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Supreme Court Rejects the Government's "Fishy" Interpretation of Sarbanes-Oxley Obstruction Statute

On February 25, the United States Supreme Court issued a decision in *Yates v. United States*.[1] This case involved the interpretation of Title 18, United States Code, Section 1519, a statute that was added as part of the Sarbanes-Oxley Act of 2002, and which provides that a person is guilty of a crime if he or she "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" a federal investigation. The particular allegedly obstructive act at issue in *Yates* involved a fisherman who discarded undersized red grouper which previously had been caught in violation of federal conservation regulations. The Eleventh Circuit affirmed a conviction and the Supreme Court, in a split decision, reversed.

Justice Ginsburg wrote a decision for four judges – Justice Ginsburg, Chief Justice Roberts, Justice Breyer and Justice Sotomayor – ruling that a "tangible object" under Section 1519 is some material used to record or preserve information. Justice Alito concurred and provided the fifth vote, but he offered his own, independent assessment of the statutory interpretation issues. Justice Kagan authored a dissent, in which she was joined by Justices Scalia, Kennedy and Thomas.

Justice Ginsburg's majority opinion explained at the outset that Section 1519 is part of the Sarbanes-Oxley Act and is meant to protect investors and restore trust in financial markets after the Enron scandal. While "[a] fish is no doubt an object that is tangible" – it can "be seen, caught, and handled" – she concluded that "it would cut [Section] 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent."[2] Accordingly, "[a] tangible object captured by [Section] 1519 . . . must be one used to record or preserve information."

The underlying facts are not complicated: Captain Yates and three crew members operated a commercial fishing boat, the *Miss Katie*. A deputized state employee who was empowered to enforce federal laws by the National Marine Fisheries Service, Officer Jones, observed three undersized red grouper on the deck of the *Miss Katie*, and looked for other undersized fish on the boat. He ultimately found 72 undersized fish which he directed Yates to keep segregated until the *Miss Katie* returned to port. Contrary to this instruction, Captain Yates directed the crew to throw the undersized fish overboard. Thirty-two months later, Captain Yates was charged with a violation of Title 18, United States Code, Section 2232(a), which makes it a crime to destroy property to prevent a federal seizure, and with a violation of Section 1519.[3] At trial, Yates moved for a judgment of acquittal on the ground that Section 1519 did not apply to his conduct. The district court seemed to agree with Yates, but felt compelled by Eleventh Circuit precedent to deny the motion. Yates was convicted on both the Section 2232 and the Section 1519 count. As Justice Ginsburg observed, "[f]or life, [Yates] will bear the stigma of having a federal felony conviction."[4]

Justice Ginsburg's analysis of Section 1519 began with a review of the legislative history behind the statute. The provision was meant to cure a perceived gap in the existing law relating to obstruction of justice. In particular, Section 1512(b) seemed to criminalize the act of persuading another person to destroy records but did not impose liability on the person who destroyed records on their own. Section 1519 also expanded the reach

1 No. 13-7451, 574 U.S. __ (Feb. 25, 2015).
2 *Id.*, slip op. at 2.
3 By the time of Captain Yates's indictment, the conservation regulations were changed; after 2009, none of the fish in question would have been illegally caught.
4 No. 13-7451, 574 U.S. __ , slip op. at 5 (Feb. 25, 2015).

of the prior obstruction statutes to a broader array of federal investigations.[5] Justice Ginsburg then turned to the dictionary definitions of "tangible" and "object," but found them not to be dispositive of the meaning of the language in Section 1519.

Justice Ginsburg instead used "[f]amiliar interpretive guides" to construe the words in question. For example, the title of the statute is "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." The heading "suppl[ies] cues that Congress did not intend 'tangible object' in [Section] 1519 to sweep within its reach physical objects of every kind, including things no one would describe as records, documents, or devices closely associated with them."[6] She also placed weight on the fact that Congress codified the statute alongside other very specific prohibitions on obstructive acts relating to documents, and not among the broader prohibitions on all forms of obstruction or spoliation. She looked to traditional forms of legislative history analysis, such as the fact that an amendment of Section 1512(c)(1) was also included in Sarbanes-Oxley and that it contained a sweeping prohibition on spoliation of evidence.

Apart from legislative history, Justice Ginsburg also turned to the canon of statutory construction known as "*noscitur a sociis*," meaning that "a word is known by the company it keeps."[7] Here, that canon of construction counsels in favor of a narrow construction of the words "tangible object" because the surrounding words in the statute ("falsifies, or makes a false entry in any record [or] document") relate to records and documents. She also relied on the *ejusdem generis* canon: "[w]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding words."[8] She concluded that "[h]ad Congress intended 'tangible object' in [Section] 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.'"[9]

Finally, Justice Ginsburg held that if any ambiguity still remained, the rule of lenity would support the Court's more narrow construction of the statute:

> That interpretative principle is relevant here, where the Government urges a reading of [Section] 1519 that 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.[10]

For all of these reasons, Justice Ginsburg "resist[ed] reading [Section] 1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be" and instead holds that "a 'tangible object' ... is one used to record or preserve information."[11]

Justice Alito wrote a short concurring opinion, giving the Court five votes to reverse. To Justice Alito, three features of the statute supported a narrow interpretation of the statute: the statute's list of nouns, its list of verbs, and its title. Alito wrote, "[a]lthough perhaps none of these features by itself would tip the case in favor of Yates, the three combined do so."[12] With respect to the title, he explained that it "points toward filekeeping, not fish."[13] "[N]o matter how other statutes might be read, this particular one does not cover every noun in the

5 *Id.*, slip op. at 6.
6 *Id.*, slip op. at 10.
7 *Id.*, slip op. at 14-15.
8 *Id.*, slip op. at 15-16.
9 *Id.*, slip op. at 16.
10 *Id.*, slip op. at 18.
11 *Id.*, slip op. at 20.
12 No. 13-7451, 574 U.S. __ , slip op. at 1 (Feb. 25, 2015) (Alito, J., concurring).
13 *Id.*, slip op. at 3.

universe with tangible form."[14]

Justice Kagan's dissent states that the term "tangible object" should simply refer to "any object capable of being touched," which is the literal meaning of the words involved.[15] She was not impressed with the Court's analysis, which she humorously describes as a "fishing expedition" for support for a narrow construction of the statute.[16] She disregards the relevance of the title of the statute, because prior Supreme Court decisions have declined to limit the plain meaning of a statute based on the title of a statute. She also explains that considering a statute's placement in the federal code is a completely novel tool of construction. Justice Kagan is dismissive of the Court's reliance on the canons of construction, stating that those canons should not be used to introduce ambiguity into what is, she believes, a clearly worded statute. For similar reasons, she dismisses the relevance of the rule of lenity: "[l]enity offers no proper refuge from that straightforward (even though capacious) construction."[17]

In her concluding pages, Justice Kagan acknowledges that there is another issue here beyond statutory construction – "the real issue [of] overcriminalization and excessive punishment in the U.S. Code."[18] She regrets that the Court's decision will de-criminalize certain acts that she believes should be punishable. However, she acknowledges that there is a problem here:

> Most district judges, as Congress knows, will recognize differences between such cases and prosecutions like this one, and will try to make the punishment fit the crime. Still and all, I tend to think . . . that [Section] 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. And I'd go further: In those ways, [Section] 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.[19]

Justice Kagan is surely right about the real issue behind *Yates*. There has been an over-expansion of federal criminal law in recent years. Traditionally, as Justice Kagan seems to recognize, we have depended on the line prosecutors and district court judges to protect individuals from the excesses of this expansion of law. To be sure, prosecutors and judges do typically act in a responsible manner, exercising their discretion wisely and prudently.

However, cases like *Yates* teach us that these traditional safeguards do not always work, which is why Justice Ginsburg and the majority felt it necessary to limit the reach of this hopelessly broad statute. After all, Yates was exposed to a 20-year maximum sentence for throwing the undersized fish overboard when the conservation regulation that Yates violated was itself only punishable by a fine or fishing license suspension.[20] Last year in *Bond v. United States*, the Supreme Court was also confronted with an application of law that Chief Justice Roberts described as over-reaching: "The global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon."[21]

While one can imagine that many prosecutors would have declined to bring the *Yates* prosecution, and that the vast majority of federal judges would have imposed a modest sentence in a case like *Yates* (as the district judge did here, imposing a 30-day sentence), our system of laws should not be so dependent on the wise exercise of discretion. As James Madison wrote in Federalist 51, "[i]f angels were to govern men, neither external nor internal

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14 *Id.*, slip op. at 4.
15 No. 13-7451, 574 U.S. __ , slip op. at 1 (Feb. 25, 2015) (Kagan, J., dissenting).
16 *Id.*, slip op. at 7.
17 *Id.*, slip op. at 15.
18 *Id.*, slip op. at 18.
19 *Id.*, slip op. at 19.
20 *Id*., slip op. at 3.
21 *Bond v. United States*, 134 S. Ct. 2077, 2093 (2014).

controls on government would be necessary."[22] In the absence of a uniformly prudent exercise of prosecutorial discretion or the uniformly wise exercise of sentencing discretion, the *Yates* decision acts to place reasonable limits on the inappropriate use of a broadly worded statute. It can be hoped that the Supreme Court and other federal courts will do likewise when confronted with the application of similarly overbroad criminal statutes.

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22 Madison, James, Federalist No. 51: *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, Independent Journal (Feb. 6, 1788).

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