

ARTICLE

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Court Decides Sarbanes-Oxley Is Intended for a Different Kettle of Fish

The Fish Tale and the U.S. Supreme Court: Part II

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By a surprisingly narrow margin, the U.S. Supreme Court recently spared future fishermen from facing up to 20 years in prison for destroying their catch. The case, *Yates v. United States of America*, involved the curious tale of John Yates, a commercial fisherman from Florida who found himself in front of our nation's highest court. During oral argument on Nov. 5, 2014, the case attracted national attention for its strange facts, as well as the unusually humorous questions that the parties received from the Court. Although many observers were skeptical that Yates' conviction would be upheld, the Court's decision was ultimately closer than anticipated. As explained below, in a 5-4 decision that was resolved by Justice Alito's concurrence, the Supreme Court agreed to let Yates off the hook. In doing so, the Court offered additional guidance on the problem of overcriminalization in American criminal jurisprudence.

Background of *Yates* Case

In *Yates*, the issue was whether a provision of the Sarbanes-Oxley Act of 2002 (SOX) – a post-Enron law that intended to prevent the shredding of incriminating documents – could also criminalize the destruction of fish. As written, the relevant provision of Sarbanes-Oxley imposes broad criminal liability on any individual who, with the requisite intent, "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object." On its face, the provision applies to the destruction of any "tangible object," including fish. Yates, in fact, had already been convicted of violating this law because he disposed of grouper to prevent a federal seizure. The Court of Appeals for the Eleventh Circuit upheld that conviction, reasoning that the statutory language "unambiguously applies to fish."

Although the issue before the Court was ostensibly one of statutory interpretation, the case captured widespread media attention for another more practical reason. As we wrote last year,¹ the issue of overcriminalization dominated oral argument and was squarely raised in the Supreme Court by Holland & Knight Partner William N. Shepherd as counsel for *Amicus Curiae* The National Association of Criminal Defense Lawyers, and by other *Amici* as



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well. Having issued its opinion at the end of February 2015, the Supreme Court's analysis now is notable for how it addresses an issue that was not presented in the lower courts: the danger of legislation that offers the government virtually unchecked prosecutorial authority.

The Justices' Opinions

Justice Ginsburg, writing for the plurality, was joined by Chief Justice Roberts and Justices Breyer and Sotomayor. Justice Alito wrote a separate concurring opinion. This majority of the Court held that the statute, read as a whole, did not apply to the destruction of Yates' grouper.

While reading a summary of the plurality opinion from the bench, Justice Ginsburg illustrated her flair for poetic turns of phrase with the following question: "Fish one may fry, but may one falsify, or make a false entry in the sea-dwelling creatures?" Focusing on the "contextual meaning" of the term "tangible object," the Court held that Congress could not have intended for Sarbanes-Oxley to criminalize a fisherman's destruction of grouper, because fish are not objects which are "used to record or preserve information." The Court refused to "cut [the statute] loose from its financial-fraud mooring," and instead concluded that various canons of statutory interpretation favored a more restrained interpretation of the law.

Justice Alito agreed with the plurality, but on narrower grounds. In a succinct opinion, Justice Alito held that "the statute's list of nouns, its list of verbs, and its title" persuade him that Yates "has the better of the argument." Finding that "the term 'tangible object' should refer to something similar to records or documents," Justice Alito observed that a "fish" simply "does not spring to mind – nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick." In a creative use of alliterative authoring, Justice Alito further observed that although most of the verbs in the provision could apply to "salamanders, satellites, or sand dunes," the verbs can only be interpreted consistently in the context of file keeping. Because the title of the law referenced "records," Justice Alito concurred that Congress did not intend for the statute to apply to fish.

In a dissenting opinion that cited Dr. Seuss, Justices Kagan, Scalia, Kennedy and Thomas chided the other justices for ignoring the plain meaning of "tangible object." Perhaps confirming that we really did learn everything we need to know in kindergarten, the dissent cited the seminal children's book, *One Fish Two Fish Red Fish Blue Fish*, to demonstrate that a fish is "a discrete thing that possesses physical form." Justice Kagan, who authored the dissent, argued straightforwardly that "[a] 'tangible object' is an object that's tangible." The dissent further criticized the plurality's attempt to limit the term "tangible object" to documentary form: "A fisherman like John Yates, who dumps undersized fish to avoid a fine is no less blameworthy than one who shreds his vessel's catch log for the same reason." Quoting other provisions that have employed similar language for broad purposes, the dissent argued that the plurality had created ambiguity where none existed, and had subverted clear statutory language.

The Dangers of Overcriminalization

Although the merits of the case turned on canons of statutory interpretation, the dissenting and plurality opinions recognized that more was at stake. Despite not being raised in the lower courts, concerns about overcriminalization and prosecutorial zeal had dominated the Court's line of questioning during oral argument in November 2014. Numerous third parties had also raised the issue in amicus briefs filed with the Court.

In a nod to these issues, the plurality devoted the final two pages of its opinion to discussing the danger of overcriminalization. Citing fairness concerns, the Court explained that its reason for reversing Yates' conviction extended beyond the "traditional tools of statutory construction." Specifically, the Court "invoke[d] the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" The plurality thus urged courts to adopt an approach that would foster an appropriate balance in defining criminal liability, while requiring Congress to speak "in language that is clear and definite" if it desires a "harsher alternative."

Concerns about overcriminalization were not limited to the plurality opinion. The dissent, in fact, offered the most acerbic critique of overcriminalization and its dangers, despite concluding that Yates' conviction should be upheld. The dissent agreed that the anti-shredding provision "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 dissent further criticized what it sees as an entrenched problem within criminal jurisprudence: "In those ways, [the anti-shredding provision] is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code."

That the justices saw fit to devote their attentions to a previously unraised issue demonstrates its importance. As Holland & Knight Partner William N. Shepherd argued in the amicus brief filed on behalf of The National Association of Criminal Defense Lawyers, overcriminalization represents a serious threat to the administration of justice because it results in convictions for conduct that the federal statutes did not intend to criminalize.

Yates: A Restraint on SOX and Overcriminalization

Despite the levity displayed during oral argument and in the citation to Dr. Suess, *Yates* represents an important restraint on Sarbanes-Oxley and overcriminalization. Indeed, the problem of overcriminalization was the only issue that united the Court – including its ideological opposites. Although the justices had different ways of dealing with the issue, the plurality and dissenting opinions sent clear messages that overly broad criminal liability remains a concern. Whether advocating for increased leniency by lower courts or encouraging Congress to pass more precise legislation, the opinions in *Yates* promise to serve as an important check on prosecutorial overreach in future indictments.

Notes

¹ See J. Allen Maines, Laurie Webb Daniel and Jordan T. Stringer, *The Fish Tale and the Supreme Court: How Applying Sarbanes-Oxley to Missing Grouper Has Raised Questions of Overcriminalization*, ACE's Management Liability Insights Newsletter (Dec. 2014).