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Justices Smell Something 'Fishy' In Anti-Shredding Case

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On Nov. 5, 2014, the U.S. Supreme Court heard oral arguments in Yates v. U.S., a case in which the court was asked to tackle the bizarre facts — and some would argue, the bizarre application of law — surrounding the criminal conviction of a commercial fisherman for violation of 18 U.S.C. § 1519, the Sarbanes-Oxley "anti-shredding" provision. This statute imposes criminal liability on anyone who "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 or obstruct an investigation.

In what defense attorney John Badalamenti characterized as severe overreaching by the government, Yates was convicted and served 30 days in jail. His crime? Ordering his fishing crew to toss overboard a number of undersized fish after a federally deputized field officer examined Yates' catch, determined that a number were smaller than the legally required minimum length, and ordered Yates to preserve the fish for seizure once he returned to port. While this case might seem trivial at first blush, the argument revealed that, in fact, the case raises important questions about governmental "overcriminalization" and the risks of unfettered prosecutorial discretion.

Badalamenti spent the majority of his argument trying to convince the court that the phrase "tangible object" cannot be interpreted as encompassing all objects — in this case, fish — because "tangible object" must be read in the context of its surrounding terms, "record" and "document." Badalamenti argued that the tangible objects referenced in the statute are limited to objects "designed" to preserve information, such as computers, servers, and hard drives. Thus, Badalamenti explained, in response to a question from Justice Anthony Kennedy, if a typewriter were used to prepare an incriminating document and both the typewriter and the document were destroyed, only the document would be covered by the statute, because the document is the "device that's designed to preserve information." Badalamenti's argument on this point is persuasive, considering the fact that § 1519 was specifically passed by Congress to combat the type of large-scale document destruction and corporate fraud that the country had only recently seen perpetrated by Enron and Arthur Andersen.

However, in an attempt to test Badalamenti's limitation on the definition of tangible object and the potential uncertainty it could create, the court posed a number of hypotheticals, including the following from Justice Kennedy: What if Yates had simply taken a picture of the undersized fish, and then

destroyed the photograph? Badalamenti responded that the photograph is still not a tangible object under his definition. He did, however, concede that if the camera used to take the photograph was digital, then the camera's memory card would be a tangible object, as would potentially the film used in the camera if it were not digital. The photograph itself, however, is not a tangible object, Badalamenti argued. Not quite convinced, Kennedy responded that this distinction "seems very odd."

The Government Refutes

The court next heard from Roman Martinez, arguing on behalf of the government. Martinez's argument was simple: "Tangible object" unambiguously encompasses all types of physical evidence. Seeking clarification, Justice Ruth Bader Ginsburg asked, "Are you then saying that this is, indeed, a general statute against destroying anything that would impede a Federal [investigation]?" Martinez responded yes.

After establishing that, under the statute, Yates could have been sentenced to 20 years, Justice Antonin Scalia questioned, "What kind of sensible prosecution is that" and "What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?" In an attempt to allay Justice Scalia's concerns, Martinez pointed out that the prosecutor in this case did not ask for 20 years, and stressed that prosecutorial discretion plays a big part in cases like these.

Martinez acknowledged that there was indeed another statute that covered Yates situation, which carried only a five-year maximum sentence. Martinez explained, however, that the U.S. Attorney's Manual contains guidance that the prosecutor should charge the offense that is most severe under the law, to which Justice Scalia responded, "Then we're going to have to be much more careful about how extensive statutes are ... or how much coverage I give to severe statutes."

In an attempt to refute the argument that this statute was misapplied, Martinez reminded the court that Yates was found guilty of directly disobeying an explicit instruction by law enforcement to preserve evidence and of launching an extensive cover-up scheme with his crew. Perhaps an indication that the court was not quite convinced, Chief Justice John Roberts quipped, "You make him sound like a mob boss or something."

A Bitter Pill to Swallow?

Cutting to the fundamental issue in the case, Justice Samuel Alito observed, "You have arguments on all of these points. But you are really asking the Court to swallow something that is pretty hard to swallow." Justice Alito noted that this statute could be abused and applied to very trivial matters, and yet carry a potential penalty of 20 years. And, as Chief Justice Roberts observed, under the government's interpretation of the statute, "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, or something like that. It's an extraordinary leverage that the broadest interpretation of this statute would give Federal prosecutors."

The risk of the government improperly using that kind of leverage, in addition to the more general concern of the government applying statutes to criminalize behavior beyond what one would reasonably understand to be prohibited, will hopefully lead the court to vacate Yates' conviction.

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