



# Obstruction of Justice As a Sidecar

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## Introduction

The U.S. Court of Appeals for the Second Circuit (Second Circuit) recently [vacated](#) the sentence of an Air Force veteran convicted of providing material support to a foreign terrorist organization and of obstruction of justice. The Second Circuit concluded that the district court judge had not sufficiently explained his sentencing rationale and sent the case back for resentencing. A concurring member of the panel [expressed](#) concern over the expanded use of obstruction of justice charges.

## Background

Pugh [served](#) in the U.S. Air Force. After his discharge, he worked as an aircraft mechanic in the Middle East. He gradually became enamored of the Islamic State of Iraq and the Levant (ISIS). Intent on joining ISIS, he flew to Istanbul from Cairo, hoping to make his way to the Syrian border. Turkish officials, however, denied him entry and put him on a return flight to Egypt. Egyptian authorities detained him and discovered that he had attempted to destroy several of his electronic devices. Egyptian officials [turned](#) the devices over to U.S. authorities and deported Pugh to the United States. A day after he arrived, federal officers arrested him at his father's home in New Jersey.

Soon thereafter, a federal grand jury indicted Pugh for attempting to provide material support to a terrorist organization and for obstructing justice. A trial jury [convicted](#) him on both charges, and the court sentenced him to prison for 35 years, the maximum statutory sentence for each offense – 15 years for attempting to provide material support and 20 years for obstruction. On appeal, Pugh [challenged](#) the sufficiency of the evidence to convict him, the introduction in evidence of a draft letter to his wife, and his sentence.

## Second Circuit

The Second Circuit affirmed Pugh's conviction, found no error in admission of the letter, but vacated his sentence and returned the case to the lower court for resentencing. Pugh's marital communication challenge is somewhat [unusual](#). Pugh speaks only English. His wife speaks no English. They communicate verbally and in writing through third parties, including family, friends, and possibly

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Facebook Messenger/GoogleTranslate. The communication at issue was a draft letter to his wife found on Pugh's laptop and containing incriminating statements. The Federal Rules of Evidence [govern](#) the admissibility of evidence in federal criminal cases as a general rule. The federal rules [defer](#) to common law "as interpreted by United States Courts in light of reason and experience" for questions of privilege such as the admissibility of confidential marital communications. Under a common law formulation, federal courts [consider](#) marital communications privileged if (1) the parties to the communication are married; (2) the communication is intended to convey information between the spouses; (3) the spouses intend the communication to be confidential. The Second Circuit [agreed](#) with the trial court that Pugh had failed to show that he intended the draft letter to serve as a marital communication. He provided no evidence that his wife had access to his laptop or that he regularly composed draft messages to his wife in English on his laptop before entering them on Facebook.

His sufficiency arguments fared no better. A conviction for attempting to provide material support to a foreign terrorist organization [required](#) the government to prove that Pugh intended to provide support and that he took a substantial step to providing it. Among other things, under the statute, support can [take the form](#) of personal service at the direction of the terrorist organization. A "substantial step" [must](#) be more than mere planning, but need not be the last act necessary for completion of the offense. Pugh [argued](#) that he had not taken a substantial step but had merely viewed ISIS propaganda, expressed his own views, and taken a flight from Cairo to Istanbul. The Second Circuit acknowledged that Pugh had neither sworn an allegiance to ISIS nor been in contact with any of its representatives. Nevertheless, the court [concluded](#) "the evidence supports the finding that he was traveling to Turkey to cross the Syrian border in an effort to join ISIS.... But for the interference of Turkish officials, there is no indication that Pugh would not have completed his journey to Syria to join ISIS."

Obstruction of justice also can take many forms. In *Pugh*, the relevant proscription, [18 U.S.C. § 1512\(c\)](#), reads: "Whoever corruptly-(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so . . ." It [condemns](#) destruction or concealment of potential evidence with the intent to prevent its use in an official federal proceeding or attempting to impede such a proceeding. The proceeding [may be](#) pending or reasonably foreseeable. The Second Circuit [rejected](#) Pugh's contention that U.S. proceedings were not foreseeable when he deleted files on some of his electronic devices and smashed others. At the time, a U.S. ally, Turkey, was holding Pugh, at the beginning of a well-traveled path used by U.S. citizens bent on joining ISIS in Syria. Moreover, the government introduced evidence that before his detention at the Turkish airport, Pugh knew of a U.S. citizen who had been prosecuted for trying to travel to Syria to join ISIS. "Accordingly, the jury could have reasonably concluded that a similar proceeding was foreseeable to Pugh at the time he was detained."

Pugh enjoyed greater success with his sentencing argument. Federal appellate courts will vacate a sentence that is either procedurally or substantively [unreasonable](#). Procedurally unreasonable sentences occur when the sentencing court fails to follow the statutory or judicially prescribed steps in the sentencing process. In *Pugh*, the Second Circuit [determined](#) that the sentencing court had failed to explain why it imposed the maximum permissible sentence as required in [18 U.S.C. § 3553\(c\)](#). The appellate court expressed particular concern over the unexplained imposition of consecutive sentences. Both a [statute](#) and the sentencing [guidelines](#) favor concurrent sentences.

## Concurrence

In a concurring opinion, Circuit Court Judge Calabresi contended that requiring the trial court to articulate reasons for a particular sentence is especially useful for sentences involving both obstruction of justice and the offense whose prosecution the defendant hoped to obstruct. He [suggested](#) that sentences for

obstruction should address the seriousness of the obstruction not the desire to exceed the maximum sentence available for the crime whose prosecution was obstructed. (“The case before us illustrates how dangerously far 18 U.S.C. § 1512(c) now extends.”) Looking at *Pugh*, the concurring opinion [questioned](#) whether “the court imposed the sentence it did based on the heinousness of Defendant’s attempted terrorism and simply used the obstruction conviction as a means to go beyond the statutory maximum of that terrorism count.” The opinion noted that “[a]s constructed by federal courts, the crime [of obstruction] has been applied expansively, as a tacked-on charge in everything from attempted robbery and murder cases to run-of-the-mill drug busts.” Moreover, it explained, the obstruction charge “can now reach everything from the smallest crime to the broadest political attack. . . .” It [urged](#) federal judges to set obstruction sentences to “reflect the severity of the obstruction of justice, in the context of a particular underlying crime, and not prosecutorial or judicial dissatisfaction with the limits Congress placed on the gravity of that underlying crime.”

## Congressional Considerations

Congress may have intended the result the concurring opinion in *Pugh* decries. That is, in criminalizing the destruction of documents and records to obstruct a federal investigation, Congress may have intended to give prosecutors and judges the flexibility to depart from statutory maximum penalties in particularly egregious cases. The portion of the statute at issue was added by the Sarbanes-Oxley Act of 2002, on the heels of accounting scandals that led to collapse of the Enron Corporation and the demise of the prosecution of its accounting firm, Arthur Andersen, for obstruction under the statute as it existed prior to Sarbanes-Oxley. The [Supreme Court](#) set aside Arthur Andersen’s conviction under the obstruction statute as it existed before enactment of the current version, on the basis of flawed jury instructions.

On the other hand, the federal sentencing guidelines already feature a general sentencing adjustment for an underlying offense made more culpable by an accompanying obstruction of justice. [USSG § 3C1.1](#). Yet, the enhancement is relatively modest, and the final sentence remains capped by the statutory maximum penalty set for the underlying offense.

Elsewhere in the federal criminal code, Congress has used several different approaches to dealing with auxiliary misconduct. For example, faced with a 20-year sanction for [laundering](#) the proceeds of a 5-year wire fraud offense, Congress raised the penalty for [wire fraud](#) to 20 years. Congress determined that an individual who [aids and abets](#) the commission of a federal crime should face the same punishment as the individual who commits the underlying offense. Having uncovered a conspiracy to commit any of several federal offenses, such as conspiracy to obstruct justice, Congress has afforded prosecutors the option of proceeding under either a general 5-year [conspiracy](#) charge or a more severely punished [conspiracy](#) charge embedded in the underlying statute. For some crimes, such as a violent attempted [civil rights](#) offense, Congress has tied the penalty to the severity of the completed offense, as the *Pugh* concurring opinion suggests.

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