

Arthur Andersen, LLP and Martha Stewart: Should Materiality be an Element of Obstruction of Justice?

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I. INTRODUCTION

Arthur Andersen, LLP, prosecuted for the crime of obstruction of justice under 18 U.S.C. § 1512, and Martha Stewart, prosecuted for several criminal charges including obstruction of justice under 18 U.S.C. § 1505, are presently appealing their convictions. These two recent convictions have brought to the forefront the government's use of powerful obstruction of justice statutes.

Although obstruction of justice statutes appear throughout the United States Code,¹ the key obstruction of justice statutes are in chapter 73 of title 18. This chapter includes an array of criminal statutes that prohibit different types of obstructive conduct. For example, specific obstruction of justice statutes pertaining to “[i]nfluencing [a] juror by writing,”² “[o]bstruction of court orders,”³ and “[o]bstruction of State or local law enforcement”⁴ appear in chapter 73. Obstructive conduct to legislative bodies is commonly the subject of a § 1505 prosecution.⁵ Congress also provides criminal penalties for specific types of obstructive conduct such as “[o]bstruction of criminal investigations of health care offenses.”⁶ Recent additions by Congress, as a part of the Sarbanes-Oxley Act, include obstruction related to “[d]estruction, alteration, or falsification of records in Federal investigations and bankruptcy”⁷ and “[d]estruction of corporate audit records.”⁸

Clearly, prosecutors have many statutory choices in presenting charges of obstruction of justice, and oftentimes more than one obstruction statute will apply to the conduct. The enormous discretion afforded to prosecutors to choose charges, defendants, and whether to even proceed with a prosecution, is magnified when prosecutors are provided with several obstruction statutes that allow them to proceed

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1. See, e.g., 26 U.S.C. § 7212 (2004) (“[a]ttempts to interfere with administration of internal revenue laws”).

2. 18 U.S.C. § 1504 (2004).

3. 18 U.S.C. § 1509 (2004).

4. 18 U.S.C. § 1511 (2004).

5. 18 U.S.C. § 1505 (2004) (“[o]bstruction of proceedings before departments, agencies, and committees”); see also *United States v. Poindexter*, 951 F.2d 369, 388 (D.C. Cir. 1991) (reversing § 1505 conviction).

6. 18 U.S.C. § 1518 (2004).

7. 18 U.S.C. § 1519 (2004).

8. 18 U.S.C. § 1520 (2004).

with a prosecution for conduct that was not the subject of their initial investigation.

This article begins by presenting a very brief overview of the proceedings in the cases of *Martha Stewart* and *Arthur Andersen, LLP*, two high profile cases that included obstruction of justice charges.⁹ The article then examines the elements of three key obstruction statutes: (1) 18 U.S.C. § 1503, the initial statute upon which many obstruction statutes are modeled; (2) 18 U.S.C. § 1505, the statute used in the *Martha Stewart* prosecution; and (3) 18 U.S.C. § 1512, the statute used in the prosecution of *Arthur Andersen, LLP*.

Covered next is “materiality,” an element in some false statement and fraud statutes. Although most courts have not included materiality as a required element for the crime of obstruction of justice, this article examines whether obstruction of justice charges warrant a materiality requirement despite the fact that the statute does not reference this term. Interestingly, materiality has been inserted in some instances when the obstructive conduct is being considered for the purposes of enhancing a convicted defendant’s sentence.

This article advocates for closer scrutiny of discretionary decisions when obstruction conduct is the basis of the charge. Clearly when the obstructive conduct precludes prosecution on the underlying charge there is no choice but to use an obstruction statute to achieve justice. Likewise, when a defendant harms a witness to avoid prosecution on the underlying conduct, it is necessary to impose punishment. In contrast, however, when the prosecutor selects an obstruction charge and fails to charge the underlying conduct solely for expediency purposes, the choice should be subject to scrutiny.¹⁰

This article advocates for legislative revision, court interpretation, or prosecutorial restraint to reign in the charging of obstruction of justice when this choice of charge is a mere shortcut to acquire a quick criminal conviction. A key focus of this piece is the need to factor in an element of “materiality,” as required for proof of obstruction of justice, when prosecutors can proceed with the underlying conduct they were investigating, but fail to do so upon realizing possible obstructive conduct.

9. These two cases were selected because of their high profile, although there are many other cases within the public eye that warrant equal review. See Andrew Ross Sorkin, *Ex-Banking Star Given 18 Months for Obstruction*, N.Y. TIMES, Sept. 9, 2004, at A1 (discussing the sentence given to Frank P. Quattrone on his conviction for obstruction of justice).

10. “[T]he cover-up is almost always easier to identify than the crime. Complicated financial transactions, executive bonuses and other activities involved in other trials of prominent executives are harder to explain than a simple lie.” Jonathan D. Glater, *Corporate Conduct: The Strategy; On Wall Street Today, a Break from the Past*, N.Y. TIMES, May 4, 2004, at C1.

II. MARTHA STEWART AND ARTHUR ANDERSON, LLP

There are three basic similarities between the prosecutions of Martha Stewart and Arthur Andersen, LLP. First, they were both charged with obstruction of justice crimes. Second, they were both initially under investigation for other crimes. The third similarity is that prosecutors in both cases did not proceed with the initial conduct under investigation, but rather selected to use “cover-up” conduct as the basis for the prosecution.¹¹

A. *Martha Stewart*

Martha Stewart¹² was charged by indictment¹³ with the crimes of conspiracy,¹⁴ false statements,¹⁵ obstruction of justice,¹⁶ and securities fraud.¹⁷ Despite discussion and press regarding possible insider trading, Martha Stewart was not charged with this offense.¹⁸ Stewart and Peter Bacanovic, her stockbroker, proceeded to trial in January of 2004. In February 2004, the court granted Stewart an acquittal on the securities fraud count.¹⁹ The jury convicted Martha Stewart on the remaining counts, and she was sentenced to a five-month jail sentence, five months of house arrest, two years of probation, and a \$30,000 fine.²⁰

11. See generally Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917 (2003) (discussing investigation and prosecution in *Andersen* case); Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 (2003) (discussing Enron and WorldCom investigations); Stuart P. Green, *Uncovering the Cover-Up Crime*, 42 AM. CRIM. L. REV. (forthcoming 2005) (discussing cover-up crimes); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937 (2003) (discussing Enron).

12. At the time of the indictment, Martha Stewart was “chairman (sic) of the board of directors and chief executive officer of Martha Stewart Living Omnimedia, Inc.” Superseding Indictment at 1, *United States v. Stewart* (S.D.N.Y. Jan. 7, 2004) (No. S1 03 Cr. 717 (MGC)), <http://news.findlaw.com/hdocs/docs/mstewart/usmspb10504sind.pdf> [hereinafter *Stewart Superseding Indictment*].

13. *Id.* at 20-36. There was also a civil suit filed by the Securities Exchange Commission against Martha Stewart and Peter Bacanovic. See Complaint, SEC v. Stewart (S.D.N.Y. June 4, 2003) (No. 03 CV 4070 (NRB)), <http://news.findlaw.com/hdocs/docs/mstewart/secmspb60403cmp.html>; see also Joan Macleod Heminway, *Save Martha Stewart? Observations About Equal Justice in U.S. Insider Trading Regulation*, 12 TEX. J. WOMEN & L. 247 (2003).

14. 18 U.S.C. § 371 (2000).

15. 18 U.S.C. § 1001 (2000).

16. 18 U.S.C. § 1505 (2000).

17. 15 U.S.C. § 78j(b), ff (1997); 18 U.S.C. § 2 (2000).

18. A key issue presented in her appeal to the Second Circuit concerns the “barrage of pretrial leaks and in-court accusations” that “left the indelible impression that she was guilty of that offense.” Brief for Defendant-Appellant Martha Stewart at 2, *United States v. Stewart*, (2d Cir. Oct. 8, 2004) (No. 04-3953(L)-cr), http://lawprofessors.typepad.com/whitecollarcrime_blog/files/Brief.pdf (last visited Mar. 16, 2005) [hereinafter *Brief for Defendant-Appellant*]. Additionally, Stewart is arguing that the district court erred in failing to permit her to respond “to those charges and prevented the jury from understanding what was—and was not—properly before it.” *Id.*

19. *Id.* at 13.

20. See Constance L. Hays, *5 Months in Jail, and Stewart Vows, “I’ll Be Back,”* N.Y. TIMES, July 17, 2004, at A1. At the time of the writing of this article the defense and government briefs in this case had just been filed in the Second Circuit.

Stewart was alleged to have disposed of shares of ImClone stock in the fall of 2001, at a time when the Food and Drug Administration was considering the approval of a cancer drug made by ImClone.²¹ It was also at a time that the FDA had notified ImClone that the application for approval of this drug was being rejected.²² The indictment stems from statements she was alleged to have made to the Securities Exchange Commission during its investigation of this matter.

Deputy Attorney General James Comey stated that the decision to prosecute Martha Stewart had to do with her “lying.”²³ The obstruction charge in the indictment was also premised upon her providing “false and misleading information to the SEC relating to [her] sale of ImClone stock.”²⁴ Martha Stewart was never charged with the underlying conduct that was the basis for the investigation, but rather was charged with conduct that resulted from the investigation. The obstruction of justice charge in this case concerned obstruction to a government agency under 18 U.S.C. § 1505.

B. *Arthur Andersen, LLP*

Arthur Andersen, LLP, an “accounting and consulting” company, was charged by way of indictment with obstruction of justice under 18 U.S.C. § 1512(b).²⁵ Andersen was accused of “corruptly persuading its employees to destroy documents with an intent to impair their availability in a United States Securities and Exchange Commission (SEC) investigation.”²⁶

The *Andersen* case stems from an investigation of Enron.²⁷ While the defense claims that Andersen was “encouraging its employees to comply with the firm’s standard document retention policy during the four-week period that preceded the SEC’s initiation of a formal pro-

21. Brief for Defendant-Appellant, *supra* note 18, at 6.

22. See Kathleen F. Brickey, *Mostly Martha*, 44 WASHBURN L.J. 517.

23. See Transcript, *CNN Newsnight*, Aaron Brown (June 4, 2003), <http://www-cgi.cnn.com/TRANSCRIPTS/0306/04/asb.00.html> (last visited Mar. 16, 2005) (quoting James Comey, stating that “[t]his criminal case is about lying, lying to the FBI and lying to investors”); see also *Martha Stewart Indicted, to Step Down as CEO*, CTV.CA NEWS, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20030605/martha_stewart_charges_030604/Entertainment?s_name= (last visited Mar. 16, 2005).

24. Superseding Indictment, *supra* note 12, at 35, <http://news.findlaw.com/hdocs/docs/mstewart/usmspb10504sind.pdf>.

25. Indictment, at 7-8, *United States v. Arthur Andersen, LLP* (S.D. Tex. Mar. 7, 2002) (No. CRH-02-121), <http://news.findlaw.com/hdocs/docs/enron/usandersen030702ind.html> (last visited Mar. 16, 2005). The statute has been modified since this prosecution. See *infra* notes 66-68 and accompanying text.

26. Brief of the United States in Opposition at 1-2, *Arthur Andersen, LLP v. United States*, 125 S. Ct. 823 (2004) (No. 04-368).

27. See generally Kathleen F. Brickey, *Andersen’s Fall from Grace*, 81 WASH. U. L.Q. 917 (2003) (describing in detail the prosecution of Arthur Andersen, LLP and the aftermath of this case); Sterling P.A. Darling, Jr., Note, *Mitigating the Impressionability of the Incorporeal Mind: Reassessing Unanimity Following the Obstruction of Justice Case of United States v. Arthur Andersen, L.L.P.*, 40 AM. CRIM. L. REV. 1625 (2003) (discussing the issue of jury unanimity as it arose in this trial).

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ceeding concerning Enron Corporation in 2001,”²⁸ the government responded that “[t]he evidence showed that, to prevent Enron’s and its own financial misdeeds and aggressive accounting from being uncovered by the SEC, petitioner instructed its employees to undertake an unprecedented campaign of document destruction.”²⁹ The company was convicted and “sentenced to five years of probation, fined \$500,000, and ordered to pay a special assessment.”³⁰ The Fifth Circuit affirmed this conviction,³¹ and certiorari was granted by the Supreme Court on January 7, 2005.³²

III. DISSECTING THE STATUTES

This section considers three obstruction of justice statutes that are extremely popular with prosecutors.³³ It looks first at the history and development of this crime through the lens of the general obstruction statute, 18 U.S.C. § 1503, that served as the model for later obstruction statutes. Next it examines 18 U.S.C. § 1505, one of the crimes included in the prosecution of Martha Stewart. Finally, 18 U.S.C. § 1512(b) is examined, as this was the statute upon which the entire Arthur Andersen, LLP prosecution was based.

A. 18 U.S.C. § 1503

Section 1503³⁴ serves as the focal point of the obstruction of justice statutes and provides the backdrop for much of the initial law

28. *Arthur Andersen, LLP v. United States*, Petition for a Writ of Certiorari, 2004 WL 2070872, at *9 (U.S. 2004).

29. Brief of the United States in Opposition at *1, *Arthur Andersen, LLP*, 125 S. Ct. 823 (2004) (No. 04-368).

30. *Id.* One of the collateral consequences of this conviction is that the “conviction barred Andersen from auditing public companies.” *Andersen Proposal Wins an Initial OK*, FT. WORTH STAR-TELEGRAM, July 25, 2003, at 2.

31. *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 284 (5th Cir. 2004).

32. 125 S. Ct. at 823.

33. See generally Sarah Roadcap, Note, *Obstruction of Justice*, 41 AM. CRIM. L. REV. 911 (2004).

34. 18 U.S.C. § 1503 (2000) provides in part (a) of the statute:

(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.

Id.

regarding obstruction of justice. Section 1503 finds its roots in an Act of 1831³⁵ that criminalized contemptuous conduct.³⁶ The statute was eventually divided, with § 401 condemning “obstructive acts in the court’s presence, and 18 U.S.C. §1503 contemptuous conduct away from [the] court.”³⁷

Initially, § 1503 concentrated on obstruction of “officers, jurors, and witnesses.”³⁸ The passage of the Victim and Witness Protection Act of 1982 transferred key aspects of the statute to new statutes, §§ 1512 and 1513, that were specifically designed to offer protection to witnesses. Section 1512 focuses on obstructive conduct occurring to witnesses, victims, and informants prior to a proceeding,³⁹ and § 1513 criminalizes retaliatory conduct against witnesses, victims, and informants.⁴⁰ Both of these statutes provide for extraterritorial jurisdiction.⁴¹

Section 1503 criminalizes acts of obstruction to jurors or court officers. It also includes an omnibus clause criminalizing acts of obstruction of the “due administration of justice.” The key elements that a prosecutor must prove to sustain a conviction under the omnibus clause of § 1503 are that the defendant: (1) “corruptly or by threats or force”; (2) endeavored; (3) “to influence, obstruct, or impede, the due administration of justice.” To obstruct the “due administration of justice,” it is necessary that there be a pending proceeding.⁴² Additionally, the accused must know or have notice of this pending proceeding and must intend to influence, obstruct, or impede its administration.⁴³

Typically one finds obstruction of justice charges where an individual attempts to interfere with or destroy evidence related to the

35. The Judiciary Act of 1789, when it established the lower courts, gave these courts contempt powers. The Act of 1831 was designed to curtail the powers initially given the courts, as a result of what Congress considered to be an abuse of the contempt powers. Congress was perturbed with Judge James H. Peck’s use of the contempt powers. When he was tried for impeachment, “[m]embers of Congress emphasized . . . that the contempt power should be limited to those situations in which it was necessary for the preservation of judicial functions.” *United States v. Reed*, 773 F.2d 477, 485 (2d Cir. 1985). Following that trial, the Act of March 2, 1831 was passed, limiting contempt powers and dividing the statute into two parts. Part one pertained to contempt, and part two was the predecessor to 18 U.S.C. § 1503. *Id.*

36. See Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1026-27 (1923).

37. See *United States v. Essex*, 407 F.2d 214, 217 (1969).

38. See generally ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 86 (3d ed. 2004).

39. 18 U.S.C. § 1512 (2000).

40. 18 U.S.C. § 1513 (2000).

41. See *id.* § 1512(h) (2000), 18 U.S.C. § 1513(d) (2000).

42. Roadcap, *supra* note 33, at 915. There is disagreement among the circuits on what constitutes a pending proceeding. *Id.* at 916-18. Additionally, two circuits have claimed that there is no requirement for a pending proceeding. *Id.*

43. See *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (requiring knowledge that the actions “are likely to affect the judicial proceeding”) (citations omitted).

criminal process.⁴⁴ Sometimes obstruction under the omnibus clause involves “encouraging or rendering false testimony.”⁴⁵ Criminal defense attorneys often caution clients of the ramifications of conduct that might impede the “due administration of justice.” In recent years, however, obstruction of justice has become a personal concern for criminal defense lawyers.⁴⁶ Attorneys have been convicted of obstruction of justice charges despite claims that they were advising witnesses⁴⁷ or representing their clients.⁴⁸

For prosecutors, the crime of obstruction of justice is an offense that is relatively easy to prove. This is in part because the statute does not require an actual obstruction.⁴⁹ Under the omnibus clause of § 1503, obstruction of justice merely requires an “endeavor” to obstruct justice.⁵⁰

Despite the ease with which prosecutors can prove obstruction cases, there are arguments that remain for defense counsel. Defense counsel has been successful in demonstrating that a defendant has not acted corruptly, a necessary element for this charge.⁵¹ When the government fails to provide a sufficient nexus “between the false statements and the obstruction of the administration of justice,” it can prove problematic to securing a conviction.⁵² Some courts have also

44. *See, e.g.*, *United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir. 1978) (obstructing justice by selling secret grand jury transcripts).

45. *See, e.g.*, *United States v. Griffin*, 589 F.2d 200, 204 (5th Cir. 1979) (finding that perjury by a witness can constitute obstruction of justice); *see also* Alicia M. Dixon, Robert Kwak, & Catherine Morris, Note, *Obstruction of Justice*, 34 AM. CRIM. L. REV. 815, 821 (1997).

46. *See* *United States v. Atkin*, 107 F.3d 1213 (6th Cir. 1997); *United States v. Lahey*, 55 F.3d 1289 (7th Cir. 1995); *United States v. Silverman*, 745 F.2d 1386 (11th Cir. 1984). *See generally* *Lawyer Convicted in Obstruction-of-Justice Trial*, CHICAGO DAILY LAW BULLETIN, June 12, 1997, at 2; James Jay Hogan & G. Richard Strafer, *The (Shrinking) Line Between Zealous Advocacy and Obstruction of Justice*, 1996 A.B.A. SEC. OF CRIMINAL JUSTICE AND CTR. FOR CONTINUING LEGAL EDUC. A-39.

47. *See, e.g.*, *Cole v. United States*, 329 F.2d 437 (9th Cir. 1964). In *Maness v. Meyers*, however, the Supreme Court found that a lawyer was not in contempt where in a civil proceeding the lawyer was alleged to have counseled “a witness in good faith to refuse to produce court-ordered materials on the ground that the materials may tend to incriminate the witness in another proceeding.” 419 U.S. 449, 465 (1975). The Court held that the attorney “may not be penalized even though his advice caused the witness to disobey the court’s order.” *Id.*

48. *See, e.g.*, *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987). Concerns of criminal defense attorneys are not limited to their exposure to obstruction of justice charges. *See generally* Paul G. Wolfteich, Note, *Making Criminal Defense a Crime Under 18 U.S.C. Section 1957*, 41 VAND. L. REV. 843 (1988).

49. *See* *United States v. Brimberry*, 744 F.2d 580, 583 (7th Cir. 1984) (“[T]he impossibility of accomplishing the goal of an obstruction of justice does not prevent a prosecution for the endeavor to accomplish the goal.”) (citation omitted).

50. *See* *Catrino v. United States*, 176 F.2d 884, 887 (9th Cir. 1949) (endeavoring to have someone commit perjury can be sufficient to constitute obstruction of justice).

51. *See* *United States v. Brand*, 775 F.2d 1460, 1460 (11th Cir. 1985) (reversing convictions of obstruction of justice).

52. *United States v. Thomas*, 916 F.2d 647, 654 (11th Cir. 1990) (finding insufficient evidence that “the statements had a natural and probable effect of impeding justice”); *see also* *United States v. Aguilar*, 515 U.S. 593 (1995).

refused to allow obstruction of justice convictions to stand when the conduct forming the obstruction is a mere false statement.⁵³

B. 18 U.S.C. § 1505

Section 1505⁵⁴ of the obstruction statutes, a statute that served as one of the charges against Martha Stewart, requires there to be “a proceeding pending before a department or agency of the United States.”⁵⁵ This phrase is the major difference between § 1503 and § 1505. While § 1503 is used for prosecutions related to courts and judicially related entities such as the grand jury, § 1505 focuses on legislative and administrative bodies. The remaining elements of § 1503 are also required in § 1505, these being that “the defendant knew of or had a reasonably founded belief that the proceeding was pending; and the defendant corruptly endeavored to influence, obstruct, or impede the due and proper administration of the law under which the proceeding was pending.”⁵⁶

There is an additional parallel between § 1503 and § 1505. Like § 1503, § 1505 was revised as a result of the Victim and Witness Protection Act. When the victims of the obstruction are witnesses, crime-victims, or informants, prosecutors may use § 1512 or § 1513 as the basis for the charges.⁵⁷ Section 1505, like § 1503, retains its generic omnibus clause that allows prosecutions when there has been an obstruction against the “due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States.”⁵⁸

In 1996, a new subsection was added to the definition statute,⁵⁹ a statute that supplies definitions of terms for many of the obstruction statutes located within Title 18.⁶⁰ This new subsection, 1515(b), offers

53. See *United States v. Fassnacht*, 332 F.3d 440, 448 (7th Cir. 2003) (finding that the conduct went beyond being a mere false statement).

54. The first part of the statute pertains to the Antitrust Civil Process Act. The second paragraph of the statute states,

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1505 (2004).

55. *United States v. Sprecher*, 783 F. Supp. 133, 163 (S.D.N.Y. 1992) (holding premised on attorneys giving false testimony to a government agency).

56. *Id.* (enumeration omitted).

57. See *infra* notes 65-79 and accompanying text.

58. Section 1505 also includes the language: “or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress.” 18 U.S.C. § 1505.

59. Pub. L. No. 104-292, § 3(2), 110 Stat. 3459 (1996).

60. 18 U.S.C. § 1515 (2000).

a specific definition of the term “corruptly” as used in § 1505.⁶¹ The need for this new definition can be attributed to the District of Columbia Circuit’s decision in *United States v. Poindexter*,⁶² where the court held the term “corruptly” as used in § 1505 was “too vague to provide constitutionally adequate notice that it prohibits lying to the Congress.”⁶³ The new definition clarifies the term “corruptly” for purposes of § 1505 so that prosecutors can continue to proceed with prosecutions against individuals who make “false or misleading statement[s].”⁶⁴

C. 18 U.S.C. § 1512

Section 1512, the obstruction statute under which Arthur Andersen, LLP was prosecuted, focuses on obstruction conduct aimed at witnesses, victims, or informants.⁶⁵ The statute has been modified since the *Andersen* prosecution.⁶⁶ Additionally, a new statute has been added to the federal obstruction statutes, 18 U.S.C. § 1519,⁶⁷ that

61. Section 1515(b) provides, “As used in [§] 1505, the term ‘corruptly’ 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 information.” *Id.*

62. 951 F.2d 369 (D.C. Cir. 1991).

63. *Id.* at 379.

64. 18 U.S.C. § 1515(b).

65. The title of the statute is “[t]ampering with a witness, victim, or an informant.” 18 U.S.C. § 1512.

66. 18 U.S.C. § 1512(b) now reads,

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than ten years, or both.

Id. Prior to the recent modification, § 1512(b) made “it a crime to persuade another person to destroy documents, but not a crime for a person to destroy the same documents personally.” S. REP. NO. 107-146, at 6 (2002); see also Daniel A. Shtob, Note, *Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c)*, 57 VAND. L. REV. 1429, 1445-46 (2004) (discussing a new subsection that was added to § 1512 of Title 18).

67. Section 1519 provides,

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

specifically allows for prosecutions premised upon document destruction.⁶⁸

In examining the legislative history of § 1512, it is apparent that the focus and purpose of this statute was to punish individuals engaged in conduct that intimidated witnesses.⁶⁹ The legislative history references the American Bar Association Criminal Justice Section's Victims Committee that heard testimony from numerous witnesses.⁷⁰ It was noted that "some 80 witnesses showed intimidation to be widespread and [a] pervasive problem which inherently thwarts the administration of criminal justice."⁷¹ The Victim and Witness Protection Act of 1982 states as one of its purposes "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process."⁷² It is clear in examining the legislative history that Congress was concerned about witnesses who were being intimidated in court and legislative proceedings.⁷³ There was an intent that this new statute, § 1512, be read as broadly as its predecessor § 1503.⁷⁴

There were some who expressed concern about the breadth of the statute at the time it was passed.⁷⁵ They feared that the "legislation is overbroad and would lead to unjust results and imposition of penalties."⁷⁶ Dissenters to the legislation were concerned that the statute might encompass conduct such as "a glaring look" or "an angry telephone call."⁷⁷

Even when the punishment for this crime was increased, the emphasis remained on protecting witnesses. On signing legislation to in-

18 U.S.C. § 1519 (2004).

68. Gary G. Grindler & Jason A. Jones, *Please Step away from the Shredder and the "Delete" Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67, 68 (2004).

69. Throughout the legislative history there are comments regarding the need to protect crime victims. The legislation had "strong bipartisan support" and had over "60 cosponsors [that] represent[ed] every point on the ideological spectrum." 97 CONG. REC. S11,435 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias).

70. S. REP. NO. 97-532, at 15 (1982).

71. *Id.*

72. Pub. L. No. 97-291(b), 96 Stat. 1248, 1249 (1982). The other two purposes were "(2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and (3) to provide a model for legislation for State and local governments." *Id.*

73. See 97 CONG. REC. S13,062-64 (daily ed. Oct. 1, 1982); 97 CONG. REC. H8201-03 (daily ed. Sept. 30, 1982); S. REP. NO. 97-532 (1982).

74. One finds in the legislative history a belief that the term "influence" is narrowed to "clearly culpable conduct" because the section "requires that force, threat, intimidation, or deception be employed." S. Rep. No. 970532, at 16 (1982), reprinted in 1982 U.S.C.A.N. 2515, 2522. "Section 1512 was amended in 1988 to cover non-coercive witness tampering." *United States v. Ladum*, 141 F.3d 1328, 1337 (9th Cir. 1988). The court used the legislative history from the 1988 amendment to resolve the issue of whether § 1503's omnibus clause could be used despite the passage of the new statute. *Id.* at 1338. The conduct to be included in "corruptly persuades" presented concern to courts as the legislative history did not provide "much assistance." See *United States v. Farrell*, 126 F.3d 484, 487-88 (3d Cir. 1997).

75. See H.R. REP. NO. 104-549, at 8 (1996) (concern expressed by Melvin L. Watt, Bobby Scott, and Jerrold Nadler).

76. *Id.*

77. *Id.*

crease the punishment, President Clinton stated that “[t]his legislation dramatically increases the punishment for those who would influence, tamper with, or retaliate against witnesses, jurors, and court officers in federal criminal cases.”⁷⁸

As stated by Sarah Roadcap in the annual white collar crime symposium of the American Criminal Law Review, a prosecution under § 1512(b) requires proof “that the defendant: (i) knowingly; (ii) engaged in intimidation, physical force, threats, misleading conduct, or corrupt persuasion toward another person; (iii) with intent to influence, delay, or prevent testimony or cause any person to withhold a record, object, document, or testimony; (iv) from an official proceeding.”⁷⁹

IV. MATERIALITY

Materiality is an element that the Supreme Court has recently recognized in several federal statutes. This section defines materiality as an element within a federal criminal statute, considers some of the statutes where it has been included, and then considers the appropriateness of requiring prosecutors to prove materiality as part of an obstruction of justice charge.

A. *Materiality Generally*

Considering materiality in the context of a false statement statute, the Court held that a statement which has “a natural tendency to influence, or [is] capable of influencing, the decision of the decision-making body to which it was addressed” is material.⁸⁰ Thus, extraneous statements that are inconsequential to the decision being made by the decision-making body cannot be the subject of a false statement charge.⁸¹ It is not necessary, however, that the statement or representation actually influence the body.⁸² Having the capacity to influence

78. President Clinton, Statement on Signing Witness Retaliation, Witness Tampering, and Jury Tampering Legislation (Oct. 4, 1996), <http://www.gpoaccess.gov/branches.html>.

79. Roadcap, *supra* note 33, at 931 (citing 18 U.S.C.A. § 1512(b) (2002)).

80. *Kungys v. United States*, 485 U.S. 759, 770 (1988) (citations omitted).

81. In the Supreme Court decision of *Neder v. United States*, 527 U.S. 1 (1999), the Court referenced in a footnote the definition of materiality as used in the RESTATEMENT (SECOND) OF TORTS section 538 (1977), which provides

that a matter is material if:

“(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.”

Neder, 527 U.S. at 22 n.5.

82. See, e.g., *United States v. Waldemer*, 50 F.3d 1379, 1382 (7th Cir. 1995) (holding that “[m]ateriality only calls for the lie to be a potential impediment, not an actual impediment, of the grand jury’s inquiry”); *United States v. Blandford*, 33 F.3d 685, 705 (6th Cir. 1994) (rejecting

can be sufficient.⁸³ In the context of mail fraud, courts have interpreted materiality similarly.⁸⁴

When materiality is included as an element of a statute, it serves to narrow the range of conduct that is subject to prosecution. Some statutes very clearly include materiality as an element of the offense. For example, the perjury⁸⁵ and false declarations⁸⁶ statutes both explicitly recite materiality as a required element of proof, and courts have placed the burden on the government to prove this element beyond a reasonable doubt.⁸⁷ Other statutes, however, are less certain and require courts to consider the statute's history and purpose to discern the intent of Congress.

B. *Materiality in False Statement Statutes*

In *United States v. Gaudin*,⁸⁸ a case involving the false statements statute,⁸⁹ the Supreme Court held that materiality was a question for the jury and not the judge to determine.⁹⁰ Respondents in this case were charged with violations of 18 U.S.C. § 1001 for statements made on federal loan documents. Although the trial court stated that materiality was an element of the offense, it did not permit the jury to determine whether sufficient evidence of this element had been presented by the prosecution.⁹¹ The court of appeals reversed, finding that materiality was for the jury to decide, and the Supreme Court then affirmed. In *Gaudin* the government conceded that materiality was an element of § 1001.⁹²

Another false statement statute, the statute concerning making a false statement to a federally insured bank, did not have a similar res-

defendant's claim that statements were not material); *United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) (stating that actual reliance or success is not necessary) (citation omitted).

83. See, e.g., *United States v. Pettigrew*, 77 F.3d 1500, 1511 n.1 (5th Cir. 1996); *United States v. Beuttenmuller*, 29 F.3d 973, 982 (5th Cir. 1994), *overruled on other grounds*, *Pettigrew*, 77 F.3d 1500, (finding that "[t]he concealment [] must simply have the capacity to impair or pervert the functioning of a government agency") (citation omitted).

84. See, e.g., *United States v. Henningsen*, 387 F.3d 585, 589 (7th Cir. 2004) (finding a sufficient scheme to defraud for purposes of mail fraud); *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002) (finding that the jury was adequately apprised that materiality was an element of the crime).

85. 18 U.S.C. § 1621 (2000).

86. 18 U.S.C. § 1623 (2000).

87. See *United States v. Bednar*, 728 F.2d 1043, 1047 (8th Cir. 1984) (holding that "the government has the burden of proving that the defendant's statements were material to issues considered by the grand jury") (citations omitted); *United States v. Gremillion*, 464 F.2d 901, 905 (5th Cir. 1972) ("the Government has the burden of proving materiality") (citation omitted).

88. 515 U.S. 506 (1995).

89. 18 U.S.C. § 1001 (2000).

90. *Gaudin*, 515 U.S. at 522-23.

91. *Id.* at 508-10.

92. *Id.* at 523. A concurring opinion of Justices Rehnquist, O'Connor, and Breyer noted that the government conceded that materiality is an element of the false statement statute. These Justices then stated that "[c]urrently, there is a conflict among the Courts of Appeals over whether materiality is an element of the offense created by the second clause of § 1001." *Id.* at 524.

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olution. In *United States v. Wells*,⁹³ the Supreme Court held that materiality was not an element of a crime under 18 U.S.C. § 1014. Despite the fact that most circuit courts of appeal held that materiality was in fact an element of § 1014,⁹⁴ the Court found that “an unqualified reading of § 1014 poses no risk of criminalizing so much conduct as to suggest that Congress meant something short of the straightforward reading.”⁹⁵

In *Wells*, the Court examined the history of this statute and found that in enacting § 1014 Congress was consolidating several existing statutes. Some of these statutes contained materiality as an element and others did not include this term. The Court stated that “[t]he most likely inference in these circumstances is that Congress deliberately dropped the term ‘materiality’ without intending materiality to be an element of § 1014.”⁹⁶

Justice Stevens, in his dissent in *Wells*, noted that “at least 100 federal false statement statutes may be found in the United States Code.”⁹⁷ While “[a]bout 42 of them contain an express materiality requirement; approximately 54 do not.”⁹⁸ He expressed a view that the two categories of cases, those with the term included and those with it omitted, were indistinguishable. Since the two classes of statutes had no rationale, he believed that they all should require an element of materiality.⁹⁹ Justice Stevens stated that Congress probably intended this result, “as the Government did in *Gaudin*—that the materiality requirement would be implied wherever it was not explicit.”¹⁰⁰ Thus, he credited the government’s concession in not arguing a requirement for materiality in *Gaudin*, and merely focusing on whether the question was for the jury or judge, as an admission that materiality was considered by everyone as an essential element in false statement statutes.

C. *Materiality in Fraud Statutes*

The Supreme Court was again faced with the issue of whether a statute required materiality in the case of *Neder v. United States*.¹⁰¹

93. 519 U.S. 482 (1997).

94. *Id.* at 486 n.3.

95. *Id.* at 498-99.

96. *Id.* at 493. The Court also discussed precedent for the statutes that were consolidated by the enactment of § 1014. *Id.* at 494-95 (discussing the Court’s holding in *Kay v. United States*, 303 U.S. 1 (1938)).

97. *Id.* at 505.

98. *Id.*

99. *Id.* at 505-09.

100. *Id.* at 509.

101. 527 U.S. 1 (1999).

Neder involved the mail,¹⁰² wire,¹⁰³ and bank¹⁰⁴ fraud statutes. The defendant, “an attorney and real estate developer,” was alleged to be “engaged in a number of real estate transactions financed by fraudulently obtained bank loans” and to also be “engaged in a number of schemes involving land development fraud.”¹⁰⁵ Despite the fact that the mail, wire, and bank fraud statutes did not have explicit language of materiality, the Court found that it was an element of these offenses.¹⁰⁶

Using the “framework set forth in” *Wells*, the Court explained that the first step required examination of the language of the statute.¹⁰⁷ In this case all parties agreed that materiality was not included in the language of these fraud offenses.¹⁰⁸ The second step, however, allows courts to interpret words using their common law meaning.¹⁰⁹

In *Neder*, the Court found “that the well-settled meaning of ‘fraud’ required a misrepresentation or concealment of *material* fact.”¹¹⁰ As such, the Court found “that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.”¹¹¹

In *Neder*, the Court found that not “*all* the elements of common-law fraud” should be incorporated in these new federal fraud statutes. The Court held that “[t]he common-law requirements of ‘justifiable reliance’ and ‘damages,’ for example, plainly have no place in the federal fraud statutes.”¹¹² Materiality, on the other hand, would be required because it was not “incompatible” with the fraud statutes.¹¹³

Justice Stevens, writing a concurrence in the *Neder* case, referenced his remarks from his dissent in *Wells*.¹¹⁴ He noted that “[t]he Court’s conclusion that materiality is an element of the offenses defined in 18 U.S.C. §§ 1341, 1343, and 1344 is obviously correct.”¹¹⁵ In some respects his statement on materiality being required for fraud statutes was more forceful than that expressed by the majority.

In addition to Justice Stevens, who concurred in the decision, all three dissenters to the majority opinion agreed with the Court on the issue of materiality being required. Their disagreement with the

102. 18 U.S.C. § 1341 (2004).

103. 18 U.S.C. § 1343 (2004).

104. 18 U.S.C. § 1344 (2000).

105. *Neder*, 527 U.S. at 4-5.

106. *Id.* at 25.

107. *Id.* at 20.

108. *Id.*

109. *Id.* at 21-22.

110. *Id.* at 22.

111. *Id.* at 25.

112. *Id.* at 24-25.

113. *Id.* at 25.

114. *See supra* notes 97-100 and accompanying text.

115. *Neder*, 527 U.S. at 29-30.

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Court's opinion concerned other parts of the decision.¹¹⁶ As such, the *Neder* Court was unanimous in its finding that mail, wire, and bank fraud required the government to prove materiality as an element of the offense.

V. MATERIALITY IN OBSTRUCTION STATUTES

A. *Examining the Statutes*

Like the fraud statutes, materiality is not a term used in 18 U.S.C. §§ 1503, 1505, and 1512, the key obstruction of justice statutes. In addition to these statutes not including this term, courts faced with this issue have found that materiality is not an element that the government is required to prove for the substantive crime of obstruction of justice.¹¹⁷ Lower courts have rejected the application of *Gaudin* to the crime of obstruction of justice.¹¹⁸ Even when the charge in a case explicitly uses a term of “materiality,” a district court found that 18 U.S.C. § 1505 does not require proof of materiality.¹¹⁹ The Supreme Court, however, has not given explicit guidance on whether materiality should be included in obstruction statutes.

B. *Obstruction in the Context of Sentencing*

In the context of sentencing, however, a different picture emerges. In deciding whether to enhance a sentence under the federal sentencing guidelines for “Obstructing or Impeding the Administration of Justice,”¹²⁰ courts routinely examine whether a statement is material.¹²¹ Sentencing Guideline § 3C1.1 uses language similar to that found in the obstruction statutes.¹²² And like obstruction statutes

116. The dissenters “believe[d] that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of every element of the crime charged—can never be harmless.” *Id.* at 30.

117. See *United States v. Mullins*, 22 F.3d 1365, 1370 (6th Cir. 1994) (holding that in a § 1503 prosecution “the government need not prove, as an element of the crime, that the alternations made in response to a grand jury subpoena were relevant to the grand jury’s investigation”).

118. See, e.g., *United States v. Rankin*, 1 F. Supp. 2d 445, 454 (E.D. Pa. 1998) (finding that materiality is not required for § 1503 and that “*Gaudin* is irrelevant”).

119. See *United States v. Sprecher*, 783 F. Supp. 133, 163 (S.D.N.Y. 1992).

120. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2004). Although the guidelines are no longer mandatory, they are still to be used by courts in an advisory capacity. See *United States v. Booker*, 125 S. Ct. 738 (2005).

121. See, e.g., *United States v. White*, 368 F.3d 911, 916 (7th Cir. 2004) (noting that if the perjury “could affect, to some reasonable probability, the outcome of the judicial process,” it can be “a form of obstruction of justice”); *United States v. Saunders*, 359 F.3d 874 (7th Cir. 2004) (stating that if the perjury was “on an immaterial matter, even in court, there would be no obstruction of justice”); *United States v. Anderson*, 259 F.3d 853, 879 (7th Cir. 2001) (enhancing a sentence premised upon perjury under the obstruction guideline).

122. It states that if

(A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and

(B) the obstructive conduct related to

(i) the defendant’s offense of conviction and any relevant conduct; or

under §§ 1503, 1505, and 1512(b), the guideline itself makes no mention of materiality.¹²³ The Commentary to the guidelines, however, uses materiality in describing “the types of conduct to which this [enhancement] applies.”¹²⁴ When the conduct is premised upon a false statement or the giving of false information, it is required that there be a showing of materiality.¹²⁵

In reflecting on this sentencing guideline, the Seventh Circuit in the case of *United States v. Buckley*¹²⁶ held that the government had to prove materiality when obstruction takes the form “of perjury or other lying” and the determination is being made as to whether to enhance a sentence because of this obstructive conduct.¹²⁷ Judge Posner, authoring this decision, stated that “a lie that is immaterial to the justice process is not a potential interference with it.”¹²⁸

C. *Should Materiality Be Read into the Statute?*

Since the obstruction statutes do not explicitly provide for materiality, they fail the first test employed by the Court in *Wells*.¹²⁹ Mere omission of materiality language in the statute, however, is not determinative of the issue. As noted by the Court in *Neder*, a common law meaning of the statute may authorize reading in a requirement of materiality.¹³⁰ Additionally, an unusually broad statute that criminalizes a vast amount of conduct may indicate Congress’s desire to limit the statute.¹³¹ Finally, it is necessary to see if a requirement of materiality is “incompatible” with the statute as a whole.

There are ample arguments that can be made for inserting materiality into obstruction statutes. This is particularly true when the obstruction is premised upon a false statement or “lying” as was alleged in the Martha Stewart case.¹³²

(ii) a closely related offense, increase the offense level by 2 levels.
U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2004).

123. *Id.*

124. *Id.* at cmt. n.4(d), (f)-(h) (2004).

125. *Id.* at cmt. n.4. Application notes f, g, and h all relate to false statement or perjurious forms of conduct. *Id.* at cmt. n.4(f)-(h). It can be argued, however, that note d requires a “material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender.” *Id.* at cmt. n.4(d).

126. 192 F.3d 708, 710 (7th Cir. 1999).

127. *Id.* at 710.

128. *Id.*

129. *See supra* notes 107-09 and accompanying text.

130. *Neder v. United States*, 527 U.S. 1, 21-22 (1999). Additionally, courts routinely insert a *mens rea* term into a statute when Congress omits such specific language in the statute. *See United States v. Staples*, 511 U.S. 600, 607 (1994) (finding that since the statute was not a public welfare offense, insertion of a *mens rea* term was appropriate).

131. *See United States v. Wells*, 519 U.S. 482, 498-99 (1997).

132. *See supra* note 23. In the case of Martha Stewart materiality was included in the charge under the false statement statute, but omitted in the charge of obstruction of justice. For the obstruction count, the jury was instructed in part:

First, that before the defendant you are considering was interviewed in 2002, as set forth in the indictment, a proceeding was pending before the SEC; Second, that the

When the obstruction is presented as a false statement, consideration needs to be given as to whether the conduct fits a mold closer to *Neder* and *Gaudin*, such that materiality should be required, or is more like *Wells*, and not permitted. This could be considered from the perspective of the particular conduct, limiting the materiality requirement to when the obstructive conduct is premised upon a false statement. Alternatively, it could be applied to all conduct to narrow the breadth of the statute. As previously noted, when the conduct is perjury or a false statement, materiality is considered when determining a sentencing enhancement for obstructive conduct.

Some may claim that materiality is implicit in the element “corruptly endeavored to influence.” This argument, however, has a serious flaw in that “corruptly endeavored to influence” is premised upon a subjective determination of what the defendant has done, as opposed to materiality, which is an objective standard. Where a subjective presentation can be weakened when a defendant does not present personal evidence on the witness stand, an objective argument may still be viable, as the jury is considering the evidence from the standpoint of a reasonable person as opposed to looking at it solely from the perspective of the accused.

Another argument that might be made as to why materiality should not be read into obstruction statutes is that it is incompatible with the statutes because these statutes merely require an “endeavor” to obstruct justice.¹³³ In this respect, obstruction statutes operate similarly to attempt statutes in that “efforts to impede the processes of legal justice” may be sufficient.¹³⁴ It is not necessary that there be an actual obstruction, as success is not required.¹³⁵

This argument, however, approaches the statute in a vacuum and fails to read the endeavor clause as part of the entire phrase, “endeavors to influence, intimidate, or impede,” as used in § 1503 and § 1505, or “knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so,” as used in § 1512(b).

Materiality can easily be found in those situations where one attempts to kill a witness who might be crucial to the government’s case.

defendant you are considering knew that a proceeding was pending before the SEC; and that the interviews were part of the proceedings; and Third, that the defendant you are considering corruptly endeavored to influence, obstruct or impede the due and proper exercise of the power of inquiry or investigation of the SEC. Instructions at Tr. 4867, *United States v. Martha Stewart*, (S.D.N.Y. 2004) (No. S1 03 Cr. 717 (MGC)). The instructions included additional paragraphs on each of the above elements, but materiality was not used as a term in this portion of the instruction. *Id.*

133. *See United States v. Lench*, 806 F.2d 1443, 1445 (9th Cir. 1986) (stating that only an endeavor to conceal is necessary for § 1503).

134. *See Shtob*, *supra* note 66, at 1443 (stating that “‘endeavor’ as used in [§] 1503 signifies a standard lower than that of attempt and, while like attempt it does not require success”).

135. *See United States v. Ruggiero*, 934 F.2d 440, 446 (2d Cir. 1991) (finding that § 1503 requires only an endeavor and not success).

Likewise, the defendant who attempts to keep a witness from presenting truthful *material* testimony before a grand jury could meet this element. Finally, in instances pertaining to the destruction of evidence, one merely needs to examine whether the destruction, if accomplished, would be material. Thus, if the evidence was not destroyed, because of either law enforcement intervention or other factors, the test of materiality would rest upon whether the evidence, if it had been destroyed, would be material to the case. As such, the term “endeavor” is not diametrically opposed to materiality and does not preclude prosecutions.

In the *Buckley* case, Judge Posner provides language that could easily be used for adding materiality to the substantive offense of obstruction of justice.¹³⁶ Although his language was used in the context of determining obstructive conduct for the purposes of sentencing, he directly considers endeavor or attempt conduct when he states that “because the offense is one of attempting rather than of succeeding in obstructing justice, all that is required for a lie to be material is that it could, to some reasonable probability, affect the outcome of the process.”¹³⁷

D. *Factoring in Materiality in Obstruction Cases*

Factoring in materiality into obstruction of justice cases can be accomplished in one of three ways. Perhaps the most forceful and surest way of achieving this result is through legislative revision. Specifying materiality as an element in the statute will foreclose any argument of ambiguity.

Alternatively, courts could read an element of materiality into the statute. This is in keeping with the *Neder* decision, where the Court read an element of materiality into three fraud statutes.¹³⁸ It also provides consistency in that obstruction conduct that increases a sentence should be interpreted in a like manner as the substantive offense. Finally, the breadth and power provided to prosecutors requires some oversight. Reading in an element of materiality limits prosecutorial discretion to using obstruction charges in instances when it is material to the investigation, precluding its use when it would be inconsequential. In these latter instances, the government is forced to proceed with the investigation and pursue the substantive conduct that it originally considered charging.

136. 192 F.3d 708, 710 (1999); see also *supra* note 25 and accompanying text.

137. *Id.* at 710.

138. See *supra* notes 110-11 and accompanying text. See *Neder v. United States*, 527 U.S. 1 (1999).

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Perhaps the easiest way to have materiality considered as an element of the crime would be for prosecutors to self impose this factor in their decision-making process. The creation of a Department of Justice (DOJ) guideline that restricted obstruction prosecutions to those instances when they are truly necessary, as opposed to when they can merely result in a quick conviction, would provide substantial change to a criticized procedural process.¹³⁹

The use of prosecutorial guidelines as a restraint in a prosecution is not a new innovation for the government. For example, guidelines presently exist in the DOJ restricting the bringing of Racketeer Influenced and Corrupt Organization Act (RICO) charges.¹⁴⁰ Although the guidelines may not be enforceable at law, and may be overlooked by some prosecutors,¹⁴¹ a policy would provide a step in the direction of using prosecutorial power wisely.

VI. CONCLUSION

It is difficult to say whether the results in the trials would be the same if the juries in the *Martha Stewart* and *Arthur Andersen, LLP* cases had received materiality instructions for the obstruction counts. It is quite possible that the juries might have found that the statement given by Martha Stewart was in fact material to the Securities Exchange Commission investigation and that the documents destroyed in the *Andersen* case were crucial to the prosecution of the underlying conduct that was the subject of the investigation.

What is important is that the juries in these two cases did not have that opportunity. Instead, prosecutors proceeded with obstruction charges that allowed them to obtain convictions without the need to further investigate or prosecute the underlying conduct that they were originally pursuing. Unlike some cases, where obstruction is one of several charges that can be pursued, in these two cases, the only crimes brought by the government pertained to “cover-up conduct” as opposed to the substantive crimes. One has to wonder if we are sacrificing important judicial values for efficiency.

139. See Glater, *supra* note 10. (discussing coverup crimes).

140. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.200 (1997).

141. Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J.L. & PUB. POL'Y 167, 169 (2004) (discussing the uses and abuses of Department of Justice guidelines).

