect the “due administration of justice” element of this generic obstruction statute to include three factors. These are: “1) a pending proceeding; 2) that the accused knew or had

61. 18 U.S.C. § 1515(b). This definition is limited to interpreting § 1505.

62. 18 U.S.C. § 1515(c).

63. See Laina Lopez, *Defending Attorneys Charged with Obstruction Under the US Code*, CRIM. JUST., Fall 2013, at 31, 32 (discussing the charging of an attorney with obstruction of justice).

64. See generally Sean Lavin, Julia Bell, MaeAnn Dunker & Mitchell McBride, *Obstruction of Justice*, 56 AM. CRIM. L. REV. 1201 (2019) (discussing the elements of the different obstruction crimes).

65. 2 U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 9 (2019) [hereinafter MUELLER REPORT VOL. II] (referencing the elements for 18 U.S.C. §§ 1503, 1505, and 1512(c)(2)).

66. See *infra* notes 117–25 and accompanying text.

notice of, and [;] 3) that the accused intended to influence, obstruct, or impede its administration.”⁶⁷

3. *Judicial oversight*

a. Generally. Throughout the years there have been many different arguments raised during obstruction of justice prosecutions that require judicial interpretation.⁶⁸ These include the applicable mens rea required to meet the statute and what will constitute a “corrupt intent.”⁶⁹ These issues can raise constitutional dilemmas when the individual accused of the obstruction crime is an attorney and the alleged conduct is part of his or her representation of a client. Courts have also struggled with whether issues of obstruction are issues of law or fact, an important consideration in who will decide the question.⁷⁰ The generic obstruction of justice statute found in 18 U.S.C. § 1503 includes obstructions that arise from both acts occurring in criminal as well as civil proceedings.⁷¹

Likewise, interpreting the term “endeavor” has produced significant caselaw.⁷² Courts have looked at questions of how much of an attempt is needed to satisfy this element. Courts have also considered what will constitute a pending proceeding for influencing, obstructing, or impeding its administration. One sees an overlap with false statements and perjury⁷³ when the accused is

67. PODGOR ET AL., *supra* note 39, at 171.

68. See also Ralf Willer, *Hiding a Cartel's Traces – A Criminal Offence? A Comparative Review of Liability for Obstruction of Justice Under German, French and US Law*, 10 COMPETITION L. INT'L 179 (2014) (providing a comparative law review of obstruction of justice). See generally Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90 (1983) (discussing issues related to venue in obstruction of justice cases).

69. See *infra* notes 79–83 and accompanying text.

70. Typically, determining if the accused acted corruptly will be a fact question for the jury to decide. See *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978). *But see* *United States v. Fayer*, 523 F.2d 661, 664 (2d Cir. 1975) (finding these questions to be mixed questions of law and fact).

71. See *Roberts v. United States*, 239 F.2d 467, 470 (9th Cir. 1956) (“The obstruction of justice statute is broad enough to cover the attempted corruption of a prospective witness in a civil action in a Federal District Court.”).

72. See *infra* notes 85–86 and accompanying text.

73. See generally Ira P. Robbins, *Perjury by Omission*, 97 WASH. U. L. REV. 265 (2019) (discussing a flaw in the current perjury statute).

charged with an obstruction of the due administration of justice and conduct involves perjurious or false statements.⁷⁴

The Supreme Court has also tackled issues of the “nexus” needed between the obstruction conduct and the due administration of justice.⁷⁵ Here again, the specific obstruction statute may complicate this consideration. Coupled with this question may be whether materiality is a component of the obstruction crime.

Finally, defendants on occasion have raised the government’s use of the generic obstruction statute § 1503 when specific obstruction statutes were passed by the legislature to address the criminality.⁷⁶ The classic example seen here is when the government charges the accused under § 1503 with conduct that could easily fit the elements of witness intimidation under §§ 1512 and 1513.⁷⁷ The government’s choice of the older generic statute for a prosecution has typically been upheld as within the ambit of prosecutorial charging prerogatives.⁷⁸

74. See Decker, *supra* note 5, at 61–63 (discussing the use of false testimony as obstruction).

75. See *infra* notes 100–10 and accompanying text.

76. See *United States v. Lester*, 749 F.2d 1288, 1298–99 (9th Cir. 1984) (rejecting the defendant’s argument that the legislature’s removal of witnesses from § 1503 should be indicative that witness tampering can only be charged under 18 U.S.C. §§ 1512–13). When Congress amended § 1512 in 1988, Senator Biden stated that the new legislation was:

intended . . . merely to include in section 1512 the same protection of witnesses from non-coercive influence that *was (and is)* found in section 1503. It would permit prosecution of such conduct in the Second Circuit, where it is not now permitted, and would *allow* such prosecutions in other circuits to be brought under section 1512 rather than under the catch-all provision of section 1503.

United States v. LeMoure, 474 F.3d 37, 41 (1st Cir. 2007) (citing 134 CONG. REC. S17, 369 (1988)).

77. See *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (“The fact that there is now some overlap between § 1503 and § 1512 is no more intolerable than the fact that there is some overlap between the omnibus clause of § 1503 and the other provisions of § 1503 itself. It hardly leads to the conclusion that § 1503 was, to the extent of the overlap, silently repealed.”).

78. See, e.g., *LeMoure*, 474 F.3d at 40–41 (finding no ban in using § 1503 even when the conduct may fit under the newer witness tampering provisions); *United States v. Tackett*, 113 F.3d 603 (6th Cir. 1997) (same). The government’s argument to claims that prosecutions should be required to use §§ 1512 or 1513 when the conduct involves witness obstruction is that there is “nothing in the legislative history expressly indicating that Congress intended to contract the purview of the omnibus clause.” See U.S. DEP’T OF JUST., CRIMINAL RESOURCE MANUAL § 1724 (2020) (citing S. REP. NO. 97-532, at 14–22, 27–29 (1982), *reprinted in* 1982 U.S.C.A.N. 2515, 2520–28, 2533–35; 128 CONG. REC. H8203-05 (daily ed. Sept. 30, 1982)).

b. Mens rea. Whether the accused acted with a “corrupt” intent has been a key focus in analyzing the appellate decisions with convictions under various obstruction of justice statutes. In this regard, acting corruptly is not confined to one definition or set of specific conduct. Some court opinions reflect on whether there is specific proof of an intent to act “corruptly”⁷⁹ while other courts do not require an evil motive.⁸⁰ When examining the specific act to determine if the conduct was corrupt, courts have found conduct of bribery,⁸¹ destruction of documents,⁸² and fraudulent acts⁸³ to satisfy this element of the crime. The controversy in considering this question is seen when comparing the *Mueller Report* on the alleged obstruction acts by President Trump, followed by Attorney General Barr’s decision that the conduct was not conducted with a corrupt intent.⁸⁴

c. Endeavor. As previously noted, the generic obstruction of justice statute, § 1503, as well as some of the other obstruction statutes, do not require a completion of the crime. The term “endeavor” in the statute allows it to encompass attempt acts. A defense that the obstruction was thwarted or impossible to complete will not serve as a defense to the crime.⁸⁵ Although the use of the term “endeavor” is similar to attempt conduct, it does not require proof of the elements necessary for attempt crimes. Thus,

(section-by-section analysis of H.R. 7191)), <https://www.justice.gov/archives/jm/criminal-resource-manual-1724-protection-government-processes-omnibus-clause-18-usc-1503>.

79. See *United States v. Brand*, 775 F.2d 1460 (11th Cir. 1985) (finding insufficient evidence of a corrupt motive).

80. See *United States v. Ogle*, 613 F.2d 233 (10th Cir. 1979) (finding that attempting to influence a juror is per se an unlawful corrupt act).

81. See *United States v. Osborn*, 350 F.2d 497, 505 (6th Cir. 1965) (finding that telling someone to bribe a juror is a corrupt endeavor for obstruction).

82. See generally Joseph V. De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570 (1992) (advocating for a Model Penal Code approach in interpreting the mens rea element of obstruction of justice).

83. *United States v. Polakoff*, 121 F.2d 333 (2d Cir. 1941) (finding a fraudulent act sufficient in meeting the obstruction statute).

84. See *infra* notes 142–45 and accompanying text.

85. See, e.g., *Osborn v. United States*, 385 U.S. 323, 333 (1966) (noting that the use of the word “endeavor” in the statute does not require success in accomplishing the corruption act); *United States v. Edwards*, 36 F.3d 639, 645 (7th Cir. 1994) (holding that it is not “required that the attempted obstruction be successful”); *United States v. Bucey*, 876 F.2d 1297, 1314 (7th Cir. 1989) (holding that the impossibility to accomplish the obstruction of the administration of justice does not preclude a conviction).

proof of the accused having taken a “substantial step” to completion of the crime is not required. It operates comparable to a solicitation type of crime.⁸⁶

d. *The Due Administration of Justice.* As noted, the components of the “due administration of justice” element are: “1) a pending proceeding; 2) that the accused knew or had notice of[.] and 3) that the accused intended to influence, obstruct, or impede its administration.”⁸⁷ Courts have included grand jury, trial, and appellate proceedings as within the “pending proceeding” language.⁸⁸ Although § 1503, the generic obstruction statute, does not cover proceedings before agencies or legislative bodies, other statutes do cover this conduct.⁸⁹

The necessity for a “pending proceeding” has been met when the conduct involved the accused speaking to a probation officer in anticipation of sentencing.⁹⁰ But if there is no evidence that a grand jury is pending, it may not suffice for meeting the requirement of a pending proceeding.⁹¹ Where some courts hold that “the acts complained of must bear a reasonable relationship to the subject of the grand jury inquiry,”⁹² other courts reject this approach.⁹³

The accused also needs to know of the pending proceedings. Requiring a mens rea for the pending proceeding aspect of the statute was solidified in the Supreme Court decision of *Pettibone v. United States*,⁹⁴ although an older statute was used in this particular case. Newer cases have equated this element with the nexus

86. See *United States v. Fasolino*, 586 F.2d 939, 940 (2d Cir. 1978).

87. See *PODGOR ET AL.*, *supra* note 39, at 170.

88. Although appeals are covered as a pending proceeding, when the time for filing the appeal had expired, it was held not to be within the scope of a pending proceeding. See *United States v. Fulbright*, 105 F.3d 443 (9th Cir. 1997) (holding that an appeal was no longer a pending proceeding once the appellate clock had run).

89. See 18 U.S.C. § 1505 (governing “[o]bstruction of proceedings before departments, agencies, and committees”).

90. See *United States v. Gonzalez-Mares*, 752 F.2d 1485, 1491 (9th Cir. 1985) (finding it was immaterial whether complaint was filed minutes after the interview instead of minutes before the interview).

91. See *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1971).

92. *Id.* at 734.

93. See *United States v. Erickson*, 561 F.3d 1150, 1161 (10th Cir. 2009) (finding that the government does not need to prove that the obstructive acts were relevant to the grand jury’s investigation). In a § 1505 case, the Tenth Circuit held that agency investigative activities were “proceedings” within the meaning of obstruction of “proceedings” before departments, agencies, or committees. See *United States v. Sutton*, 732 F.2d 1483 (10th Cir. 1984).

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

requirement and in some instances required a direct knowledge of the pending proceeding. For example, in *Marinello v. United States*,⁹⁵ an obstruction case brought under a tax obstruction statute, the Supreme Court held that “[j]ust because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.”⁹⁶ So, although it may not be necessary to know that the proceeding is federal,⁹⁷ it is necessary to know of the pending proceeding.

The final aspect of the due administration of justice portion of the obstruction statute is the requirement to show an intent to influence, obstruct, or impede. Here again, evidence that may be used in an obstruction case may meet several different elements. The most noticeable exclusions here are instances when the grand jury or proceedings have ended and therefore cannot meet this element.⁹⁸ That said, other obstruction statutes can be used to prosecute this conduct. For example, 18 U.S.C. § 1513 prohibits “[r]etaliating against a witness, victim, or an informant.”⁹⁹

e. Nexus. One of the more controversial elements of obstruction statutes has been the requirement of a “nexus,” which is provided by a link between a false statement and the obstruction of the due administration of justice.¹⁰⁰ The “nexus” element proved to be a matter of concern in the criminal case against Judge Robert Aguilar, a United States District Court judge for the Northern District of California,¹⁰¹ and also in the prosecution of Arthur Andersen LLP,¹⁰² as well as in many other cases.

Judge Aguilar’s case alleged his disclosure of a wiretap and obstruction of justice in providing a false statement to an investigating officer. He was convicted under a statute that made it illegal to disclose wiretap information, and also for a violation of the obstruction statute in § 1503 for endeavoring to obstruct the due

95. *Marinello v. United States*, 138 S. Ct. 1101 (2018).

96. *Id.* at 1110.

97. *See United States v. Ardito*, 782 F.2d 358 (2d Cir. 1986).

98. *See United States v. Bashaw*, 982 F.2d 168 (6th Cir. 1992) (threatening jurors whose service has ended does not meet the obstruction statute).

99. 18 U.S.C. § 1513; *see United States v. Bailey*, 931 F.3d 558 (6th Cir. 2019) (affirming conviction on guilty plea for retaliating against a witness after a trial).

100. *See PODGOR ET AL.*, *supra* note 39, at 177–78.

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

102. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

administration of justice.¹⁰³ The Supreme Court affirmed the en banc Ninth Circuit's reversal of the obstruction conviction.¹⁰⁴

The Court held that an "endeavor" to obstruct does not require that the act be successful. It is necessary, however, for the defendant to know that his or her acts would be used before a judicial proceeding. The Court stated, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."¹⁰⁵ The Court noted that "[t]he Government did not show here that the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents."¹⁰⁶

The nexus requirement was also a key issue in the *Arthur Andersen LLP*¹⁰⁷ case that was reversed by the Supreme Court. The company, which had been "Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy."¹⁰⁸ Charged and found guilty of violating 18 U.S.C. § 1512(b)(2)(A), the Supreme Court reviewed the jury instructions used in the case. The Court gave examples of the lack of culpability required by the instructions, including noting that "[t]he instructions also diluted the meaning of 'corruptly' so that it covered innocent conduct."¹⁰⁹ In reversing the conviction, the Court found the instructions improper because "[t]hey led the jury to believe that it did not have to find *any* nexus between the 'persua[sion]' to destroy documents and any particular proceeding."¹¹⁰

f. Materiality. Materiality¹¹¹ as an element of an obstruction of justice offense is not a clearly accepted principle. For one, the key

103. *Aguilar*, 515 U.S. at 595.

104. *Id.* at 606. The en banc Ninth Circuit had reversed both convictions, but the Supreme Court, while affirming the decision on the obstruction count, reversed the wiretap conviction. *Id.*

105. *Id.* at 599.

106. *Id.* at 600.

107. *Arthur Andersen LLP*, 544 U.S. at 707–08.

108. *Id.* at 698.

109. *Id.* at 706.

110. *Id.* at 707.

111. Materiality is typically defined as "ha[ving] a natural tendency to influence" although the object of the influence differs by the respective statute that requires materiality. See *Kungys v. United States*, 485 U.S. 759, 807–08 (1988) (examining materiality as it related to "[influencing] decisions of the Immigration and Naturalization Service").

obstruction statutes do not include the word “materiality.” Likewise, older court decisions did not focus on materiality as a required element necessary for these offenses.¹¹²

The Supreme Court spoke clearly in finding that a key false statement statute requires materiality,¹¹³ although it also found that a different false statement statute did not include a materiality element.¹¹⁴ The confusion as to when materiality is required is also seen in determining whether it is an element in prosecutions of fraud. Although the word “materiality” is not found in the classic criminal fraud statutes, like mail and wire fraud, the Court found it to be an element of these offenses. Using a common law approach, the Court held in *Neder v. United States*¹¹⁵ that “materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.”¹¹⁶

Although the Supreme Court has not squarely addressed the question of whether materiality is a required element in an obstruction case, an en banc Ninth Circuit decision did so. Celebrity baseball player Barry Bonds¹¹⁷ was questioned in front of a federal grand jury for approximately three hours on his “suspected use of steroids.”¹¹⁸ His testimony resulted in him being charged with four counts of making a false statement and one count of obstruction of justice. The obstruction was premised on his alleged false testimony before the grand jury.¹¹⁹ With the exception of being convicted on the obstruction count, the other charges resulted in a hung jury.¹²⁰ The Ninth Circuit reversed his conviction because there was “insufficient evidence” that the statement used by the prosecution as proof of an obstruction of justice under § 1503 was “material” to the grand jury investigation.

112. See Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?*, 44 WASHBURN L.J. 583 (2005) (discussing how materiality was not being used as an element in obstruction cases and advocating for a change).

113. See *United States v. Gaudin*, 515 U.S. 506 (1995) (finding that the resolution of materiality was a question for the jury as opposed to the judge).

114. See *United States v. Wells*, 519 U.S. 482 (1997) (finding that materiality was not an element of 18 U.S.C. § 1014).

115. *Neder v. United States*, 527 U.S. 1 (1999).

116. *Id.* at 25.

117. *United States v. Bonds*, 784 F.3d 582 (9th Cir. 2015).

118. *Id.* at 582.

119. *Id.* at 582–83.

120. *Id.*

The *Bonds* court was concerned about the breadth of the generic obstruction statute, stating that “[s]tretched to its limits, § 1503 poses a significant hazard for everyone involved in our system of justice, because so much of what the adversary process calls for could be construed as obstruction.”¹²¹ It proved particularly problematic in this case where the alleged obstruction was a single statement which consisted of two questions and two answers to those questions.¹²² It was this statement alone that formed the basis of the alleged obstruction conduct. The Ninth Circuit held that “[m]ateriality screens out many of the statute’s troubling applications by limiting convictions to those situations where an act ‘has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body.’”¹²³ A concurring opinion noted that a “single truthful but evasive or misleading statement can never be material.”¹²⁴

In examining the elements specific to one obstruction of justice statute, it is important to note that the statutes in chapter 73 of Title 18 do differ. What might be excluded under one statute may be allowed under another. The more specific statutes offer a greater range of conduct to be prosecuted while also maintaining the current breadth of the generic statute found in § 1503.

II. PROSECUTORIAL PRACTICES IN CHARGING OBSTRUCTION CRIMES

A. Generally

A long list of different forms of conduct has been the basis for an obstruction charge under § 1503, the founding obstruction statute. The *Criminal Resource Manual* that accompanies the U.S. Attorneys’ *Justice Manual*¹²⁵ includes the following conduct as the basis of convictions under § 1503: “[e]ndeavoring to suborn perjury[,]” “[e]ndeavoring to influence a witness not to testify or to

121. *Id.* at 584.

122. *Id.* at 583.

123. *Id.* at 585 (citing *Kungys v. United States*, 485 U.S. 759 (1988)). In *Kungys*, the Court was considering materiality in connection with the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a).

124. *Bonds*, 784 F.3d at 589.

125. “The Justice Manual contains publicly available Department of Justice (DOJ) policies and procedures.” U.S. Dep’t of Just., Just. Manual § 1-1.100 (2018), <https://www.justice.gov/jm/jm-1-1000-introduction>.

make himself/herself unavailable to testify[.]” “[g]iving false denials of knowledge and memory, or evasive answers[.]” “[f]alsifying a report likely to be submitted to a grand jury[.]” “[d]estroying, altering, or concealing subpoenaed documents[.]” “[e]ndeavoring to sell grand jury transcripts[.]” “[o]ffering to sell a guarantee of a jury acquittal to a defense counsel[.]” “[e]ndeavoring to influence, through a third party, a judge[.]” “[d]eliberately concealing one’s identity thereby preventing a court from gathering information necessary to exercise its discretion in imposing a sentence[.]” “[o]btaining secret grand jury testimony[.]” “[s]ubmitting false or misleading information to the grand jury[.]” or “[r]efusing to testify before the grand jury.”¹²⁶ The list grows even longer when one includes other obstruction statutes that include conduct before federal government agencies and the legislative body.

Typically, oversight of the charging process is minimal and guidance may be limited to what is stated internally to government prosecutors.¹²⁷ The *Justice Manual* provides general considerations for initiating and declining prosecution and the probable cause requirement necessary to bring charges.¹²⁸ Key in commencing prosecution is the finding of a “federal offense [and having] admissible evidence will probably be sufficient to obtain and sustain a conviction.”¹²⁹ But it is noted that prosecution should be declined when (1) the prosecution would serve “no substantial

126. U.S. DEP’T OF JUST., *supra* note 78, § 1724.

127. The *Justice Manual* (previously *U.S. Attorneys’ Manual*) provides as follows: Generally, obstruction of justice offenses fall under the supervisory responsibility of the Division and Section of the Department having responsibility for, or expertise in, the basic subject matter. For example, obstruction of an investigation into health care fraud would fall under the supervision of the Fraud Section of the Criminal Division; obstruction involving violence against a witness would fall under the supervision of the Gang Unit of the Criminal Division; obstruction of a gambling investigation would fall under the supervision of the Organized Crime and Racketeering Section of the Criminal Division; and obstruction of a public corruption investigation or a congressional proceeding would fall under the supervision of the Public Integrity Section of the Criminal Division. If such responsibility cannot be identified, supervisory responsibility rests with the Fraud Section of the Criminal Division.

U.S. Dep’t of Just., *Just. Manual* § 9-69.100 (2009), <https://www.justice.gov/archives/usam/archives/usam-9-69000-protection-government-processes#9-69.100>.

128. U.S. Dep’t of Just., *Just. Manual* § 9-27.200 (2017), <https://www.justice.gov/archives/usam/archives/usam-9-27000-principles-federal-prosecution#9-27.200>.

129. *Id.* at § 9-27.220.

federal interest[.]” (2) the “person is subject to effective prosecution in another jurisdiction;” or (3) “there exists an adequate non-criminal alternative to prosecution.”¹³⁰ The *Justice Manual* specifies factors that are impermissible considerations, such as race, sexual orientation, and “the possible affect [sic] of the decision on the attorney’s own professional or personal circumstances.”¹³¹ One also finds guidance stating that one should charge the most serious offense and that each U.S. Attorneys’ Office should create internal office policies in order to have a charging review process.¹³² This guidance is minimal in comparison to the more detailed guidance provided to prosecutors who are considering proceeding against corporations. Corporate guidelines tell prosecutors to use the individual guidance provided, but then note that “due to the nature of the corporate ‘person,’ some additional factors are present.”¹³³ These include factors such as the “corporation’s timely and voluntary disclosure of wrongdoing[.]” the “pervasiveness of wrongdoing within the corporation[.]”¹³⁴ and their cooperation in the prosecution of individuals.¹³⁵ Throughout the years, different Attorneys General and Deputy Attorneys General have issued

130. *Id.* Later sections of the *Justice Manual* (U.S. Attorneys’ Manual) provide “relevant considerations” for substantial federal interest as well as guidance for other reasons for declining prosecution, such as a prosecution in another jurisdiction. *Id.* at §§ 9-27.230 to 9-27.250.

131. *Id.* at § 9-27.260.

132. *Id.* at § 9-27.300. The *Justice Manual* states:

To ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney. All but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision therein. Each United States Attorney’s Office and litigating division of the Department is required to promulgate written guidance describing its internal indictment review process.

Id.

133. U.S. Dep’t of Just., Just. Manual § 9-28.300 (2015), <https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations>.

134. *Id.* A key consideration in recent years is corporate cooperation. In discussing the value of cooperation, the *Justice Manual* states, “[i]n order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct.” *Id.* at § 9-28.700.

135. *Id.*

memos to instruct Assistant United States Attorneys on how to handle corporate investigations and charging.¹³⁶

Use of obstruction of justice is referenced here as a “short-cut”¹³⁷ offense because this crime allows prosecutors to charge the conduct without needing to present to a jury a complicated case. This can be particularly important in white collar cases where there might have been a lengthy investigation, significant financial data, and a need for a jury to understand an intricate fraudulent transaction. Instead, charging perjury, false statements, or obstruction of justice bypasses the need to explain the transactions to the jury and provides a way to secure a conviction by proving the accused lied to federal officers, a grand jury, an agency, or obstructed an investigation. It also allows some prosecutors to stack charges with the same conduct being charged as both false statements, perjury, and obstruction of justice.¹³⁸

B. *The Mueller Investigation & Response*

In the *Mueller Report*, Robert S. Mueller and his team examine ten alleged acts of President Donald J. Trump, considering them in conjunction with the elements of the federal criminal obstruction of justice statutes. The *Mueller Report* also provides an overview of

136. See Katrice Bridges Copeland, *The Yates Memo: Looking for “Individual Accountability” in All the Wrong Places*, 102 IOWA L. REV. 1897 (2017) (discussing former Deputy Attorney General Sally Yates’ corporate charging memorandum); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 969 (2009) (discussing former Deputy Attorney General Larry Thompson’s corporate charging memorandum); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 316 (2007) (discussing the corporate charging memorandum of former Deputy Attorney Generals Thompson and McNulty).

137. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435 (2009) (discussing “process crimes”); Stuart P. Green, *Uncovering the Cover-up Crimes*, 42 AM. CRIM. L. REV. 9, 9–13 (2005) (examining the government’s charging of cover-up crimes); see also Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1137 (2004) (discussing “pretextual prosecutions” for charging individuals as opposed to focusing on the offense itself). See generally Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925 (2018) (analyzing the government’s use of “pretextual,” “process,” or just more easily proved crimes to assure a favorable jury resolution).

138. See Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN STATE L. REV. 1107 (2005) (discussing how prosecutors will charge the same conduct using multiple different crimes). Prosecutors also will tack on charges such as money laundering and conspiracy. See Teresa E. Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. STATE U. L. REV. 531 (2000) (discussing how prosecutors will add money laundering charges in white collar cases).

these ten acts and an additional cumulative consideration in the final section. Even if these acts do meet the elements of the applicable obstruction statutes, there is likewise a disparity in view as to whether this should be a basis for indictment or impeachment—as the statutes were being examined against the conduct of a sitting President.¹³⁹ The *Mueller Report* notes that an Office of Legal Counsel (OLC) memo found that a sitting president cannot be indicted, and notes that “this Office accepted OLC’s legal conclusion for the purpose of exercising prosecutorial jurisdiction.”¹⁴⁰

Further, although the *Mueller Report* provides extensive analysis for each of these ten separate instances that might be considered as obstruction of justice conduct,¹⁴¹ this activity did not form the basis of the two acts of impeachment later brought against President Trump. Instead, the articles of impeachment against President Trump centered on obstruction of justice, but it was the obstruction of the legislative body investigating his case that was the focus, not the alleged obstructive acts found in the *Mueller Report*. Thus, the *Mueller Report*, although referenced at various parts of the impeachment hearings and trial, did not serve as the basis for the impeachment against President Trump.

Although the *Mueller Report* was not a basis for impeachment, it is important to examine this report and the reaction of Attorney General Barr, as it illuminates an approach to the use of obstruction of justice in his office and, some may conclude, the arbitrariness of its application.

The *Mueller Report* is presented in two volumes. The first examines “Russia’s interference in the 2016 presidential election and its interactions with the Trump Campaign.”¹⁴² Volume Two, the focus of obstructive acts, “addresses the President’s actions towards the FBI’s investigation into Russia’s interference in the 2016 presidential election and related matters, and his actions

139. See generally Ediberto Roman, Melissa Gonzalez & Dianet Torres, *Collusion, Obstruction of Justice, and Impeachment*, 45 J. LEGIS. 9, 37–46 (2018) (discussing whether a sitting President can be criminally indicted).

140. MUELLER REPORT VOL. II, *supra* note 65, at 1.

141. *Id.*

142. 1 U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2 (2019) [hereinafter MUELLER REPORT VOL. I].

towards the Special Counsel's investigation."¹⁴³ The *Mueller Report* notes that his team did not make a "traditional prosecutorial judgment."¹⁴⁴ It notes that "[t]he conclusion that Congress may apply the obstruction laws to the President's corrupt exercise of the powers of office accords with our constitutional system of checks and balances and the principle that no person is above the law."¹⁴⁵ But the *Mueller Report* also notes that "if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state."¹⁴⁶ The executive summary of Volume II concludes: "Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him."¹⁴⁷

Prior to releasing the *Mueller Report* with some redactions, Attorney General William P. Barr issued a letter on March 24, 2019,¹⁴⁸ that references the obstruction allegations. The letter states:

After reviewing the Special Counsel's final report on these issues; consulting with Department officials, including the Office of Legal Counsel; and applying the principles of federal prosecution that guide our charging decisions, Deputy Attorney General Rod Rosenstein and I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense.¹⁴⁹

Despite the exhaustive evidence and specificity in the *Mueller Report*, Attorney General Barr found that

143. *Id.* at 3.

144. MUELLER REPORT VOL. II, *supra* note 65, at 8.

145. *Id.*

146. *Id.*

147. *Id.*

148. Letter from William P. Barr, Att'y Gen., to Lindsey Graham, Chairman for the U.S. Senate Comm. on the Judiciary, Jerrold Nadler, Chairman for the U.S. House of Representatives Comm. on the Judiciary, Dianne Feinstein, Ranking Member for the U.S. Senate Comm. on the Judiciary, and Doug Collins, Ranking Member for the U.S. House of Representatives Comm. on the Judiciary (Mar. 24, 2019), <https://www.justice.gov/ag/page/file/1147981/download>.

149. *Id.* at 3. Attorney General Barr states that his determination was "made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president." *Id.* (citing *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000)).

[i]n making this determination, we noted that the Special Counsel recognized that “the evidence does not establish that the President was involved in an underlying crime related to Russian election interference,” and that, while not determinative, the absence of such evidence bears upon the President’s intent with respect to obstruction.¹⁵⁰

In his later remarks on April 18, 2019,¹⁵¹ Attorney General Barr noted that “[a]part from whether the acts were obstructive, this evidence of non-corrupt motives weighs heavily against any allegation that the President had a corrupt intent to obstruct the investigation.”¹⁵²

150. *Id.* He further states:

Generally speaking, to obtain and sustain an obstruction conviction, the government would need to prove beyond a reasonable doubt that a person, acting with corrupt intent, engaged in obstructive conduct with a sufficient nexus to a pending or contemplated proceeding. In cataloguing the President’s actions, many of which took place in public view, the report identifies no actions that, in our judgment, constitute obstructive conduct, had a nexus to a pending or contemplated proceeding, and were done with corrupt intent, each of which, under the Department’s principles of federal prosecution guiding charging decisions, would need to be proven beyond a reasonable doubt to establish an obstruction-of-justice offense.

Id.

151. William P. Barr, Att’y Gen., Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election (Apr. 18, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian>.

152. *Id.* Attorney General Barr stated:

After carefully reviewing the facts and legal theories outlined in the report, and in consultation with the Office of Legal Counsel and other Department lawyers, the Deputy Attorney General and I concluded that the evidence developed by the Special Counsel is not sufficient to establish that the President committed an obstruction-of-justice offense.

Although the Deputy Attorney General and I disagreed with some of the Special Counsel’s legal theories and felt that some of the episodes examined did not amount to obstruction as a matter of law, we did not rely solely on that in making our decision. Instead, we accepted the Special Counsel’s legal framework for purposes of our analysis and evaluated the evidence as presented by the Special Counsel in reaching our conclusion.

In assessing the President’s actions discussed in the report, it is important to bear in mind the context. President Trump faced an unprecedented situation. As he entered into office, and sought to perform his responsibilities as President, federal agents and prosecutors were scrutinizing his conduct before and after taking office, and the conduct of some of his associates. At the same time, there was relentless speculation in the news media about the President’s personal culpability. Yet, as he said from the beginning, there was in fact no collusion. And

Clearly, an exhaustive evaluation of the *Mueller Report* may present differing views on whether the conduct of President Trump met the elements of the crime of obstruction of justice.¹⁵³ This Article's examination is more nuanced in that the focus is on whether underlying conduct is a necessary component for a corrupt intent for purposes of a criminal obstruction case. In this regard, data provides observations that counter this contention.

C. *Empirical Analysis of Obstruction Charging Practices*

1. *Generally*

The use of empirical data often comes with caveats, and this data is no exception. There is no accessible database that provides complete information on the charging of crimes by the government. Existing data does not offer information on cases where there were declinations of prosecutions. There also is no public database to scrutinize prosecutorial decisions not to include charges such as an obstruction of justice charge. Further, existing databases do not provide the pre-charge bargaining that can skew what may have been considered by prosecutors in selecting a charge of obstruction or deciding not to charge this conduct. In the early years of the U.S. Sentencing Guidelines, years in which the judiciary had little discretion to go outside the mandatory sentencing grid,¹⁵⁴ pre-

as the Special Counsel's report acknowledges, there is substantial evidence to show that the President was frustrated and angered by a sincere belief that the investigation was undermining his presidency, propelled by his political opponents, and fueled by illegal leaks. Nonetheless, the White House fully cooperated with the Special Counsel's investigation, providing unfettered access to campaign and White House documents, directing senior aides to testify freely, and asserting no privilege claims. And at the same time, the President took no act that in fact deprived the Special Counsel of the documents and witnesses necessary to complete his investigation.

Id.

153. See Charlie Savage, *How Barr's Excerpts Compare to the Mueller Report's Findings*, N.Y. TIMES (Apr. 20, 2019), <https://www.nytimes.com/2019/04/19/us/politics/mueller-report-william-barr-excerpts.html> (discussing differences in Barr's response to the Mueller Report and the Mueller Report itself).

154. See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993) (discussing the harshness of the sentencing guidelines).

charge bargaining was commonplace.¹⁵⁵ Criminal defense attorneys would try to secure a plea agreement prior to their client's indictment to minimize the repercussions of sentencing. Criminal defense attorneys still negotiate prior to charging, often to secure benefits such as a decrease in the sentence for "acceptance of responsibility"¹⁵⁶ or receipt of a sentence reduction based on the government filing a 5K1.1 motion for the defendant's cooperation and assistance to the government.¹⁵⁷

Noting the deficiencies in existing databases, there are still several remaining sources for consideration of actual charges of obstruction of justice. Three of those sources are used here.

A first method is seen in the TRAC reporting system that includes separate numerical statistics for federal charging and convictions of crimes.¹⁵⁸ TRAC Reports obtain applicable data from the Department of Justice and then provide comparisons and contrasts throughout the years, typically in five-year increments. The data, however, is limited to the lead charges, so cases with obstruction of justice counts may be omitted because they might not have been designated as lead charges by the Department of Justice.

Second is the wealth of data accessible from the United States Sentencing Commission. Its available data provides information on cases that have included obstruction charges, including both the number of cases, the accompanying charges, and the sentences

155. See generally Sonja B. Starr & M. Marit Rehaavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013) (noting how pre-charge bargaining can be a limitation to observing sentencing disparities).

156. U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 1989). The Sentencing Guidelines provide for a decrease in the offense level when a defendant "clearly demonstrates . . . acceptance of personal responsibility for his criminal conduct." *Id.*

157. *Id.* § 5K1.1. Section 5K1.1 of the U.S. Sentencing Guidelines allows prosecutors to file a motion "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." *Id.* The court then decides the "appropriate reduction" taking into effect factors such as the "the nature and extent of the defendant's assistance" and the timeliness of that assistance. *Id.*

158. "Transactional Records Access Clearinghouse (TRAC) is a data gathering, data research and data distribution organization at Syracuse University." *About Us*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, <https://trac.syr.edu/aboutTRACgeneral.html> (last visited Sept. 11, 2020). TRAC uses the Freedom of Information Act (FOIA) to obtain Department of Justice data. *Id.*

received.¹⁵⁹ Because many of the cases are resolved via a plea agreement, the data provides the widest range of information. A key deficiency in this data is that it is basically cold numbers without reference to specific cases, so that underlying issues cannot be discerned here.

Finally, a third, more tedious method used is to examine all reported opinions that include an obstruction of justice statute as a basis for the charge or where the accused had an obstruction conviction. The information provided here is significantly more extensive in that it allows one to consider the underlying conduct used for the obstruction prosecution. But from another perspective the sample here is more limited, since most of the obstruction cases are resolved via plea agreements and thus are seldom the subject of a reported decision. With so many cases resolved through a plea agreement, the obstruction appellate issues in these decisions may focus on the plea, its voluntariness, or whether the accused's attorney provided ineffective assistance of counsel. Pre-trial motions in obstruction cases, along with appellate decisions on convictions obtained after a trial, do offer some view of what the charging practices may have been.

Thus, admittedly the data in the sections below is far from perfect. But the trends and observations with respect to charging obstruction without other offenses, or with only "shortcut crimes," are apparent here and are a constant throughout this review process.

159. The easily accessible statistics of the U.S. Sentencing Commission report by type of crime as opposed to focusing just on obstruction offenses. Obstruction offenses come under Administration of Justice Offenses which include a wider range of conduct well beyond the statutes in 18 U.S.C. §§ 1501–21. The Commission states that Administration of Justice Offenses include "obstructing or impeding officers, contempt, obstruction of justice, perjury or subornation of perjury, bribery of a witness, impersonation, failure to appear by offender, failure to appear by material witness, commission of offense while on release, payment of witness, and misprision of a felony." *2018 Annual Report and Sourcebook*, U.S. SENT'G COMM'N app. A (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/AppendixA.pdf>. For fiscal year 2018, there were a total of 730 offenses encompassed under the rubric of "administration of justice" of which 93.4% (682) were pleas and 6.6 % (48) were trials. *Id.* tbl.12, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table12.pdf>.

2. Obstruction charging data

The following chart was developed by using specific lead charge reports from TRAC. It demonstrates that there has been a decrease in the number of cases using obstruction of justice as the lead charge from cases twenty years ago, and that this decrease is more significant when noting the increased number of overall cases.

Key Obstruction Statutes	1999	2009	2014	2019
18 U.S.C. § 1503	30	14	7	23
18 U.S.C. § 1505	9	5	3	2
18 U.S.C. § 1510	8	1	0	1
18 U.S.C. § 1512	69	66	52	52
18 U.S.C. § 1513	36	25	11	18
All Federal Crimes Charged	89,309	169,612	153,207	184,274

Figure 1: Obstruction as Lead Charge¹⁶⁰

Just examining the charging of obstruction under the generic statute § 1503, it is apparent that the number of prosecutions using this statute as the lead charge is significantly decreased from twenty years ago. Although TRAC reports that there has been an increased number of charges in 2019,¹⁶¹ in this year it demonstrates a 36.7 percent decrease in § 1503 being the lead charge from twenty years ago.¹⁶² Attributing this decrease to the growth of the newer obstruction statutes found in 18 U.S.C. §§ 1512 and 1513 is not warranted, as one finds these two obstruction offenses have also experienced a decrease.

These statistics do not, however, represent that there has been an overall decrease in the use of obstruction crimes — these numbers are merely limited to the Department of Justice's representation of what is their lead charge in a case. This is relevant because the

160. This figure was produced by taking the data from each of the individual TRAC reports of specific statutes presented above. (The author can provide this data.) Reporting is initially in 5-year increments, but then goes to 10 years as seen above.

161. Figure 1 *supra* does not report on the difference from 2018 to 2019, but this percentage is provided in the TRAC Reports. (The author can provide this data.)

162. See *supra* Figure 1.

government designation of lead charge can show its emphasis on different areas of criminal activity. For example, one sees an increased number of drug and immigration offenses in the last few years,¹⁶³ but many of these cases have also included obstruction charges.

3. *Obstruction sentencing data*

When one looks at sentencing data that does not designate the lead charge, a somewhat different picture emerges. Here it becomes apparent that the government is widely using obstruction charges and that many convictions include obstruction of justice crimes. It is also apparent that many of the convictions may be instances of sole convictions for obstruction conduct without convictions for any other crimes. The numbers below do not separate convictions premised upon pleas and trials, so it is possible that some of the obstruction convictions below resulted from a plea to an obstruction charge with an accompanying dismissal of other counts in an indictment. The columns of A1–A4 designate different obstruction crimes, while columns B, C, and D provide obstruction with other offenses. Convictions are only listed one time, so the numbers below represent separate cases and there are no cases that are placed in multiple boxes on the chart in Figure 2 below.

163. Attorney Generals typically set their priorities upon entering the office. For example, Attorney General Barr stated that he “support[ed] the prosecutorial priorities that Attorney General Sessions put in place.” See William P. Barr, Att’y Gen., Opening Remarks at the U.S. Attorney’s Conference (June 26, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-opening-remarks-us-attorneys-conference>. Those were “violent crime, drugs, immigration, and national security.” *Id.* Other Attorney Generals have had different priorities. For example, Attorney General Eric Holder had priorities that included “terrorism and other threats to national security,” violent crimes, financial fraud, and “protecting the most vulnerable members of our society” (e.g. elderly, victims of hate crimes). See Eric Holder, Att’y Gen., Speech on the Department of Justice’s Priorities and Mission (Apr. 25, 2011), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-about-the-department-justice-s-priorities-and-mission>.

Date	A1	A2	A3	A4	B	C	D	Total
2004	16	9	53	15	12	7	86	198
2009	14	5	77	32	8	9	125	270
2014	13	4	69	25	12	12	135	270
2018	9	5	66	24	6	9	103	222

Figure 2: Sentencings with Obstruction Convictions¹⁶⁴

- *A1: 18 U.S.C. § 1503.* The sentences in this column are based on a violation of the generic obstruction statute, that is, one against the “due administration of justice.” It is the sole conviction upon which the defendant is being sentenced, except for the caveat of accessories and conspiracies noted below.
- *A2: 18 U.S.C. § 1505.* The sentences in this column are based on a violation of the statute “Obstruction of proceedings before departments, agencies, and committees.” It is the sole conviction upon which the defendant is being sentenced, except for the caveat of accessories and conspiracies noted below.
- *A3: 18 U.S.C. § 1512 and § 1513.* The sentences in this column show a combined number for violations of either of these two statutes that pertain to “Tampering with a witness, victim, or an informant,” and “Retaliating against a witness, victim, or an informant.” The number is limited to a sole conviction of one or both of these obstruction statutes upon which the defendant is being sentenced, except for the caveat of accessories and conspiracies noted below. It is also possible that there might be multiple counts of conviction for different subsections within either of these statutes.¹⁶⁵
- *A4.* This column represents sentences for convictions of all other obstruction statutes not listed in A1, A2, and A3, limited to 18 U.S.C. § 1501 through and including § 1519. It does not include §§ 1520–21. This column is limited just to obstruction statutes and does not include sentences that might have been given for obstructive conduct along with other criminal

164. The choice of years reported here was to replicate as close as possible the five-year increments seen in the prior data. The dates, however, may not coincide as the entities use different reporting dates for their year.

165. There can be multiple counts of an obstruction case premised upon different provisions found in § 1512.

offenses. If the obstruction conviction includes a multiple of A1, A2, and A3, it is included in this column, A4, and not included in A1–A3. Thus, a sentence that might have been given for a violation of both 18 U.S.C. § 1503 and § 1512 would be included in this column. Like A1–A3, however, it remains included here even if there are also convictions as an accessory or if the defendant has a conspiracy charge along with the obstruction count.

- B. This column includes sentences for obstruction crimes that also had sentences of a “shortcut offense.” Thus, it includes an obstruction offense from 18 U.S.C. § 1501 through and including § 1519, but also has a conviction for perjury (18 U.S.C. § 1621), false statements (18 U.S.C. § 1001), or false declarations (18 U.S.C. § 1623). Like A1–A4, however, it remains included here even if the designation includes a reference to accessories or has a conspiracy charge along with these other crimes.
- C. This column includes sentences for an obstruction crime that also has sentences for key fraud statutes.¹⁶⁶ Thus, it includes an obstruction offense from 18 U.S.C. § 1501 through and including § 1519, but also has a conviction for mail or wire fraud, or a fraud statute that is an outgrowth of one of these statutes.¹⁶⁷ Like the prior columns, however, it remains included here even if the defendant was an accessory or has a conspiracy charge along with these other crimes.
- D. This column includes sentences of obstruction that also had sentencing for any other criminal offense that was other than a “shortcut offense,” a fraud statute, or conspiracy. But if the obstruction statute had both a “shortcut crime” and a fraud statute, it would be listed in this column as it includes multiple charges.

166. Not included here are Racketeer Influenced and Corrupt Organization (RICO) cases brought under 18 U.S.C. § 1962. A RICO charge could have as its predicate act a fraud offense, such as mail or wire fraud. *See* 18 U.S.C. § 1961 (providing the list of predicate acts for a “pattern of racketeering” under RICO).

167. Mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, are common prosecution charges as the statutes are broad and provide significant leeway for charging many different forms of fraudulent conduct. Additionally, fraud-related statutes have greatly increased with new fraud offenses for health care fraud (18 U.S.C. § 1347) and securities and commodities fraud (18 U.S.C. § 1348). All of the fraud-related statutes that grow from the 1872 mail fraud statute are included in Column C.

- *Total.* The total reflects all of the cases involved in these designated years that included a charge based upon an obstruction of justice statute from 18 U.S.C. § 1501 through and including § 1519 in its sentence.

In producing this chart, it is noted that numbers included in each category omit violations premised on 18 U.S.C. § 2, the federal statute that allows accessories to be charged as principals.¹⁶⁸ The chart also omits cases when there are accompanying conspiracy charges under 18 U.S.C. § 371, the generic conspiracy statute in the federal system. Since many of these offenses are duplicative of the obstruction charge and use the obstruction charge as the underlying offense, excluding these numbers seemed warranted. Unlike some states, the federal system allows for conspiracy to be charged when the specific offense for the conspiracy statute is the same as the main conduct being charged.¹⁶⁹

In comparing the data from Figure 1 and Figure 2 *supra*, it is clear that there are a greater number of cases with obstruction convictions (Figure 2) than there are cases with the government's designation of obstruction being the lead charge (Figure 1). It is also clear that there are many cases with a sole obstruction conviction without other offenses accompanying the obstruction charge. This does not necessarily mean that obstruction was the sole charge

168. 18 U.S.C. § 2 states:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2. The Sentencing Guidelines do allow for a reduced sentence when an individual plays a minimal role in the criminal activity and when a defendant is a minor participant in the criminal activity. *See* U.S. SENT'G GUIDELINES MANUAL § 3B1.2 (U.S. SENT'G COMM'N 1991).

169. 18 U.S.C. § 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371. It is possible to have a "conspiracy to defraud" as opposed to a conspiracy to commit a specific offense that might not include obstruction of justice as an underlying offense. *Id.*

when the accused was initially indicted, as there may be dismissed charges, perhaps as a result of pleas, or not guilty verdicts, that may have eliminated other possible conduct.

4. Obstruction court data

Looking directly to the courts allows for closer scrutiny of data. Unfortunately, however, this examination is limited to cases that proceeded on appeal or had a reported decision on a pre-trial matter. This omits all but a narrow range of cases, as the federal system is predominantly one of pleas, and fewer cases proceed through the appellate process when the conviction results from a plea agreement. Also, the number of cases with pre-trial issues that will have a reported decision are not significant. Thus, the data provided in Figure 3 *infra* is a significantly smaller number of cases than seen in Figure 1 and Figure 2 *supra*. The information, however, about the individual cases represented on this chart is greater.

Date	A1	A2	A3	A4	B	C	D
1994	0	0	1	2	4	0	37
2009	2	3	10	9	7	3	119
2014	2	2	18	9	8	3	126
2019	0	0	9	3	6	4	92

Figure 3: Obstruction Counts in Court Opinions¹⁷⁰

Examining specific cases as represented by the numbers in Figure 3, using the same categories used in compiling the data for Figure 2, confirms the existence of obstruction charges being brought without any crimes beyond obstruction of justice being charged. *United States v. Solofa*¹⁷¹ is an example of a prosecution exclusively premised on obstruction statutes. The District of Columbia Circuit Court affirmed the defendant's convictions in this case under two separate obstruction of justice statutes: witness tampering under § 1512(b)(3) and the generic obstruction statute

170. Although the categories in Figure 3 remain the same as those in Figure 2, a wider range of obstruction statutes, namely 18 U.S.C. §§ 1503–21, is used in Figure 3. The two prior charts also do not coincide as pre-trial data, trial data, and sentencing data may not match in date ranges. These differences are merely a function of the reporting dates used in compiling the data and the ability to observe easily the applicable statutes.

171. *United States v. Solofa*, 745 F.3d 1226 (D.C. Cir. 2014).

under § 1503. The defendant's claim that he did not have a corrupt intent was rejected at trial, and the convictions were affirmed on appeal.¹⁷²

Some cases present obstruction charges along with "shortcut offenses." For example, in the 1994 decision of *United States v. DeSalvo*,¹⁷³ one sees the classic charging of four counts of the generic obstruction statute found in § 1503, along with four counts of perjury.¹⁷⁴ The case involved the defendant testifying three times, initially in front of a state grand jury, second in front of a federal grand jury, and finally in court. Immunity, albeit different forms because of the state and federal immunity laws, was provided on each occasion. The Second Circuit affirmed the convictions noting that immunity did not protect a person from perjury charges.¹⁷⁵ Although the crux of the decision centered on the scope of immunity, it should be noted that the statements used in this prosecution were allowed for meeting both perjury and obstruction of justice and that beyond these false statements there was no further underlying conduct that was charged.

When coupled with underlying conduct, as reported in Column D of Figure 3 *supra*, one finds a wide array of conduct accompanying the obstruction charge. For example, there are obstruction cases that also had immigration,¹⁷⁶ money

172. *Id.* at 1228. The court rejected on appeal a claim of ineffective assistance of counsel premised on counsel not presenting an entrapment defense. *Id.* at 1230.

173. *United States v. DeSalvo*, 26 F.3d 1216 (2d Cir. 1994).

174. Although the court uses the term "perjury," the case actually came under the false declarations statute found in 18 U.S.C. § 1623.

175. *DeSalvo*, 26 F.3d at 1220 (citing *United States v. Apfelbaum*, 445 U.S. 115 (1980) (allowing indictment for perjury despite immunity)).

176. See *United States v. Carriles*, 263 F.R.D. 400, 401 (W.D. Tex. 2009) (discussing a superseding indictment of two counts of perjury, one count of obstruction before an agency under § 1505, one count of naturalization fraud, and seven counts of false statement in naturalization proceeding).

laundering,¹⁷⁷ fraud,¹⁷⁸ tax,¹⁷⁹ and murder charges.¹⁸⁰ Obstruction crimes in these cases stand alongside the underlying conduct as opposed to it being the sole charge like we see in the cases in columns A1–A3, and some instances in column A4 of Figure 3 *supra*.

5. Summary analysis

What is noteworthy here in looking at all three charts, Figures 1–3 *supra*, is that throughout the years, obstruction of justice has been charged as a sole offense without other charges. We also see obstruction of justice crimes matched with other “shortcut offenses.” This correlates with court matters that have found a false statement in a proceeding to be both perjury and a false declaration, in addition to being obstruction of justice.

Recent Department of Justice (DOJ) press releases highlight the use of obstruction of justice as a sole offense against individuals.¹⁸¹ This stance appears to be contrary to the position taken by Attorney General Barr in response to the *Mueller Report*, where he discounted cases brought under obstruction of justice without underlying conduct being charged. DOJ press releases also highlight the use of

177. See *United States v. Farrell*, 921 F.3d 116 (4th Cir. 2019) (affirming convictions of a former attorney for violations of 18 U.S.C. § 1512, money laundering, and conspiracy to commit money laundering).

178. See *United States v. Simpson*, 741 F.3d 539 (5th Cir. 2014) (affirming the obstruction of justice count and conspiracy, while reversing the conviction for false registration of a domain name).

179. See *United States v. Williamson*, 746 F.3d 987 (10th Cir. 2014) (affirming an obstruction case premised on impeding due administration of Internal Revenue laws).

180. See *United States v. Fowler*, 749 F.3d 1010 (11th Cir. 2014) (resentencing for convictions of obstruction under § 1512(a)(1)(C) and using a firearm for killing a police officer).

181. See, e.g., Press Release, U.S. Dep’t of Just., Former Caregiver Pleads Guilty to Obstructing Investigation Related to Violation of Disabled Resident’s Civil Rights (Feb. 13, 2020), <https://www.justice.gov/opa/pr/former-caregiver-pleads-guilty-obstructing-investigation-related-violation-disabled-resident>; Press Release, U.S. Dep’t of Just., Massachusetts District Court Judge and Court Officer Indicted for Obstruction of Justice (Apr. 25, 2019), <https://www.justice.gov/usao-ma/pr/massachusetts-district-court-judge-and-court-officer-indicted-obstruction-justice>; Press Release, U.S. Dep’t of Just., President of Texas-Based Beverage Company Indicted for Obstruction of Justice (Oct. 10, 2019), <https://www.justice.gov/opa/pr/president-texas-based-beverage-company-indicted-obstruction-justice>; Press Release, U.S. Dep’t of Just., University of Kansas Researcher Indicted for Fraud for Failing to Disclose Conflict of Interest with Chinese University (Aug. 21, 2019), <https://www.justice.gov/opa/pr/university-kansas-researcher-indicted-fraud-failing-disclose-conflict-interest-chinese>.

obstruction of justice with other shortcut offenses.¹⁸² Likewise, examining other cases emanating from Special Counsel Robert Mueller's investigation demonstrates the use of obstruction charges as solo offenses,¹⁸³ coupled with short-cut offenses,¹⁸⁴ and alongside other conduct.¹⁸⁵ One need only look at the indictments against Konstantin Kilimnik, Roger Stone, and Paul Manafort, Jr., to see the government's use of these approaches in obstruction of justice prosecutions.

III. OBSTRUCTION AS A SENTENCING ENHANCEMENT

A. Sentencing Guideline § 3C1.1

In addition to its role as a federal criminal offense, obstruction of justice also has a unique role in serving as a sentencing enhancement. In this context, obstruction of justice is not being considered a crime but rather a basis for raising the accused's sentence for specific obstruction conduct.

182. See, e.g., Press Release, U.S. Dep't of Just., Oil Tanker Owner, Operator, and Chief Engineer Convicted for Obstruction of Justice and Concealing Deliberate Pollution (Dec. 20, 2019), <https://www.justice.gov/opa/pr/oil-tanker-owner-operator-and-chief-engineer-convicted-obstruction-justice-and-concealing>; Press Release, U.S. Dep't of Just., Chicago Area Lawyer Indicted for Perjury and Obstructing Justice (Nov. 25, 2019), <https://www.justice.gov/opa/pr/chicago-area-lawyer-indicted-perjury-and-obstructing-justice>; Press Release, U.S. Dep't of Just., Former FBI Linguist Arrested and Indicted on Obstruction Charges (May 6, 2019), <https://www.justice.gov/usao-edva/pr/former-fbi-linguist-arrested-and-indicted-obstruction-charges>; Press Release, U.S. Dep't of Just., Witness Indicted for False Declarations Before a Grand Jury and Obstruction of Justice (Aug. 20, 2019), <https://www.justice.gov/opa/pr/witness-indicted-false-declarations-grand-jury-and-obstruction-justice>.

183. See Superseding Indictment at 29–30, *United States v. Manafort*, No. 1:17-cr-201 (D.D.C. June 8, 2018), <https://www.justice.gov/sco/page/file/1070326/download> (charging Kilimnik with obstruction of justice and conspiracy to obstruct justice).

184. See Indictment, *United States v. Stone*, No. 1:19-cr-18 (D.D.C. Jan. 24, 2019), <https://www.justice.gov/file/1124706/download> (charging obstruction of justice under §§ 1505 and 1512, as well as a false statement charge under 18 U.S.C. § 1001). On July 10, 2020, President Trump issued an executive grant of clemency for Roger Stone, Jr. Press Release, White House, Statement from the Press Secretary Regarding Executive Grant of Clemency for Roger Stone, Jr. (July 10, 2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-roger-stone-jr/>.

185. See Superseding Criminal Information, *United States v. Manafort*, No. 1:17-cr-201 (D.D.C. Sept. 14, 2018), <https://www.justice.gov/file/1094141/download> (including conspiracy to commit money laundering, tax fraud, conspiracy to obstruct justice (witness tampering), and other offenses).

When computing a sentence under the U.S. Sentencing Commission's Federal Sentencing Guidelines,¹⁸⁶ a variety of different adjustments are considered, such as victim-related adjustments,¹⁸⁷ the accused's role in the offense,¹⁸⁸ whether there are multiple counts,¹⁸⁹ and whether the defendant accepted responsibility for his or her actions.¹⁹⁰ In some instances the adjustments call for an increased sentence, such as when there is a hate crime motivation in the act.¹⁹¹ In other instances, such as when the defendant has a mitigating role in the offense or accepted responsibility for his or her actions, the adjustments may lower the sentence level that will be used in computing the sentence using the sentencing guidelines.¹⁹² Part C of the Federal Sentencing Guidelines provides four guidelines applicable to obstruction conduct, all providing a basis for a court to increase a sentence level for the accused's conduct. Specifically, Guideline § 3C1.1¹⁹³ pertains to "obstructing or impeding the administration of justice."

As a consideration under the federal sentencing guidelines, "obstructing or impeding the administration of justice" provides for an increase in two levels on the sentencing chart if the conduct fulfils two components:

[i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct

186. Initially, one computes the base offense level and then determines if adjustments and departures are necessary. The criminal history of the offender also plays a role in factoring the sentence. As a result of Supreme Court decisions, the imposition of a sentence is determined by implementing the language in 18 U.S.C. § 3553. *See generally* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (discussing the change in sentencing resulting from Supreme Court rulings).

187. *See* U.S. SENT'G GUIDELINES MANUAL § 3A (U.S. SENT'G COMM'N 2018).

188. *See id.* § 3B.

189. *See id.* § 3D.

190. *See id.* § 3E.

191. *See* U.S. SENT'G GUIDELINES MANUAL § 3A1.1 (U.S. SENT'G COMM'N 2010).

192. *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2018).

193. *See* THOMAS W. HUTCHISON, SIGMUND G. POPKO, DEBORAH YOUNG, MICHAEL P. O'CONNOR & CELIA M. RUMANN, *FEDERAL SENTENCING LAW AND PRACTICE* 1024–25 (2020 ed.) (discussing the history of section 3C1.1 of the sentencing guidelines).

related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense . . .¹⁹⁴

The application notes make clear that "[o]bstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction."¹⁹⁵ The application provides a long list of conduct that may fall under this sentencing adjustment, specifically noting that this list is not exhaustive.¹⁹⁶

The sentencing guidelines application notes also provide a list of conduct that ordinarily would not fit the contours for an increased sentence under this guideline adjustment. In some instances, one finds conduct that may more appropriately be

194. U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018).

195. *Id.* at Application Note 1.

196. *Id.* at Application Note 4. The examples are:

(A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so; (B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction; (C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding; (D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender; (E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding; (F) providing materially false information to a judge or magistrate judge; (G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense; (H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court; (I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (*e.g.*, 18 U.S.C. §§ 1510, 1511); (J) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p); (K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

Id. It is also stated that "[t]his adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct." *Id.*

covered under other guideline sentencing provisions.¹⁹⁷ This guideline's application notes also explicitly provide an exclusion when the defendant is actually being sentenced for an obstruction, perjury, or contempt crime.¹⁹⁸ That said, a typical obstruction enhancement is seen in cases when the defendant provides false or perjurious testimony during his or her trial,¹⁹⁹ or when someone threatens a witness who testifies at the trial.

But many issues concerning the application of an obstruction enhancement to a sentence remain contentious. For example, circuits have not ruled consistently on whether one who misrepresents his or her assets on a pre-trial financial affidavit in order to obtain appointed defense counsel would constitute sufficient conduct warranting a sentencing enhancement pursuant to § 3C1.1 of the sentencing guidelines.²⁰⁰ Likewise, although it is clear that the obstruction sentencing enhancement covers "attempt" conduct, it remains an open question as to whether § 3C1.1 covers attempt conduct when the conduct is not a significant obstruction of the investigation or when it occurs through unsworn statements.²⁰¹ Obstruction as used as a

197. *Id.* at Application Note 5. The guidelines provide the following non-exhaustive list of examples that would not be considered the basis for an enhancement premised on obstruction conduct:

(A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense; (B) making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies; (C) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation; (D) avoiding or fleeing from arrest (*see, however*, §3C1.2 (Reckless Endangerment During Flight)); (E) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).

Id.

198. *Id.* at Application Note 7.

199. *See* *United States v. Dunnigan*, 507 U.S. 87 (1993).

200. *See* *United States v. Iverson*, 874 F.3d 855 (5th Cir. 2017) (joining the majority that this constitutes obstruction of justice for the purposes of sentencing). *But see* *United States v. Khimchiachvili*, 372 F.3d 75, 80, 82–83 (2d Cir. 2004) (holding that when the false statement only results in obtaining indigent counsel, it is not sufficient for a sentencing enhancement).

201. Application Note 5 to § 3C1.1 appears to exclude the making of "false statements, not under oath, to law enforcement officers." U.S. SENT'G GUIDELINES MANUAL § 3C.1 Application Note 5 (U.S. SENT'G COMM'N 2018). But it also states that this does not apply when Application Note 4(G) occurs, which is when the defendant "provid[es] a materially

sentencing enhancement, however, does require materiality.²⁰² The fact-finding process for using a sentence enhancement has also proved disconcerting when the accused is accepting a plea as opposed to going to trial.²⁰³ Finally, because the obstruction conduct is not being charged as a crime, the accused does not receive all the constitutional benefits accorded in a typical criminal prosecution, such as the right to “a presentment or indictment of a Grand Jury,”²⁰⁴ on the specific conduct outlined in the enhancement.

It is possible, however, for obstruction to be the crime charged, with the case also having separate obstruction conduct being argued as the basis for a sentencing enhancement. For example, Roger J. Stone, Jr., was convicted of one count of obstructing a congressional investigation under 18 U.S.C. § 1505, five counts of making numerous false statements to Congress under 18 U.S.C. § 1001(a)(2), and one count of witness tampering under 18 U.S.C. § 1512(b)(1). All of these convictions resulted from his testimony of September 26, 2017, before the U.S. House of Representatives Permanent Select Committee on Intelligence that was investigating “allegations of Russian interference in the 2016 presidential election.”²⁰⁵ In the Government’s initial sentencing memorandum, it requested a two-level increase in the sentence premised on

false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense.” *Id.* at Application Note 4(G). Courts have struggled in interpreting these two provisions. *See* *United States v. Slager*, 912 F.3d 224, 237–38 (4th Cir. 2019) (finding no error in having the two level sentence enhancement when the significant statements made to law enforcement were unsworn); *United States v. Girod*, 646 F.3d 304, 318 (5th Cir. 2011) (enhancement allowed for significant obstruction made through attempt conduct). *But see* *United States v. Adejumo*, 772 F.3d 513, 529 (8th Cir. 2014) (finding it improper to allow enhancement for attempted obstruction conduct that was not proven to be significant).

202. *See* *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999) (“[A] lie that is immaterial to the justice process is not a potential interference with it.”); *United States v. Saunders*, 359 F.3d 874, 879 (7th Cir. 2004) (stating that if the perjury was “on an immaterial matter, even in court, there would be no obstruction of justice”); *see also* Podgor, *supra* note 112, at 597–98 (looking at whether materiality should be an element of obstruction of justice).

203. *See generally* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001) (discussing how the sentencing enhancement world fails to adequately account for a criminal justice system that is predominantly pleas).

204. U.S. CONST. amend. V.

205. Government’s Sentencing Memorandum at 1–4, *United States v. Stone*, No. 1:19-cr-18 (D.D.C. Feb. 10, 2020). “[T]he House Intelligence Committee was considering Russian involvement in obtaining and transmitting stolen documents that were eventually released by WikiLeaks and any links with the Trump Campaign.” *Id.* at 4.

alleged post-indictment obstruction conduct.²⁰⁶ In its second sentencing memorandum it removed this enhancement stating that “the two-level enhancement for obstruction of justice (§ 3C1.1) overlaps to a degree with the offense conduct in this case.”²⁰⁷ Thus, although one had obstruction of justice as a crime, the government changed its position in the two sentencing memorandums from initially saying the obstruction conduct after the filing of the charges differed from the charged conduct and therefore could be the basis of a sentencing enhancement, to later saying it should not be used this way.

B. Statistical Use of Guideline § 3C1.1

Sentencing enhancements for obstruction conduct under § 3C1.1 are not significantly used by courts in comparison to the total number of individuals sentenced. The chart below provides a sampling of the number of cases where the offender received a sentencing enhancement for obstruction of justice, in comparison to the number of cases with no such sentencing enhancement. It also provides the percentages for the applicable years.

206. The government argued that “[s]hortly after the case was indicted, Stone posted an image of the presiding judge with a crosshair next to her head.” *Id.* at 18. There were also allegations of violations of a “court order by posting messages on social media about matters related to the case.” *Id.*

207. Government’s Supplemental and Amended Sentencing Memorandum at 3, *United States v. Stone*, No. 1:19-cr-18 (D.D.C. Feb. 11, 2020). This new Memorandum also stated that “[m]oreover, it is unclear to what extent the defendant’s obstructive conduct actually prejudiced the government at trial.” *Id.* at 3–4. The filing of an amended government sentencing memorandum proved to be highly controversial. See Matt Zapotosky, Devlin Barrett, Ann E. Marimow & Spencer S. Hsu, *Prosecutors Quit amid Escalating Justice Dept. Fight over Roger Stone’s Prison Term*, WASH. POST (Feb. 11, 2020, 6:44 PM), https://www.washingtonpost.com/national-security/justice-dept-to-reduce-sentencing-recommendation-for-trump-associate-roger-stone-official-says-after-president-calls-it-unfair/2020/02/11/ad81fd36-4cf0-11ea-bf44-f5043eb3918a_story.html. On July 10, 2020, President Trump issued an executive grant of clemency for Roger Stone, Jr. Press Release, White House, Statement from the Press Secretary Regarding Executive Grant of Clemency for Roger Stone, Jr. (July 10, 2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-roger-stone-jr/>.

Year	Offender Obstructed Justice	Offender Did Not Obstruct Justice	Percentage of Offender Obstruction	Percentage of No Offender Obstruction
2017	1,319	60,588	2.1	97.9
2014	1,404	66,247	2.1	97.9
2009	1,614	69,405	2.3	97.7
2004	1,469	41,115	3.4	96.6
1999	1,666	46,354	3.5	96.5
1994	1,681	32,961	4.9	95.1

*Figure 4: Obstruction as a Sentencing Enhancement*²⁰⁸

Examining this chart in Figure 4, it is apparent that over time there has been a percentage decrease in the use of obstruction as a sentencing option. The change from 4.9% in 1994 to 2.1% in 2017 demonstrates this decrease in cases where a court used the § 3C1.1 enhancement in sentencing a convicted defendant.

C. *Contrasted with Obstruction as a Crime*

When contrasting obstruction of justice as a federal crime with its use as a sentencing factor, several points are important here. First is that although a prosecutor may argue for an obstruction enhancement, the probation department has an equal voice in offering the judge its opinion on whether the sentence should be increased due to obstruction conduct. Likewise, the defense is a key

208. From 1996 and thereafter the figures are a part of Table 18 of the Annual Sourcebook of Federal Sentencing Statistics, although the included timeframe may have differed in some years. See U.S. SENT'G COMM'N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-44 tbl.18 (2017), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table18.pdf>; U.S. SENT'G COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2014), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table18.pdf>; U.S. SENT'G COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2009), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table18_0.pdf; U.S. SENT'G COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2004/table18pre_0.pdf; U.S. SENT'G COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (1999), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1999/table18_0.pdf. Prior to 1996, the numbers are a part of the Annual Reports for each year. U.S. SENT'G COMM'N, 1994 ANNUAL REPORT 68–69 tbl.25 (1994), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1994/1994%20Annual%20Report.pdf>.

player in the process and may file a sentencing memorandum as to why this enhancement might be inapplicable for their client. A judge makes the ultimate decision.

Thus, prosecutors do not have an increased or superior role in the sentencing context. Unlike the government's unique ability to charge a defendant with a federal crime, select the crimes to be prosecuted, offer plea benefits of their choosing, and dismiss counts of an indictment, sentencing of the defendant does not provide the government with this sole discretion. When it comes to sentencing enhancements, such as the enhancement for obstruction conduct, multiple players may be influential in the decision of whether to increase the base level of the offense.

Second, it should be noted that obstruction as a sentencing enhancement is seldom a negotiating point between the prosecution and defense in a plea agreement. The conduct in question may be a function of a defendant lying on the witness stand or intimidating or harassing witnesses²⁰⁹ during the trial.²¹⁰ This is particularly true because obstruction conduct typically happens surrounding the trial, as opposed to being a part of the crime charged. Thus, this sentencing enhancement is unlikely to be included in the plea negotiations. This is unlike sentencing mitigators such as the accused's "acceptance of responsibility," where the government's plea negotiation may offer this reduction in sentence as a carrot for the accused to accept the plea. As 97.4% of cases in the federal system are resolved via a plea agreement,²¹¹ not having this sentencing enhancement as a part of the negotiation limits its role as an influencing factor. The greatest role § 3C1.1 may have will be in deciding whether a defendant will testify at his or her trial. Testifying falsely can open the defendant to this sentencing enhancement.

When the obstruction conduct is encompassed within the crime, the prosecutor has the ability to include it as a count in the

209. It is possible that the prosecutor could add charges under §§ 1512 or 1513 of Title 18 for intimidating or retaliating against a witness.

210. The prosecutor would have the option of including this as a federal crime, but if the case has already started, it is more likely that the conduct will be used to increase the sentence as opposed to presenting it as part of the initial indictment or through a superseding indictment.

211. See U.S. SENT'G COMM'N, 2018 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl.11 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table11.pdf>.

criminal indictment against the accused. Alternatively, the government may amend the indictment to add obstruction conduct, thus removing it from being a sentencing enhancement.

Third, it is important to note that although sentencing enhancements can be subject to inconsistencies, there is the appellate remedy available to both the convicted individual and the government if either party believes that the judge did not correctly assess the sentence. From the defense perspective, an increased sentence for obstruction conduct would not be lost in a selective prosecution claim, one with an enormous burden on the defense and one that is seldom successful.²¹² Since it is not a part of the charging of the crime, there is equal ability to contest a judge's use of this factor in increasing or not increasing a sentence for obstruction conduct. Because the U.S. Sentencing Commission compiles extensive statistical data, transparency is provided to review consistency in the use of sentencing factor § 3C1.1.²¹³

Finally, because the government can proceed with a criminal charge for obstruction conduct related to the trial and avoid its consideration as merely a sentencing enhancement, the government retains discretion in how they will proceed when there is obstruction conduct related to the defendant. As noted, if the obstruction conduct occurs during the trial, it is unlikely that the government will file new charges against the accused. But it is important to note that they do have this discretion.

IV. OBSTRUCTION AS AN ARTICLE OF IMPEACHMENT

A. *Generally*

Of the twenty federal impeachments,²¹⁴ only the impeachments of Presidents Clinton and Trump explicitly include obstruction as

212. See *United States v. Goodwin*, 457 U.S. 368, 382–84 (1982) (placing a high burden on the defense to show that the prosecutor's charging decision was motivated by an improper purpose); see also Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001) (discussing prosecutorial discretion in charging).

213. The Sentencing Commission issues annual reports that include information pertaining to each guideline within the federal sentencing guidelines.

214. These impeachments were: William Blount (Senator), John Pickering (District Judge), Samuel Chase (Supreme Court Justice); James H. Peck (District Judge), West Humphreys (District Judge), Andrew Johnson (President), Mark Delahey (District Judge),

an article of impeachment.²¹⁵ Obstruction of justice was considered in some impeachment investigations, but these impeachments did not come to fruition,²¹⁶ such as the investigation of President Richard M. Nixon who resigned prior to articles of impeachment being voted upon by the House of Representatives.²¹⁷ Several judicial impeachments include allegations of perjury or false testimony. The articles of impeachment in these instances do not include explicit allegations of obstruction of justice.²¹⁸ This is noteworthy, however, because prosecutors often charge

William Belknap (Secretary of War), Charles Swayne (District Judge), Robert Archbald (Commerce Court Judge), George W. English (District Judge), Harold Louderback (District Judge), Halsted Ritter (District Judge), Harry Claiborne (District Judge), Alcee Hastings (District Judge), Walter Nixon (District Judge), William Jefferson Clinton (President), Samuel Kent (District Judge), Thomas Porteous (District Judge), Donald J. Trump (President). See MICHAEL J. GERHARDT, *IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW* 201-03 (2018) (providing an appendix of the federal impeachments up through 2010).

215. See *infra* notes 225-41.

216. See 3 ASHER C. HINDS, *Impeachment Proceedings Not Resulting in Trial*, in HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 981, 981-1034 (1907), <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3-28.pdf>.

217. In the case of Former President Richard Nixon, an impeachment investigation by the Judiciary Committee had been authorized by the House. See H.R. Res. 803, 93d Cong. (1974), <https://www.congress.gov/bill/93rd-congress/house-resolution/803>. The committee voted three articles of impeachment for consideration by the House, but they were not presented because of his resignation. Two of the three Articles could be considered allegations of obstructive forms of conduct. Article One included language alleging that the President "committed unlawful entry of the" Democratic Headquarters in using his powers "personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up . . . and to conceal the existence and scope of other unlawful covert activities." See COMM. ON THE JUDICIARY, *IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES*, H.R. REP. NO. 93-1305, at 2, 4 (1974), <https://www.justsecurity.org/wp-content/uploads/2019/11/ukraine-clearinghouse-house-rep.-93-1305.pdf>. Nine specific acts are then alleged. *Id.* Article Three concerned the alleged refusal to produce certain materials to Congress. *Id.*

218. For example, the three articles of impeachment against Judge Walter L. Nixon, Jr., reference the making of false material statements to a grand jury and concealing information to the grand jury, but there are no explicit statements of this being an obstruction of justice. See *IMPEACHMENT OF WALTER L. NIXON, JR.* (1989), <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-19-6.pdf>. Likewise, the four articles of impeachment against Judge G. Thomas Porteous, Jr., include corruption and perjury, but no mention of obstruction of justice. See Bruce Alpert, *Judge Thomas Porteous: Summary of 4 Articles of Impeachment Approved*, TIMES-PICAYUNE (Mar. 11, 2010, 10:41 PM), https://www.nola.com/news/crime_police/article_fba1b03d-0784-5e16-8e4d-a5df7706d2fe.html.

obstruction of justice in federal criminal cases based upon false statements,²¹⁹ false declarations,²²⁰ or perjury.²²¹

Two impeachments were premised upon judicial use and alleged misuse of contempt powers, an early form of obstruction of justice. These impeachments involved Judge James H. Peck in 1830,²²² previously discussed as his impeachment was the impetus for the initial obstruction statute, and Judge Charles Swayne, a federal district court judge for the Northern District of Florida who faced impeachment in 1905.²²³ Both of these judges were accused of improperly issuing contempt orders and faced impeachment for this alleged judicial misconduct.²²⁴ Both were acquitted following their impeachment trials. In each of these cases, the alleged obstruction of justice was not being done by the judicial officer, but

219. See *United States v. Barfield*, 999 F.2d 1520, 1524–25 (11th Cir. 1993) (finding that a government informant had obstructed justice by making false statements to an attorney).

220. See *United States v. Langella*, 776 F.2d 1078, 1078 (2d Cir. 1985) (charging both false declarations and obstruction for false testimony to a grand jury).

221. See *United States v. Bonanno*, 177 F. Supp. 106, 111 (S.D.N.Y. 1959) (charging both perjury and obstruction of justice for an agreement to frustrate a grand jury using “evasion, silence or lies”).

222. See *supra* notes 27–36 and accompanying text.

223. In several ways Judge Swayne’s case mirrors that of Judge Peck as one of the Articles related to his “[h]aving imprisoned and fined certain lawyers in his District and certain citizens therein without authority of law upon an alleged contempt proceeding.” E. Hilton Jackson, *The Swayne Impeachment Proceedings*, 10 VA. L. REG. 1071, 1072 (1905) (providing a summary of the articles of impeachment). The judge was alleged to have “negotiate[d] with a real estate agent in” Florida for land that was in litigation in his court. *Id.* at 1075. Thereafter the two attorneys involved in the land case dismissed the suit in Judge Swayne’s court and began litigation in the state courts of Florida. Judge Swayne believed that the filing of this suit was an attempt to force him to recuse himself so that the attorneys could obtain a new judge. In response to the attorneys’ actions, Judge Swayne sentenced the two lawyers to imprisonment, a fine, and two years disbarment. The case against the attorneys was thereafter reversed by the Northern District of Florida. But the conduct ended up being a key component in this 1905 impeachment action against the judge. *Id.*; see also ASHER C. HINDS, *The Impeachment and Trial of Charles Swayne*, in HINDS’ PRECEDENTS *supra* note 216, at 948, <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/html/GPO-HPREC-HINDS-V3-27.htm>. The article of impeachment was considered the most serious of the charges and involved allegations that he imposed an “illegal and arbitrary” sentence on two Florida lawyers. Jackson, *supra*, at 1075.

224. In Judge Swayne’s 1905 impeachment trial it was argued that “no officer can be impeached except for indictable offenses, and that, as there are no common law offenses against the United States, it follows that there can be no impeachment except for an offense expressly declared and made indictable by Act of Congress.” Jackson, *supra* note 223, at 1077. The discussion, however, went on to note that this “construction would of course render the constitutional provision affecting impeachments a practical nullity, for Congress has defined and made indictable by statute comparatively few offenses.” *Id.*

rather by an attorney appearing before the judges. The judges' response to the activities of these attorneys was to issue a finding of contempt against the lawyers. These cases, therefore, differ from the discussion in this Part.²²⁵

First, the articles of impeachment do not coincide with the current obstruction statutes, but rather with its predecessor contempt offense that was initially combined with obstruction outside the courtroom in a unitary offense. This form of contempt is not currently in the federal criminal obstruction statutes, but instead located in a separate contempt statute that is removed from all the typical obstruction crimes found in chapter 73 of Title 18. Second, the impeachments of both Judge Peck and Judge Swayne do not use obstruction of justice as the basis for the impeachment, but rather have the contempt matter being used by them against another party. Thus, for purposes of this Article they are not considered in the comparison of impeachment premised on obstruction and federal criminal law obstruction crimes.

Two of the three presidential impeachments,²²⁶ however, are considered here, as obstruction conduct was explicitly stated as one of the articles of impeachment in each of these cases.²²⁷

225. Impeachments that involve other forms of courtroom misconduct by a judicial officer differ from the obstruction of justice conduct being considered here. For example, a prior impeachment involved United States Supreme Court Justice Samuel Chase who was impeached on eight articles of impeachment that focused on his courtroom conduct that was alleged to be "arbitrary, oppressive, and unjust." ASHER C. HINDS, *The Impeachment and Trial of Samuel Chase*, in HINDS' PRECEDENTS, *supra* note 216, at 711, 722, <https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/html/GPO-HPREC-HINDS-V3-21.htm>. He was acquitted following a failure to secure a 2/3 vote on any of the articles of impeachment. *Id.* at 770.

226. See generally JON MEACHAM, TIMOTHY NAFTALI, PETER BAKER & JEFFREY A. ENGEL, *IMPEACHMENT: AN AMERICAN HISTORY* (2018) (discussing the impeachments of Andrew Johnson, Richard Nixon, and Bill Clinton).

227. In the case of Andrew Johnson, the first U.S. President to face impeachment, the eleven articles of impeachment alleged conduct that might today fit under an obstruction of justice statute. But he was not charged at that time with statements of obstructing the due administration of justice. Yet, allegations of intimidation, as noted below, would fit current obstructive activities. For example, Article IV of Articles of Impeachment against President Andrew Johnson was:

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, in violation of the Constitution and laws of the United States, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other

The impeachments of Presidents William Jefferson Clinton and Donald J. Trump both included obstruction of justice in the articles of impeachment.²²⁸ As with many of the other impeachment trials in the history of the United States, both also resulted in an acquittal.²²⁹

As one might suspect, many issues surround impeachments,²³⁰ especially presidential impeachments. These include what constitutes a “high crime and misdemeanor,”²³¹ whether a criminal act is required,²³² whether presidential immunity precludes the

persons to the House of Representatives unknown, with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton, then and there Secretary for the Department of War, duly appointed under the laws of the United States, from holding said office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States, and of the provisions of an act entitled “An act to define and punish certain conspiracies,” approved July thirty-first, eighteen hundred and sixty-one, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high crime in office.

Article IV, *The Articles of Impeachment, Andrew Johnson—National Historic Site Tennessee*, NAT’L PARK SERV. (Mar. 7, 1868), <https://www.nps.gov/anjo/learn/historyculture/the-articles-of-impeachment.htm>.

228. See IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 105-830 (1998), <https://www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf>; Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H.R. Res. 755, 116th Cong., at 6 (2019) (enacted), <https://www.documentcloud.org/documents/6572344-Articles-of-Impeachment-1.html#document/p1>.

229. William Clinton was acquitted on February 12, 1999. *President Bill Clinton Acquitted on Both Articles of Impeachment*, HISTORY (Feb. 9, 2010), <https://www.history.com/this-day-in-history/president-clinton-acquitted>. Donald Trump was acquitted on February 5, 2020. Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html>.

230. See generally CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN’S GUIDE (2017) (discussing a historical overview of impeachment and the many accompanying issues); see also GERHARDT, *supra* note 214 (discussing a wide array of background on the procedures and issues arising in impeachment cases).

231. See generally Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”*: Basic Principles, 67 GEO. WASH. L. REV. 712 (1999) (discussing what constitutes a “high crime and misdemeanor” for purposes of impeachment).

232. See CHARLES L. BLACK, JR. & PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK 107–09 (2018) (noting that it is a fallacy to claim that a criminal act is required for a presidential impeachment). The authors use as one of their examples of why a crime is not a necessary component of an impeachment— “[w]hat if the president required that all cabinet members affirm their belief in the divinity of Christ?” *Id.* at 108–09; see also MAJORITY STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 116TH CONG., CONSTITUTIONAL GROUNDS

impeachment of a president for presidential office-related activities,²³³ the applicable standards to be used for a conviction of an impeachment, and whether exhaustion of all remedies is necessary prior to proceeding with an obstruction allegation. Although these issues are significant to impeachment matters, they are for the most part beyond this discussion.²³⁴

This next Section looks at obstruction of justice as alleged in the articles of impeachment and trials of Presidents Clinton and Trump. Following these two subsections, the Article specifically examines the structural differences between obstruction of justice used as the basis for an impeachment and its use as a federal criminal offense or as a sentencing enhancement. It is the contrast to the federal crime and sentencing enhancement that is the crux of this next Section. Thus, this discussion examines obstruction conduct for purposes of impeachment from the perspective of the obstructive acts used as charges for impeachment and the process in evaluating this specific conduct.

B. Obstruction as an Article of Impeachment

1. President William Jefferson Clinton

The events leading up to the impeachment of President Bill Clinton concerned his sexual relationship with Monica Lewinsky, a White House intern, which came to light during a civil lawsuit filed against him during his presidency. Paula Jones, who had been

FOR PRESIDENTIAL IMPEACHMENT (2019), <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/hcm%20final%20v.3.pdf>. But recently in the Senate hearing on the impeachment of Donald J. Trump, Professor Alan Dershowitz argued that “criminal-like conduct akin to treason and bribery” was a necessary component for a guilty finding of impeachment. *Alan Dershowitz Defense Argument Transcript: Trump Impeachment Trial January 27*, REV: BLOG, at 15:27 (Jan. 28, 2020), <https://www.rev.com/blog/transcripts/alan-dershowitz-defense-argument-transcript-trump-impeachment-trial-january-27>.

233. See generally Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277 (2018) (discussing the need to consider how “criminal law can be harmonized with the president’s constitutional responsibilities”); Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW & CONTEMP. PROBS. 169 (2000) (looking at how the legislature in impeachment hearings is making constitutional decisions).

234. See Roman et al., *supra* note 139, at 37–46 (discussing the conclusion of Robert Mueller, the Department of Justice, and others on whether a sitting President can be criminally indicted).

an employee of the Arkansas Development Commission and had worked for Clinton when he was governor, filed a sexual harassment lawsuit against him.²³⁵ Clinton's attempt to claim immunity during his presidency was rejected by the Supreme Court,²³⁶ with the Court holding that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office. On remand to the Arkansas District Court, the court states, "What began as a civil lawsuit against the President of the United States for alleged sexual harassment eventually resulted in an impeachment trial of the President."²³⁷

Although there are mountains of materials that provide the details of the matter, a synopsis would include that the lawyers for Paula Jones, learning of a relationship between President Clinton and Monica Lewinsky, questioned him on this conduct during his deposition.²³⁸ In August 1998, the President also appeared before a grand jury as part of an Office of Independent Counsel (Starr) Investigation, an investigation that had expanded to cover conduct well beyond its initial scope.²³⁹ The net result was that Kenneth W. Starr, Independent Counsel, eventually referred the matter to the House of Representatives with a listing of eleven possible "[a]cts [t]hat [m]ay [c]onstitute [g]rounds for an [i]mpeachment."²⁴⁰

235. GERHARDT, *supra* note 214, at 35.

236. Clinton v. Jones, 520 U.S. 681, 681-82 (1997). One of the arguments raised by Clinton was "that this particular case—as well as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn—may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office." *Id.* at 701-02. The Court also rejected his argument regarding separation of powers. *Id.* at 705-06.

237. Jones v. Clinton, 36 F. Supp. 2d 1118, 1120 (E.D. Ark. 1999).

238. *Id.* at 1121-22 (discussing the extensiveness of the questioning and his responses).

239. *See id.* at 1123.

240. COMMUNICATION FROM KENNETH W. STARR, INDEPENDENT COUNSEL, H.R. DOC. NO. 105-310, at 129 (1998), <https://www.govinfo.gov/content/pkg/CDOC-105hdoc310/pdf/CDOC-105hdoc310.pdf>. The conclusion of Starr's Report stated:

In this case, the President made and caused to be made false statements to the American people about his relationship with Ms. Lewinsky. He also made false statements about whether he had lied under oath or otherwise obstructed justice in his civil case. By publicly and emphatically stating in January 1998 that "I did not have sexual relations with that woman" and these "allegations are false," the President also effectively delayed a possible congressional inquiry, and then he further delayed it by asserting Executive Privilege and refusing to testify for six

The U.S. House of Representatives considered four articles of impeachment with eventually two articles being transmitted to the Senate for trial.²⁴¹ The two articles approved by the House alleged that the President “provided perjurious, false and misleading testimony to the grand jury regarding the Paula Jones case and his relationship with Monica Lewinsky,” and that he “obstructed justice in an effort to delay, impede, cover up and conceal the existence of evidence related to the Jones case.”²⁴² The specific conduct that was the essence of the obstruction article was described as “[e]ncouraging Lewinsky to file a false affidavit,” “[e]ncouraging Lewinsky to give false testimony if called to appear,” “[e]ncouraging Lewinsky to hide gifts,” “[g]etting Lewinsky a job to ensure her silence,” “[l]etting [Robert S. Bennett, Clinton’s attorney,] make false and misleading statements,” “[t]ampering with the testimony of Currie, a potential witness,” and “[l]ying to aides about his relationship with Lewinsky when he knew they were potential grand jury witnesses who would repeat the falsehoods before the grand jury.”²⁴³ Following a five-week trial in the Senate, President Clinton was acquitted of both articles of impeachment.²⁴⁴

2. *President Donald J. Trump*

The trajectory of the Trump Impeachment differs in large part from the Clinton Impeachment because the acts of impeachment were not items transmitted to the U.S. House of Representatives from the Mueller Investigation. On May 17, 2017, Acting Attorney General Rod Rosenstein issued an order appointing a special

months during the Independent Counsel investigation. This represents substantial and credible information that may constitute grounds for an impeachment.

Id. at 210.

241. The House Committee on the Judiciary Report had four articles of impeachment. See IMPEACHMENT OF WILLIAM JEFFERSON CLINTON, *supra* note 228.

242. See *Approved Articles of Impeachment*, WASH. POST (Dec. 20, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/articles122098.htm>.

243. Ruth Marcus, *The Articles Explained*, WASH. POST (Dec. 18, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/articles121898.htm>.

244. *President Bill Clinton Acquitted on Both Articles of Impeachment*, *supra* note 229. A transcript of the hearing on Article III demonstrates that witness tampering, false statements, and a false affidavit were the heart of the testimony and discussion. See Federal News Service, *The Impeachment Hearings: Dec. 11: Debate and Vote on Article III*, WASH. POST (Dec. 11, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/articleiii121198.htm>.

counsel to investigate Russian interference with the 2016 Presidential election.²⁴⁵ Indictments and convictions against a host of different individuals, many associated with the President, were an outgrowth of the Mueller Investigation.²⁴⁶ The *Mueller Report*, however, did not serve as the basis of the impeachment of President Trump, although information from the Report was used by the House Managers during the Impeachment trial.²⁴⁷

The impeachment of President Donald J. Trump revolved around whether he had solicited foreign assistance from the Ukrainian government to secure information about one of his political rivals in the upcoming election, including his withholding aid to this country. The House Investigation included testimony from some key members from the State Department, a whistleblower complaint that offered inside information concerning a telephone call between President Trump and Ukraine's President Volodymyr Zelensky, and other information provided during a variety of congressional hearings.²⁴⁸

Two articles of impeachment against President Trump were the eventual result of the House consideration of ongoing matters. Article I focused on allegations that the President abused his power. It is Article II that contains alleged obstruction conduct in charging him with obstruction of Congress for "blocking testimony and refusing to provide documents in response to House subpoenas in the impeachment inquiry."²⁴⁹ At the Senate trial there were issues

245. *Appointment of Special Counsel*, DEP'T OF JUST. (May 17, 2017), <https://www.justice.gov/opa/pr/appointment-special-counsel>.

246. See, e.g., Indictment, *United States v. Stone*, No. 1:19-cr-18 (D.D.C. Jan. 24, 2019), <https://www.justice.gov/file/1124706/download>; Plea Agreement, *United States v. Cohen*, No. 1:18-cr-850 (S.D.N.Y. Nov. 29, 2018), <https://www.justice.gov/file/1115566/download>.

247. See MUELLER REPORT VOL. I, *supra* note 142; MUELLER REPORT VOL. II, *supra* note 65; Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H.R. Res. 755, 116th Cong. (2019) (enacted), <https://www.congress.gov/bill/116th-congress/house-resolution/755/text>.

248. *Read the Articles of Impeachment Against President Trump*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/interactive/2019/12/10/us/politics/articles-impeachment-document-pdf.html>.

249. *Id.* Article II explicitly states that without lawful cause or excuse, President Trump directed Executive Branch agencies, offices, and officials not to comply with those subpoenas. President Trump thus interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, and assumed to himself functions and judgments

raised, including whether there was a quid pro quo, whether a criminal act was required for an impeachment conviction, whether the president had done anything improper,²⁵⁰ and whether the impeachment was brought with a political motive. One of the key points in the Senate trial was whether additional witnesses could be called, most notably the former National Security Advisor John Bolton,²⁵¹ and whether there was sufficient evidence to sustain an impeachment conviction. The House managers lost both issues and the impeachment trial ended with an acquittal for President Trump.²⁵²

C. *Contrasted with Obstruction as a Crime
and Sentencing Enhancement*

In looking at how impeachment premised on obstruction differs from obstruction as a federal crime and as a sentencing enhancement, the most obvious differences rest in the procedure being used to proceed with the charges, the ability of parties to present comparable evidence as one would at a criminal trial, and the constituencies that review the evidence. Less clear is the standard of proof needed for an impeachment. Conduct that might fit a specific criminal statute might prove insufficient for conviction in an impeachment matter. Some may claim that the political context for consideration of impeachment charges is a crucial difference.

Unlike federal statutes that outline the basis for criminal charges, or Sentencing Guideline § 3C1.1, which provides an enhancement for obstruction conduct, the source for impeachment is the U.S. Constitution, which has four provisions related to

necessary to the exercise of the “sole Power of Impeachment” vested by the Constitution in the House of Representatives.

Impeaching Donald John Trump, H.R. Res. 755. This Article of Impeachment then provides the specific acts that are claimed as an abuse of President Trump’s “powers in the high office.” *Id.*

250. See Molly O’Toole, *Trump’s Impeachment Counteroffensive Undercut by Bolton Report Bolstering Call for Witnesses*, L.A. TIMES (Jan. 26, 2020, 7:23 PM), <https://www.latimes.com/politics/story/2020-01-26/whos-on-trial-trumps-defense-team-turns-impeachment-into-counteroffensive>.

251. See Li Zhou, *Trump’s Defense in the Impeachment Trial Just Wrapped. Here Are 6 Key Moments*, VOX (Jan. 28, 2020, 6:10 PM), <https://www.vox.com/2020/1/28/21110795/trump-defense-impeachment-trial-ken-starr-alan-dershowitz>.

252. Baker, *supra* note 229.

impeachment.²⁵³ The process with House Managers from the House of Representatives, who then present the case for trial in the Senate, does not come with Federal Rules of Procedure and instead is governed only by agreements of the parties based upon prior impeachments.²⁵⁴ Unlike courts, which have precedent to rely on, impeachment procedure is fluid and not binding in large part because the constitutional language provides only a high-level overview of the process, and impeachment proceedings are few and far between. There can be strong disagreements, such as most recently seen in the impeachment trial against President Trump when the Senate voted not to hear witnesses that the trial managers wanted to present.²⁵⁵

It has continually been noted that a violation of a criminal statute is not imperative for an impeachment conviction. Although Alan Dershowitz, in the recent impeachment of President Trump, argued otherwise with regard to the first Article of Impeachment, which was premised on “abuse of power,” the long-standing position has been that a President can commit “high Crimes and Misdemeanors” without violating the criminal law.²⁵⁶ That said, in

253. One finds the following constitutional provisions related to impeachment: The Constitution states that “[t]he House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.” U.S. CONST. art. I, § 2, cl. 5. It also states that:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Id. art. I, § 3, cls. 6–7. Article II, § 2 provides that “[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” *Id.* art. II, § 2, cl. 1. Finally, Article II, § 4 states that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. *Id.* art. II, § 4.

254. See DOUG COLLINS, MODERN PRECEDENT ON IMPEACHMENT PROCEDURE: IMPEACHMENT PROCEEDINGS FOR PRESIDENTS RICHARD NIXON AND BILL CLINTON (2019), https://conaway.house.gov/uploadedfiles/modern_precedent_on_impeachment_procedure_-_ranking_member_report.pdf.

255. See Zhou, *supra* note 251.

256. See MAJORITY STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 116TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 1 (2019).

both the Impeachments of Presidents Clinton and Trump, there were existing federal obstruction crimes that easily could be matched with the charges against them. In the case of President Clinton, claims that he “obstructed justice in an effort to delay, impede, cover up and conceal the existence of evidence related to the Jones case”²⁵⁷ would merit consideration under 18 U.S.C. § 1503. Likewise, claims of perjury could also be prosecuted under this statute. In the Impeachment of President Trump, Article II’s claims that he obstructed Congress for “blocking testimony and refusing to provide documents in response to House subpoenas in the impeachment inquiry,”²⁵⁸ would fit consideration under 18 U.S.C. § 1505, “[o]bstruction of proceedings before departments, agencies, and committees.” Clearly there would be defenses that can be associated with each of these criminal statutes, but the wording of the Articles of Impeachment correlate to these federal statutes. The acquittals in both cases do not negate whether the language in the Articles of Impeachment correlate to obstruction statutes in the federal system.

The Impeachment process, despite resting on obstruction-related conduct in some cases, is very different from that of a criminal process that affords a codified scheme for witness testimony, a somewhat clearer base for finding criminality, and an appellate process for review. Arguably one can say that impeachments carry a review by the electorate in future presidential, House, and Senate elections, but this is limited to impeachments of elected officials who have upcoming elections. Although outside the legal structure and hardly a typical appellate process, elections provide a reaction to an impeachment result,

257. See *Approved Articles of Impeachment*, *supra* note 235.

258. See *Read the Articles of Impeachment Against President Trump*, *supra* note 248. Article II explicitly states that

without lawful cause or excuse, President Trump directed Executive Branch agencies, offices, and officials not to comply with those subpoenas. President Trump thus interposed the powers of the Presidency against the lawful subpoenas of the House of Representatives, and assumed to himself functions and judgements necessary to the exercise of the “sole Power of Impeachment” vested by the Constitution in the House of Representatives.

Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H.R. Res. 755, 116th Cong. (2019) (enacted).

albeit not necessarily focused on the alleged conduct that was the subject of review in the impeachment process.²⁵⁹

CONCLUSION

It is likely that overcriminalization and overfederalization have played a role in providing increased discretion to prosecutors to proceed against obstruction conduct.²⁶⁰ What was initially one federal statute has become an array of different obstruction statutes allowing prosecutors flexibility in their charging practices. Professor John F. Decker has written on ways to “[r]estrict[] the [b]oundaries” of what will constitute obstruction of justice, such as requiring an increased intent or limiting the range of conduct.²⁶¹ The focus here is not on curtailing the legislation or its interpretation by courts, although these remedies would certainly assist. Rather, what is considered here is how to achieve a fair and just system that provides consistency and thus predictability.

One has to ask whether discretion should be in the hands of a sole individual. Should Attorney General Barr read the *Mueller Report* and be able to conclude that the conduct alleged in the report should not be charged as obstruction?²⁶² Does the fact that his office charges obstruction of justice without underlying conduct in other cases demonstrate a contradiction? Even after his pronouncement following the *Mueller Report*, his office continued to charge obstruction of justice as an exclusive charge.²⁶³

259. This, of course, would be inapplicable for judicial impeachments, where the judge may continue a lifetime appointment if he or she is not convicted in the impeachment trial.

260. See Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, HERITAGE FOUND. & NAT’L ASS’N OF CRIM. DEF. LAWS. (2010), <https://www.nacdl.org/getattachment/8d5312e0-70f8-4007-8435-0ab703dabda9/without-intent-how-congress-is-eroding-the-criminal-intent-requirement-in-federal-law.pdf> (discussing the increased number of statutes and how many of these statutes have no or a low mens rea); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (discussing the political economy of criminal law).

261. Decker, *supra* note 5, at 128–29.

262. In his statements, Attorney General Barr did say that this was not only his decision but the decision of prior Acting Attorney General Rod Rosenstein. See Barr, *supra* note 151, reprinted in ELLEN S. PODGOR, KATRICE BRIDGES COPELAND, MICHAEL R. DIMINO, SR., RUTHANN ROBSON, LOUIS J. VIRELLI III, ANDREW M. WRIGHT & ELLEN C. YAROSHEFSKY, *THE MUELLER INVESTIGATION AND BEYOND* 16 (2020).

263. See *United States v. Williamson*, 746 F.3d 987 (10th Cir. 2014) (affirming an obstruction case premised on impeding due administration of Internal Revenue laws).

Confining prosecutorial discretion is difficult.²⁶⁴ One can educate prosecutors,²⁶⁵ confine statutes, readjust federal rules of evidence, and provide closer judicial oversight to achieve reform. For example, the Supreme Court rejected prosecutors using a Sarbanes-Oxley statute pertaining to document destruction as a basis for charging obstruction of justice against a Florida fisherman for throwing overboard undersized fish that he was told to bring back to shore.²⁶⁶ But the Supreme Court's reversal of the government's use of an obstruction charge against fisherman John Yates did not alleviate the collateral consequences he suffered of having his fishing business decimated by the government's stretching of this obstruction statute.

Government oversight prior to indictment provided in cases involving lawyers,²⁶⁷ international matters, and other high-profile individuals²⁶⁸ is not provided in typical street crime cases. Charging decisions in cases that are not front-pagers may be a single decision of a prosecutor who may be influenced by extensive dollars spent by law enforcement in investigating the case that he or she feels the need to placate the investigators' time, effort, and expense. And even with the use of Department of Justice Guidelines, their flexibility and status as mere guidance precludes them from offering consistency, as they are unenforceable at law.²⁶⁹

As profoundly noted by Professor Angela Davis, at a minimum, reform should achieve goals of "(1) the elimination of the arbitrary exercise of prosecutorial discretion, and (2) the establishment of initiatives to strengthen the current mechanisms of prosecutorial accountability."²⁷⁰ Achieving these goals is possible here.

264. See generally Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515 (2009) (discussing prosecutorial power with process crimes).

265. See generally Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000) (calling for increased education for prosecutors in their discretionary decision-making role).

266. *Yates v. United States*, 574 U.S. 528 (2015).

267. U.S. Dep't of Just., Just. Manual § 9-2.032 (2020), <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.400>.

268. See *id.* § 9-2.400. In the cases with international implications, the oversight is often to avoid international ramifications.

269. See generally Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167 (2004) (discussing the non-enforceability of Department of Justice internal guidelines).

270. DAVIS, *supra* note 8, at 180.

Suggested here is that transparency can offer better accountability.²⁷¹ More data is needed to fully consider the charging practices in the obstruction of justice realm. The data available in the sentencing realm needs to be replicated in the charging arena. The U.S. Sentencing Commission's data provides the number of cases having the lead charge for each obstruction of justice statute.

It also provides the sentence on each of these cases. But it fails to provide the charging numbers as well as the pre-indictment bargaining numbers that may have occurred in determining whether obstruction of justice would be charged or not.

Data transparency will also offer defense counsel with a wider range of arguments against charges that are outside the norms in the practice. It allows those in a smaller U.S. Attorney's Office, like Wyoming, the ability to compare what is happening in their locale with situations in New York or Washington, D.C. Consistency can be enhanced with increased data compilation. It also allows courts to offer better oversight and accountability²⁷² when considering pre-trial motions and sentencing recommendations.

This data can also be influential in the impeachment world. It will allow consideration of whether there were criminal cases indicted for alleged lies in a civil action or claimed stonewalling of congressional subpoenas, the basis for the Clinton and Trump Impeachments. Data that reflects this information, data that is not quickly pulled together by the press to discuss actual charges, offers the public the ability to properly assess government actions.

Obstruction of justice is an important crime in that it rests at the heart of our administration of justice. Haphazard results in prosecutions, sentencings, and impeachments foster distrust in the government. Transparency, in contrast, can increase accountability.²⁷³

271. See generally David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010) (discussing the flaws with secrecy); Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463 (2019) (noting how accountability is at the heart of legitimacy); PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY (Máximo Langer & David Alan Sklansky eds., 2017) (providing comparative essays on prosecutorial accountability).

272. See generally Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016) (discussing the need for prosecutorial accountability to correct prosecutorial misconduct).

273. Virelli & Podgor, *supra* note 271, at 503.

