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Yates: A Welcome End To Prosecutorial 'Fishing' Expedition

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In this week's ruling in Yates v. United States, the U.S. Supreme Court put an appropriate end to the government's efforts to expand the Sarbanes-Oxley Act's so-called "anti-shredding" provision, 18 U.S.C. § 1519, far beyond the conduct that Sarbanes-Oxley was designed to address. Sarbanes-Oxley was enacted in response to a massive accounting fraud at Enron, and the concern that Enron's outside auditor had destroyed incriminating documents. The Yates case involved nothing close to either corporate misconduct or document destruction — rather, John Yates, a commercial fisherman, was convicted of ordering his crew to toss overboard a number of undersized fish a deputized federal officer had identified in Yates' catch.

The government contended that the plain meaning of the Sarbanes-Oxley provision prohibiting destruction or concealment of a "tangible object" could apply to any tangible object, including fish. In reversing Yates' conviction, a divided court struck down the government's expansive reading of this anti-shredding provision. In so doing, the court reinforced the principle that the language of a statute must be analyzed in an appropriate context and, more importantly, put a damper on prosecutors' dangerous trend toward applying certain statutes to criminalize behavior beyond what one would reasonably understand to be prohibited.

A Defining Moment

Justice Ruth Bader Ginsberg's plurality opinion held that a "tangible object" under §1519 "must be one used to record or preserve information." The plurality rejected the government's argument that the words of § 1519 "support reading the provision as a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter under federal investigation." Applying principals of statutory construction, the plurality reasoned that despite dictionary definitions suggesting that the words "tangible object" might "cover[] the waterfront, including fish from the sea," the words must be read in the broader context of the statute as a whole. As the court explained: "Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in difference contexts, sometimes mean different things." Viewing the words "tangible object" in § 1519 in the overall context of the Sarbanes-Oxley Act, as well as the statute's placement in the Criminal Code adjacent to specialized provisions aimed at corporate fraud, the court concluded that "an aggressive interpretation of 'tangible object' must be rejected."

Finally, the court invoked the rule of lenity, stating that if statutory analysis leaves any doubt as to the meaning of "tangible object," any doubt must be resolved in favor of the defendant. The court reasoned that that principle was relevant with respect to § 1519, where the government's expansive reading of § 1519 "exposes individuals to 20-year prison sentences for tampering with any physical object that might have evidentiary value in any federal investigation into any offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil." Thus, the court ruled, in determining the meaning of "tangible object" in § 1519, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

Not the Usual Suspects

One somewhat surprising aspect of the Yates ruling was unusual lineup of justices. Justice Ginsberg wrote for a plurality that included liberal Justices Stephen Breyer, Ginsberg and Sonia Sotomayor (not surprising), but also — somewhat surprisingly — Chief Justice John Roberts. Justice Samuel Alito submitted a concurring opinion, agreeing with the plurality's conclusion that § 1519 must be read narrowly. While one might have expected Justice Elena Kagan to line up with the other more liberal justices in the plurality, in fact, Justice Kagan wrote the dissent and was joined by Justices Antonin Scalia, Clarence Thomas and Anthony Kennedy.

The unusual breakdown of justices, inconsistent with what one would typically expect, gives rise to some uncertainty as to how the court will handle future cases involving statutory construction. Both the plurality and the dissent noted that it was up to Congress to decide how broad a law to enact, but disagreed as to what Congress had actually done in enacting § 1519. Both the plurality and dissent appeared to recognize the potential for harsh results if §1519 is interpreted broadly, though interestingly, Justice Ginsberg wrote: "[W]e resist reading §1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be," thus at least raising the question whether those in the plurality might favor a more generally applicable obstruction statute.

Conversely, the dissent, though speaking in favor of a broad interpretation of §1519 under the dissent's statutory analysis, seemed troubled by the broad, and perhaps dangerous, leverage § 1519 gives to federal prosecutors if interpreted broadly. Justice Kagan wrote: "§ 1519 is a bad law – too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion." The question thus arises whether Congress will step in.

Fishing in Troubled Waters

Although the Yates case has given rise to a predictable number of "fish" jokes, including Justice Kagan's citation of Dr. Seuss' "One Fish Two Fish Red Fish Blue Fish" for the proposition that a "fish" is a "discrete thing that possesses physical form," the implications of the case are serious and real. As Justice Kagan noted in her dissent, the "real issue" presented in this case is "overcriminalization and excessive punishment in the U.S. Code." She concluded: "§ 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code."

In sum, the Yates decision is a welcome ruling for those increasingly concerned about the government overreaching to apply certain statutes to criminalize behavior beyond what one would reasonably understand to be prohibited. The notion that Sarbanes-Oxley's "anti-shredding" provision would ever be applied to discarded fish is bizarre on its face, yet that is exactly what the government sought to do in Yates. Although the three opinions in the case focused far more on canons of statutory construction

than on real-world implications, both the plurality and dissenting opinions seemed to recognize the dangers posed by a broad interpretation of §1519, a criminal statute with a maximum penalty of 20 years in prison.

At oral argument, Chief Justice Roberts aptly expressed the dangerous leverage prosecutors would have under the government's broad view of the statute. He observed that “every time you get somebody who is throwing fish overboard, you can go to him and say: Look, if we prosecute you you’re facing 20 years, so why don’t you plead to a year.” That is a realistic yet frightening glimpse into what could happen if § 1519 were to continue to be read broadly. Thankfully, with this weeks’ ruling in Yates, the court rejected such a broad interpretation.

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