Hook, Line & Sinker: Supreme Court Holds (Barely!) that Sarbanes-Oxley's Anti-Shredding Statute Doesn't Apply to Fish

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"What do the former employees of Enron and I have in common? According to the Department of Justice, we're both guilty of the same crime. They spent their nights purging documents in order to hide massive financial fraud. I was accused of disposing of several purportedly undersized red grouper into the Florida surf from which I caught them."[1] This is how John Yates describes the ordeal that culminated in the Supreme Court's closely divided opinion in *Yates v. United States*, in which a bare majority held that an anti-shredding provision in the Sarbanes-Oxley Act did not extend to the act of tossing undersized red grouper back into the sea.[2]

A Fine Kettle of Fish

John Yates's plight began on August 23, 2007, when the *Miss Katie*, a commercial fishing vessel, was boarded off the coast of Cortez, Florida, in the Gulf of Mexico by John Jones, a field officer with the Florida Fish and Wildlife Conservation Commission. Jones had also been deputized as a federal agent by the National Marine Fisheries Service, empowering him to enforce federal fisheries laws. Yates had been hired to serve as captain of the three-member crew, and the *Miss Katie* was six days into its voyage to catch red grouper.

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[1] John Yates, A Fish Story: I Got Busted for Catching a Few Undersized Grouper. You Won't Believe What Happened Next, Politico Magazine, Apr. 24, 2014, available at http://www.politico.com/magazine/story/2014/04/a-fish-story-106010.html.

[2] 135 S. Ct. 1074 (2015).

At that time, federal law required that harvested red grouper be at least 20 inches long. Upon boarding the vessel, the officer spotted three red grouper that appeared to be undersized. He proceeded to spend the next several hours inspecting the more-than 3,000 fish in the ship's hold, ultimately determining that 72 grouper measured between 18-3/4 and 19-3/4 inches.

Harvesting undersized grouper is not a crime. It is, however, a civil violation under the Magnuson-Stevens Act, punishable by a fine of up to $500 and possible suspension of one's fishing license.[3] Before departing, Officer Jones issued Yates a citation, placed the undersized fish in wooden crates (but did not seal them with evidence tape), and instructed Yates to leave them there until the ship returned to the dock.

Two days after the *Miss Katie* returned, Officer Jones re-measured the fish and determined that although 69 (not 72) of the fish still measured less than 20 inches, the majority of those fish were much closer to 20 inches than the fish he had inspected at sea. Fishy behavior was clearly afoot—Jones suspected that these were not the same fish. Federal agents then spoke to Thomas Lemmons, one of the other crew members, who eventually admitted that Yates had directed him to remove the undersized fish from the unsealed crate, throw them overboard, and replace them with other fish from the catch, which he did.

Nearly three years later, in May 2010, John Yates was charged in a three-count felony indictment. Specifically, he was charged with violating 18 U.S.C. § 2232(a) (which carries a potential five-year sentence) for throwing the undersized fish overboard in order to prevent the government from taking possession of them; 18 U.S.C. § 1001(a)(2) (which carries a potential five-year sentence) for falsely stating to federal agents that the fish that were measured on the dock were the same fish Officer Jones had measured at sea; and, 18 U.S.C. § 1519 (better known as Sarbanes-Oxley's anti-shredding provision, which carries a potential 20-year sentence) for destroying, concealing, and covering up the undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit. Somewhat ironically, the regulation governing

[3] 16 U.S.C. §§ 1857–1858.

size limits for grouper has been amended, reducing the permissible length from 20 to 18 inches—so had the inspection taken place today, all of the fish aboard the *Miss Katie* would have been in the clear.

The jury acquitted Yates on the Section 1001 false statement count but convicted him on the remaining two counts, specifically, Section 1519 and Section 2232(a).

Section 1519 of Title 18 provides:

> Whoever 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 the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

And Section 2232(a) of Title 18 provides:

> Destruction or Removal of Property to Prevent Seizure. Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

Although the Sentencing Guidelines range was 21 to 27 months' imprisonment, the judge sentenced Yates to 30 days' imprisonment, followed by three years' supervised release. Yates's conviction was affirmed on appeal, and he subsequently sought a writ of certiorari, which the Supreme Court granted, challenging his conviction under Section 1519, but not the other count of conviction under Section 2232(a).

Why did the Court agree to review the case? After all, it was highly unlikely that anyone else would be prosecuted for violating

Section 1519 under a similar fact pattern in the future. Moreover, Yates was convicted on another felony charge, which he was not challenging, and received a sentence well below the applicable guideline range—much less the 20-year statutory maximum in Section 1519 and even the five-year statutory maximum in Section 2232(a). As the King of Siam said in Rodgers and Hammerstein's *The King and I*, "Is a puzzlement."[4]

Trawling for Evidence

Section 1519 is part of the Sarbanes-Oxley Act of 2002, which was enacted in the aftermath of the Enron Corporation fiasco. According to its reported earnings, Enron was, before its collapse, the seventh largest corporation in America. It was, however, a mirage.

On October 23, 2001, shortly after Enron announced that it was writing down over $1 billion in losses due to bad investments, David Duncan, the Arthur Andersen partner in charge of the Enron account, ordered his staff, in anticipation of a formal investigation and under the guise of complying with the company's existing document retention policy, to destroy literally tons of documents pertaining to Enron. For the next two-and-a-half weeks, Andersen employees at home and abroad worked around the clock doing precisely that. The purge, however, was not limited to documents, but extended to computer hard drives and an email system that contained copious records related to Enron. It was not until Duncan received a subpoena from the Securities and Exchange Commission on November 8 that the infamous Enron shredding party stopped.[5]

Within one month, Enron declared bankruptcy, and while certain insiders prospered to the tune of millions of dollars, the scandal left over 20,000 employees unemployed with worthless retirement accounts. Enron defrauded investors and pension funds out of billions of dollars, causing investors to question the financial reporting of other public companies. Congress responded with the Sarbanes-Oxley Act,

[4] Rodgers & Hammerstein, A Puzzlement, on "The King and I" (Decca 1951).

[5] See generally Arthur Andersen LLP v. United States, 544 U.S. 696, 699–702 (2005); S. Rep. No. 107-146, at 2–5 (2002) (Comm. Rep.); Michael Brick, Andersen Fires Lead Enron Auditor, N.Y. Times, Jan. 15, 2002, available at http://www.nytimes.com/2002/01/15/business/15CND-ENRON.html; Richard A. Oppel, Jr. & Kurt Eichenwald, Arthur Andersen Fires an Executive for Enron Orders, N.Y. Times, Jan. 16, 2002, available at http://www.nytimes.com/2002/01/16/business/16ENRO.html.

whose goal, as set forth in its preamble, was "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws,"[6] and which was designed to ensure that, in the words of President George W. Bush at the bill signing ceremony, "No boardroom in America is above or beyond the law."[7]

Section 1519 of Sarbanes-Oxley was designed "to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records."[8] These loopholes posed a problem for prosecutors in the ultimately ill-fated criminal case against Arthur Andersen. One of the problems that this section sought to address was the fact that federal obstruction of justice statutes in effect at that time did not cover the destruction, alteration, or fabrication of documents *prior to* the formal initiation of a federal investigation. Another problem this law was designed to address was that the existing witness tampering statute, 18 U.S.C. § 1512, made it a crime to "persuade[] another person" to destroy evidence but not to destroy evidence oneself, which forced prosecutors in the Arthur Andersen case "to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves."[9]

While it's clear that Section 1519 criminalized the destruction or alteration of corporate records with the intent to frustrate an actual or contemplated federal investigation, the precise scope of its parameters remained unclear. Could it extend to John Yates? The government sure thought so.

The Government's Fishing Expedition

The government contended that Section 1519, located in Chapter 73 of Title 18 which covers "Obstruction of Justice,"[10] was always envisioned to be a broad and general evidence-destruction provision,

[6] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002).

[7] Elisabeth Bumiller, Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud in Corporations, N.Y. Times, July 31, 2002, available at http://www.nytimes.com/2002/07/31/business/corporate-conduct-the-president-bush-signs-bill-aimed-at-fraud-in-corporations.html.

[8] 148 Cong. Rec. 104, S7418–21 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy).

[9] S. Rep. No. 107–146, at 7 (2002) (Comm. Rep.).

[10] 18 U.S.C. § 1501 et seq.

something long sought by legal reformers. Further, Section 1519 was meant to be paired with Section 1512(c), the witness-tampering statute, which, among other things, makes it a crime to make unavailable any "record, document, or other object" in an official proceeding, whether pending or not, or to corruptly persuade, intimidate, force, mislead, or otherwise induce someone else to "alter, destroy, mutilate, or conceal an object with the intent to impair the object's integrity or availability for use" in such a proceeding. It was undisputed that Section 1512(c), which uses similar language to Section 1519, applies to all types of physical items, not just business records.

The government argued that Section 1519's use of the phrase "any . . . tangible object" unambiguously covers the destruction of any and all types of physical evidence—including undersized grouper—so long as it's done with the requisite obstructive intent and pertains to an investigation or administration of "any matter within the jurisdiction of any department or agency of the United States." The government further noted that it had "used these provisions to prosecute the destruction of a wide array of physical evidence—including human bodies, bloodstains, guns, drugs, cash, and automobiles—in order to cover up offenses ranging from terrorism and the unreasonable use of lethal police force to violations of environmental and workplace-safety laws."[11] The government also argued that it would make little sense for Congress to pass a statute that prohibited a murderer from destroying a threatening letter to his victim—in other words, a document—"but not the murder weapon, his victim's body, or the getaway car."[12]

The government maintained that Yates's arguments based on canons of statutory construction and the rule of lenity, discussed below, were unavailing because of the plain meaning of the language used in Section 1519. While canons of construction and the rule of lenity are appropriate to resolve any ambiguity or uncertainty in the meaning of a statute, neither existed here. It was the government's position that

> The objective of both Chapter 73 and Section 1519 is to protect the integrity of government operations, promote

[11] Brief for Respondent at 5–6, n.1, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451) (listing cases).

[12] *Id.* at 47.

> fairness to all parties in official proceedings, and ensure that government determinations of factual matters are accurate and true. Those goals are threatened by the destruction of *any* relevant evidence, regardless of its particular form.[13]

Slipping Through the Net

Yates contended, on the other hand, that the meaning of the phrase "tangible object" is "chameleon-like," adapting "to whatever context it is used in."[14] To illustrate his point that "tangible object" can mean different things in different contexts, Yates noted in his brief that, "if a person says, 'General Motors sells tangible objects,' one would naturally understand the person to be referring to automobiles, automobile parts, and the like. But if a person says, 'Apple sells tangible objects,' one would not think of automobiles; rather, one would ordinarily understand the person to be referring to MacBooks, iMacs, iPhones, iPads, and other similar electronic 'i' products."[15]

To ascertain the true meaning of "tangible object" as used in Section 1519, Yates and many of the amici curiae supporting him urged the Court to apply two well-known canons of statutory construction, both of which are designed to narrow the potential universe of meanings that could attach to a statutory term in order to avoid giving unintended breadth to those terms: *noscitur a sociis* and *ejusdem generis*. The former instructs that "words grouped in a list should be given related meaning,"[16] while the latter advises that where general or vague words follow specific words in a statute, the "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[17]

McBoyle v. United States[18] is illustrative of this approach. McBoyle transported from Illinois to Oklahoma an airplane that he knew had

[13] *Id.* at 18 (emphasis in original).

[14] Brief for Petitioner at 12, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451).

[15] *Id*. at 13–14.

[16] Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990) (quoting Mass. v. Morash, 490 U.S. 107, 114 (1989)). See also Third Nat'l Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322 (1977); United States v. Williams, 553 U.S. 285, 294 (2008).

[17] Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003) (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001)).

[18] 283 U.S. 25 (1931).

been stolen. He was subsequently convicted of violating the National Motor Vehicle Theft Act and sentenced to three years' imprisonment and ordered to pay a $2,000 fine. On appeal, McBoyle argued that the act, which made it a crime to transport a "motor vehicle" in interstate commerce that the defendant knows to have been stolen, did not encompass the interstate transportation of a stolen aircraft. The act defined "motor vehicle" as including "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails," and there is no question that an airplane is clearly a "self-propelled vehicle not designed for running on rails." Nonetheless, Justice Oliver Wendell Holmes, writing for a unanimous Court, held that an aircraft was not a vehicle for purposes of the act. Although acknowledging that, "etymologically it is possible to use the word to signify a conveyance working on land, water or air," the Court cautioned:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.[19]

In that case, the Court concluded, "[i]t is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class."[20] Similarly, the Court in *Begay v. United States*[21] rejected the government's argument that drunk driving was a "violent felony" for purposes of the catch-all provision of the Armed Career Criminal Act, because unlike the other crimes listed in the act, drunk driving

[19] *Id.* at 26–27.

[20] *Id.* at 27.

[21] 553 U.S. 137 (2008).

"is a crime of negligence or recklessness, rather than violence or aggression."[22] The presence of the other crimes "indicates that the statute covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'"[23]

Perhaps most significantly, in *Bond v. United States*[24]—a strange case decided the previous term—the Court stated, "We are reluctant to ignore the ordinary meaning of 'chemical weapon' when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish."[25] *Bond* involved the federal prosecution of Carol Anne Bond for her clumsy attempts to harm her former best friend after discovering that she was having an affair with Bond's husband and was pregnant with his child, by spreading common chemicals which left a distinctive color on the woman's car door, mailbox, and front doorknob, resulting in a minor chemical burn on the woman's thumb. Rather than leaving this garden-variety crime to local authorities, federal authorities charged Bond with violating the Chemical Weapons Implementation Act of 1998 (CWIA), a statute designed to implement the United States' treaty obligations under the 1993 Chemical Weapons Convention, thought to be reserved for actions such as the 1995 Sarin gas attack on the Tokyo subway system by members of the doomsday cult Aum Shinrikyo. In an opinion by Chief Justice John Roberts, the Court gave a narrowing construction to the CWIA and held that it did not extend to such criminal activity, stating "[t]he 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

[22] *Id.* at 146 (quoting United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting)).

[23] *Id.* at 142. See also, Gustafson v. Alloyd Co., 513 U.S. 561, 575–76 (1995) ("[T]he term 'written communication' must be read in context to refer to writings that . . . are similar to the terms 'notice, circular, [and] advertisement,'" which appeared in the same list; holding that the word 'communication' applied only to "communications held out to the public at large," which would exclude person-to-person communications even though a dictionary definition might include such communications.); Robinson v. Shell Oil Co., 519 U.S. 337, 343–44 (1997) (explaining that the word "employees" took on different meanings within different sections of the Civil Rights Act of 1964).

[24] 134 S. Ct. 2077 (2014).

[25] *Id.* at 2091.

irritant as the deployment of a chemical weapon."[26] Indeed, as I will discuss below, I suspect that the specter of the *Bond* case was evident throughout the *Yates* case and played an important role in Yates's narrow victory.

In this case, Yates argued, the meaning of the phrase "tangible object" in Section 1519 must be ascertained by reading it within the context of the statutory scheme, its placement within the statute as a whole, and the verbs and surrounding objects that precede it. When taken altogether, and applying the standard canons of statutory construction, Yates claimed that the only sensible reading of "tangible object" within the meaning of this statute must be to refer to a thing that is used to preserve information, such as a computer, server, or other storage device.

Here, Yates asserted, the Sarbanes-Oxley Act was passed in response to the concerted effort by Enron and Arthur Andersen to destroy records, documents, and other things used to store them—such as computer hard drives, DVDs, flash drives, and email systems—in anticipation of a federal investigation. The anti-shredding provision, entitled "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy," was placed in Title VIII of the act, more specifically within Section 802, which was itself entitled "Criminal Penalties for Altering *Documents*."[27] Moreover, the phrase "tangible object" in Section 1519 was immediately preceded by the nouns "record" and "document," which share a common meaning in everyday usage of being things that contain and preserve information—an attribute not shared by fish. The phrase is also preceded by the verbs "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." While it might be the case that some of these verbs could apply to an undersized red grouper, one could certainly never make a false entry in one.

Although conceding that Section 1519 falls within the chapter entitled "Obstruction of Justice," Yates pointed out that the provisions immediately preceding that section address acts of obstruction in specific contexts, including federal audits, examinations of

[26] Bond, 134 S. Ct. at 20–21.

[27] Pub. L. 107-2014, Title VIII, § 802, 116 Stat. 745 (emphasis added). See R.R. Trainmen v. Balt & O. R. Co., 331 U.S. 519, 528 (1947) (While not dispositive, titles are useful aids that provide "a short-hand reference to the general subject matter involved.").

financial institutions, bankruptcy investigations, and healthcare-related offenses, and that the section immediately following it was aimed at the destruction of corporate audit records, requiring that such records be retained for five years. In short, these provisions fit neatly within the category of requiring that corporate records be preserved for use as evidence in various contexts to discover and punish fraudulent conduct.

Further, while Section 1519 utilizes similar language to the witness-tampering statute, Section 1512(c), it is not identical. While Section 1512(c) established a broad prohibition on the destruction or alteration of any kind of object, including fish, it applies to a more narrow circumstance—evidence being used in an "official proceeding"—which would be more likely to put someone on notice of their obligation to preserve such evidence. Indeed, if the government's argument was correct, Section 1512(c) would likely be rendered superfluous, since a prohibition on destroying (either by oneself or inducing someone else to do so) any conceivable physical object if done to obstruct, impede, or influence an investigation—including a contemplated investigation—or the administration of any matter within the jurisdiction of any department or agency of the United States, would surely encompass any attempt to destroy a physical object to prevent its availability for use in an "official proceeding." Indeed, if the phrase "tangible object" in Section 1519 was meant to encompass every conceivable physical object, then the words "record" and "document" would also be superfluous.[28]

Finally, if any doubt remained as to the meaning of "tangible object" in the anti-shredding provision, Yates argued that doubt should be resolved in his favor under the well-established—but rarely applied—rule of lenity.[29] The rule of lenity functions as both a tie-breaker and a rule of constitutional avoidance, underscoring

[28] Kungys v. United States, 485 U.S. 759, 778 (1988) ("[N]o provision [of a statute or document] should be construed to be entirely redundant.").

[29] See, e.g., McNally v. United States, 483 U.S. 350, 359–60 (1987) (observing that the rule of lenity requires that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language"); Skilling v. United States, 561 U.S. 358, 404, 410 (2010) (holding that the honest-services statute "presents no vagueness problem" when narrowly construed to apply only to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party"; any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

the value of providing fair warning to people about what conduct is and is not illegal to ensure that they are not subject to undue punishment for violating vague prohibitions. As the Supreme Court has said on many occasions, because "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,"[30] criminal statutes must provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[31]

The Scales of Justice

The potential for abuse by the government and potential reach of Section 1519 appeared to weigh heavily on the justices' minds in this case. It did not escape the justices' attention that Yates had been charged with two obstruction of justice charges, one of which carried a potential 5-year penalty (Section 2232(a)), the other of which carried a potential 20-year penalty (Section 1519). In enacting Section 1519, was it really Congress's intent to pass a new law that criminalized essentially the same conduct as an existing law, and was it really Congress's intent to *quadruple* the potential penalty for obstruction of justice?[32] Could Congress really have meant to punish somebody who violated a fishing regulation, a civil infraction that did not even rise to the level of a misdemeanor, with a potential twenty-year prison sentence? If so, this would give the

[30] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[31] McBoyle, 283 U.S. at 27. See also, United States v. Harriss, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."); United States v. Lanier, 520 U.S. 259, 265 (1967); Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

[32] It is worth noting that, in addition to Section 2232(a), the vast majority of other federal obstruction of justice statutes also carry a potential five-year penalty. See, e.g., 18 U.S.C. § 245(b) (2006) (obstruction of civil rights); 18 U.S.C. § 505 (2006) (court forgeries); 18 U.S.C. § 1505 (2006) (obstruction before departments, agencies, and committees, unless terrorism is involved, in which case the penalty rises to eight years); 18 U.S.C. § 1510 (2006) (obstruction of criminal investigations).

government a tremendous amount of discretion in terms of the charges it could file and considerable leverage over defendants in plea negotiations. What defendant facing a potential twenty-year sentence wouldn't be tempted to charge bargain or plea bargain even if he truly believed he was innocent? And if the government could wield such a heavy hammer in this case—one involving throwing some undersized grouper back into the sea—who else might be at risk of facing the same charge for similarly benign conduct?

During oral argument, the justices peppered the government's attorney, Assistant Solicitor General Roman Martinez,[33] with questions about the potential scope of the statute. For instance, Justice Samuel Alito asked whether someone could be prosecuted under Section 1519 and subjected to a potential 20-year sentence if he caught an undersized fish on federal land and threw it back in the lake when he saw an inspector approaching.[34] Indeed he could, replied Martinez.[35]

[33] Whose writing has appeared in these pages. See Gregory G. Garre and Roman Martinez, Looking Ahead: October Term 2011, 2010–2011 Cato Sup. Ct. Rev. 357 (2011).

[34] Transcript of Oral Argument at 50–51, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451). Several amici who filed briefs in support of Yates raised similar hypotheticals urging the Court to read Section 1519 narrowly to avoid such absurd results. See, e.g., Brief for Cato Institute as Amici Curiae Supporting Petitioner, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451) at 4 (suggesting that "a smoker stealing the last few puffs of his cigarette as he enters the lobby of a government building could be criminally charged for dousing that cigarette in his coffee cup as he approaches the metal detectors manned by a federal officer"); Brief of Cause of Action, et al. as Amicus Curiae Supporting Petitioner, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451) at 10 (suggesting that "a person who destroys a misappropriated image of 'Smokey Bear,' conceals evidence of a surfboard being used on a beach designated for swimming, throws away a bag of chips from a workplace restroom prior to an OSHA inspection, fails to declare an item on a customs form at the airport, gets rid of a bat used in a teenager's game of 'mailbox baseball,' or discards an empty container of medicine purchased from a foreign pharmacy" could be prosecuted under Section 1519) (citations omitted); See Clinton v. City of New York, 524 U.S. 417, 429 (1998) (When one possible interpretation of a statute "would produce an absurd and unjust result which Congress could not have intended," a court should adopt an alternative reading.); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940) ("A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.").

[35] Transcript, *supra* note 34, at 51.

Justice Antonin Scalia seemed incredulous that a federal prosecutor bothered to pursue this case, at one point asking, "Is this the same guy that ... brought the prosecution in *Bond* last term? . . . What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?"[36] The justices did not seem mollified when Martinez stated that the government had not sought a 20-year sentence in this case, especially after informing them that his "understanding of the U.S. Attorney's Manual is that the general guidance that's given is that the prosecutor should charge—once the decision is made to bring a criminal prosecution, the prosecution should charge the . . . offense that's the most severe under the law. That's not a hard and fast rule, but that's kind of the default principle."[37] This prompted Justice Scalia to exclaim, "Well, if that's going to be the Justice Department's position, then we're going to have to be much more careful about how extensive statutes are. I mean, if you're saying we're always going to prosecute the most severe, I'm going to be very careful about how severe I make statutes . . . or how much coverage I give to severe statutes."[38]

Perhaps the most significant statement during the oral argument, in terms of affecting the final outcome, came from Chief Justice John Roberts who, after Martinez explained that "we do not prosecute every fish disposal case," stated:

> But the point is that you could, and the point is that once you can, 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 one year, or something like that. It's an extraordinary leverage that the broadest interpretation of this statute would give Federal prosecutors.[39]

[36] *Id.* at 27–28.

[37] *Id.* at 28–29. Indeed, Chapter 27 of Title 9 of the U.S. Attorneys' Manual provides: "Except as provided in USAM 9–27.330 (pre-charge plea agreements), once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."

[38] Transcript, *supra* note 35, at 29.

[39] *Id.* at 31.

In fairness, the U.S. Attorneys' Manual explicitly states that, "[c]harges should not be filed simply to exert leverage to induce a plea."[40] I suspect, however, that many if not all of the justices were quite reasonably concerned that the temptation to overcharge in order to induce a guilty plea out of someone who engaged in trivial, albeit criminal, behavior might be too great for some federal prosecutors to resist.

The One That Got Away

The Court issued its decision in *Yates* on February 25, 2015, and John Yates prevailed—but barely.

Writing for the plurality, Justice Ruth Bader Ginsburg, joined by the chief justice and Justices Stephen Breyer and Sonia Sotomayor, noted that the government's reading of Section 1519 "covers the waterfront, including fish from the sea"[41] but that such an interpretation "would cut §1519 loose from its financial fraud mooring."[42] The plurality concluded that the phrase "tangible object" in Section 1519 "is better read to cover only objects one can use to record or preserve information, not all objects in the physical world."[43]

Justice Ginsburg conceded, of course, that fish would qualify under the ordinary dictionary meaning of "tangible object," but that "[i]n law as in life, however, the same words, placed in different contexts, sometimes mean different things,"[44] and that while "dictionary definitions of the words 'tangible' and 'object' bear consideration, they are not dispositive of the meaning of 'tangible object' in §1519."[45]

Justice Ginsburg then proceeded to note that the heading for Section 1519 ("Destruction, alteration, or falsification of records in

[40] U.S.A.M. 9–27.300. See also U.S.A.M. 9–27.320 ("Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she, may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea).").

[41] Yates v. United States, 135 S. Ct. 1074, 1081 (2015).

[42] *Id.* at 1079.

[43] *Id.* at 1081.

[44] *Id.* at 1082.

[45] *Id.*

Federal investigations and bankruptcy") "conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records," nor did the title of the section in Sarbanes-Oxley in which the section was placed ("Destruction of corporate audit records").[46] She stated that "[w]hile these headings are not commanding, they supply cues that Congress did not intend 'tangible object' in §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."[47]

The plurality saw additional clues of congressional intent in the fact that Section 1519 was placed at the end of Chapter 73 of Title 18 among several sections prohibiting obstructive acts in specific contexts, rather than among the sections of that Chapter that more broadly address obstructive acts as they relate to official proceedings and criminal trials.[48] The plurality was also persuaded by the fact that, as noted above, if the government's interpretation of Section 1519 is correct, Section 1512(c)(1), which was passed at roughly the same time, would be rendered superfluous,[49] as would Section 2232(a), which imposed a maximum penalty of only five years.[50] The plurality also employed the *noscitur a sociis* and *ejusdem generis* canons of construction and determined that Yates's interpretation of the statute was more reasonable than the government's,[51] especially given that "Yates would have had scant reason to anticipate a felony prosecution, and certainly not one instituted at a time when even the smallest fish he caught came within the legal limit."[52]

[46] *Id.* at 1077.

[47] *Id.* at 1083.

[48] *Id.* at 1083–84.

[49] *Id.* at 1085.

[50] *Id.* at 1085 n.6.

[51] *Id.* at 1085–88.

[52] *Id.* at 1087 (citing *Bond* as another example in which the Court rejected a "boundless reading" of a statutory term because of the "deeply serious" consequences that such a reading would entail). The government urged the Court to consider that the phrase "record, document or tangible object" in Section 1519 had its origins in a 1962 Model Penal Code provision that would have imposed liability on anyone who "alters, destroys, mutilates, conceals, or removes a record, document or thing"; however, the plurality noted that the MPC provision described a misdemeanor, not a 20-year felony, and that the MPC provision and federal proposals based on it contained certain built-in limits that are lacking in Section 1519, *id.* at 1092–93 (Kagan, J., dissenting).

And finally, the plurality stated that "if our recourse to traditional statutory tools of statutory construction leaves us any doubt about the meaning of 'tangible object,' as that term is used in §1519, we would invoke the rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[53] The plurality believed "[t]hat interpretive principle is relevant here, where the Government urges a reading of §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*."[54] A frightening prospect, to be sure.

Justice Alito wrote a short separate opinion concurring in the judgment, thereby providing the decisive fifth vote for Yates. Believing that the "case can and should be resolved on narrow grounds," Justice Alito concluded that "though the question is close, traditional tools of statutory construction confirm that John Yates has the better of the argument."[55] He continued: "Three features of 18 U.S.C. § 1519 stand out to me: the statute's list of nouns, its list of verbs, and its titles. Although perhaps none of these features by itself would tip the case in favor of Yates, the three combined do so."[56]

In a powerful, sometimes biting dissent, replete with entertaining cultural references—what other Supreme Court opinion makes reference to Dr. Seuss[57] and, for those old enough to remember, Mad Libs[58]—Justice Elena Kagan, joined by Justices Antonin Scalia, Clarence Thomas, and Anthony Kennedy, did not buy what the plurality was selling. While the plurality interpreted "tangible object" to cover "only objects one can use to record or preserve information,"

[53] *Id.* at 1088 (citation omitted).

[54] *Id.* (emphasis added).

[55] Yates, 135 S. Ct. at 1089 (Alito, J., concurring in judgment).

[56] *Id.*

[57] See *id.* at 1091 (Kagan, J., dissenting) ("A fish is, of course, a discrete thing that possesses physical form. See generally, Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960).").

[58] See *id.* at 1099 ("But §1519's meaning should not hinge on the odd game of Mad Libs the concurrence proposes. No one reading §1519 needs to fill in a blank after the words 'records' and 'documents.' That is because Congress, quite helpfully, already did so—adding the term 'tangible object.'").

and Justice Alito interpreted it to cover "something similar to records or documents," the dissenters believed that "conventional tools of statutory construction all lead to a more conventional result: A 'tangible object' is an object that's tangible,"[59] which would cover undersized red grouper. The dissenters expressed the view that the plurality employed the canons of construction to create ambiguity rather than resolve it and that "the canons have no such transformative effect on the workaday language Congress chose."[60]

Justice Kagan stated that the dissenters' "interpretation accords with endless uses of the term in statute and rule books as construed by courts" and cited several federal statutes, state statutes, and federal cases to support the point.[61] And while agreeing "with the plurality (really, who does not?) that context matters in interpreting statutes" and that sometimes "the dictionary definition of a disputed term cannot control," Justice Kagan contended that "this is not such an occasion, for here the text and its context point the same way."[62] The dissenters stressed how the words surrounding "tangible object" in Section 1519 "reinforce the breadth of the term at issue,"[63] and noted the similarity of this grouping of words to those in other evidence-tampering laws that had been broadly interpreted.[64] And, perhaps in a deferential nod to Justice Scalia, who has a longstanding and noted distaste for relying on legislative history in interpreting statutes,[65] Justice Kagan added, that "legislative history, for those who care about it, puts an extra icing on a cake already frosted."[66]

Justice Kagan stated that while "the plurality searches far and wide for anything—anything—to support its interpretation" of

[59] *Id.* at 1091.

[60] *Id.* at 1097.

[61] *Id.* at 1091.

[62] *Id.* at 1092.

[63] *Id.*

[64] *Id.* at 1092–93.

[65] See, e.g., Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 302 (2010) (Scalia, J., concurring) ("Anyway, it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the *only* remnant of 'history' that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law"); Zedner v. United States, 547 U.S. 489, 511 (2006) (Scalia, J., concurring) ("[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute.").

[66] Yates, 135 S. Ct. at 1093 (Kagan, J., dissenting).

the statute, "its fishing expedition comes up empty."[67] In her view, the plurality's opinion is doomed from the outset, finding that its reliance on the title of Section 1519 is "already a sign something is amiss,"[68] since she is aware of no other case in which the Court has begun its interpretation or relied on a title "to override the law's clear terms,"[69] and that the plurality's attempt to "divine meaning" from the section's position within Chapter 73 is a "move . . . yet odder than the last."[70] And where the plurality saw surplusage, the dissenters did not, noting that "[o]verlap—even significant overlap—abounds in the criminal law,"[71] and that, regardless, while there is significant overlap between Section 1519 and Section 1512(c)(1), "each applies to conduct the other does not."[72]

Justice Kagan also criticized the plurality for giving a narrower interpretation of the phrase "object" in Section 1519 than in Section 1512(c)(1) and in other statutes that deal with obstruction of justice because those other statutes describe less serious offenses carrying a less severe penalty. She believed this should make no difference whatsoever. According to Justice Kagan, "[h]ow and why that distinction affects application of the *noscitur a sociis* and *ejusdem generis* canons is left obscure: Count it as one more of the plurality's never-before-propounded, not-readily-explained interpretive theories," and that "[t]he canons, in the plurality's interpretive world, apparently switch on and off whenever convenient."[73]

In discussing the subject and purpose of Section 1519, Justice Kagan stated:

> The plurality characterizes records and documents as things that preserve information—and so they are. But just as much, they are things that provide information, and thus potentially serve as evidence relevant to matters under review. And in a statute pertaining to obstruction of federal investigations, that evidentiary function comes to the fore. The destruction

[67] *Id.* at 1094.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1094–95.

[71] *Id.* at 1095.

[72] *Id.*

[73] *Id.* at 1098.

> of records and documents prevents law enforcement agents from gathering facts relevant to official inquiries. And so too does the destruction of tangible objects—of whatever kind. Whether the item is a fisherman's ledger or an undersized fish, throwing it overboard has the identical effect on the administration of justice.[74]

The dissenters made short shrift of the plurality's invocation of the rule of lenity, finding it inapplicable since a statute's breadth is not "equivalent to ambiguity," and that Section 1519 is "very broad . . . [and] also very clear."[75] They made even shorter shrift of Justice Alito's concurring opinion, which they described as a "shorter, vaguer version of the plurality's."[76] Citing Justice Alito's reliance on "Latin canons plus §1519's verbs plus §1519's title to 'tip the case' for Yates," Justice Kagan wryly opined that "the sum total of three mistaken arguments is . . . three mistaken arguments. They do not get better in the combining."[77]

Bigger Fish to Fry?

So why did five justices vote to overturn Yates's conviction? Justice Kagan and the other dissenters believe they have the answer: the "real issue" that motivated the other justices was "overcriminalization and excessive punishment in the U.S. Code"[78] (and, she could have added, by extension, the Code of Federal Regulations).[79] And, while

[74] *Id.* at 1097–98.

[75] *Id.* at 1098.

[76] *Id.* at 1099.

[77] *Id.* at 1100.

[78] *Id.*

[79] For examples of some of the rich literature by academicians and legal commentators on overcriminalization, see, e.g., Douglas Husak, Overcriminalization: The Limits of the Criminal Law (2007); Andrew Ashworth, Conceptions of Overcriminalization, 5 Ohio St. J. of Crim. L. 407 (2008); Sara Sun Beale, The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization, 54 Am. U. L. Rev. 747 (2005); Darryl K. Brown, Can Criminal Law Be Controlled?,108 Mich. L. Rev. 971 (2010); Stuart P. Green, Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 Emory L.J. 1533 (1997); Sanford H. Kadish, The Crisis of Overcriminalization, 374 Annals Am. Acad. Pol. & Soc. Sci. 157 (1967); Sanford H. Kadish, Some Observations on the Use of Criminal Sanctions to Enforce Economic Regulations, 30 U. Chi. L. Rev. 423 (1963); Erik Luna, Overextending the Criminal Law, in Go Directly to Jail: The Criminalization

Justice Kagan would have affirmed Yates's conviction and thinks that "the plurality somewhat—though only somewhat—exaggerates the matter,"[80] she wholeheartedly agreed that Section 1519 "is a bad law—too broad and undifferentiated, with too-high maximum penalties, which gives prosecutors too much leverage and sentencers too much discretion," and, in fact, would "go further" in that she believes that "§1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code."[81]

Mind you, I think that the plurality and concurrence have the better arguments. After all, as the Court has said before, the government should not be able to convict somebody of violating a criminal law that cannot be understood by a person of ordinary intelligence.[82] What non-judge or non-lawyer—and probably many judges and lawyers—of average intelligence would have suspected beforehand that Section 1519 would apply to throwing fish overboard? As Justice Alito noted in his concurring opinion, in applying the standard interpretive canons to the nouns in that section, "the term 'tangible object' should refer to something similar to records or documents. A fish does not spring to mind—nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. All are 'objects' that are 'tangible.' But who wouldn't raise an eyebrow if a neighbor, when

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of Almost Everything (Gene Healy ed., 2004); Ellen S. Podgor, Overcriminalization: The Politics of Crime, 54 Am. U. L. Rev. 541 (2005); Paul H. Robinson & Michael T. Cahill, The Accelerating Degradation of American Criminal Codes, 56 Hastings L.J. 633 (2005); Stephen F. Smith, Overcoming Overcriminalization, 102 J. of Crim. L. & Criminology 537 (2012); Stephen F. Smith, A Judicial Cure for the Disease of Overcriminalization, Heritage Foundation Legal Memorandum No. 135 (Aug. 21, 2014); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505 (2001); Paul J. Larkin, Jr., Public Choice Theory and Overcriminalization, 36 Harv. J.L. & Pub. Pol'y 715, 726 (2013); Edwin Meese III & Paul J. Larkin Jr., *R*econsidering the Mistake of Law Defense, 102 J. Crim. L. & Criminology 725 (2012); Michael B. Mukasey & Paul J. Larkin, Jr., The Perils of Overcriminalization, Heritage Foundation Legal Memorandum No. 146 (Feb. 12, 2015); Paul J. Larkin, Jr., A Mistake of Law Defense as a Remedy for Overcriminalization, 26 A.B.A. J. Crim. Just. 10 (Spring 2013); John Malcolm, Criminal Law and the Administrative State: The Problem with Criminal Regulations, Heritage Foundation Legal Memorandum No. 130 (Aug. 6, 2014).

[80] Yates, 135 S. Ct. at 1100 (Kagan, J., dissenting).

[81] *Id.* at 1101.

[82] See, e.g., United States v. Harriss, 347 U.S. 612, 617 (1954) (government cannot enforce a criminal law that cannot be understood by a person of "ordinary intelligence"); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (discussing persons of "common intelligence").

asked to identify something similar to a 'record' or 'document,' said 'crocodile'?"[83] And while Justice Alito conceded that many of the verbs in that section "could apply to nouns as far-flung as salamanders, satellites, or sand dunes, the last phrase in the list—'makes a false entry in'—makes no sense outside of filekeeping. How does one make a false entry in a fish?" Like Justice Alito, I believe that the government's "argument, though colorable, [is] too implausible to accept."[84] Nonetheless, I suspect that Justice Kagan may be on to something, which may also explain why the Court took the case in the first place.

As 18 prominent criminal law professors noted in an amicus brief filed in the case:

> The modern federal criminal code is vast and unwieldy: some 4,500 laws criminalize conduct ranging from stockpiling biological weapons to falsely representing oneself as a 4-H Club representative. Moreover, a host of these laws are redundant. Indeed, some federal crimes—notably fraud and false statements—are independently prohibited by over two hundred different statutes. Combined with over 300,000 federal criminal regulations, the canon benefits only the Government, which has a near-endless menu of charging options in a typical prosecution. [¶] Redundancy, however, is but one troubling consequence of the ever-growing criminal code.[85]

Other problems include the complexity of and ambiguity in many of today's criminal laws. The professors continued: "As James Madison wrote in Federalist No. 62, '[i]t will be of little avail to the people . . . if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood[.]' Yet these words provide an apt description of today's U.S. criminal code."[86]

[83] Yates, 135 S. Ct. at 1089 (Alito, J., concurring).

[84] *Id.* at 1090. Nor am I persuaded by the dissent's rejoinder that if Justice Alito wished to ask his "neighbor a question, I'd recommend a more pertinent one: Do you think a fish (or, if the concurrence prefers, a crocodile) is a 'tangible object'? As to that query, 'who wouldn't raise an eyebrow' if the neighbor said 'no'?" *Id.* at 1099 (Kagan, J., dissenting).

[85] Brief of Eighteen Criminal Law Professors as Amici Curiae Supporting Petitioner, Yates v. United States, 135 S. Ct. 1074 (2015) (No. 13-7451) at 6 (citations omitted).

[86] *Id.* at 9.

Like *Bond* from the previous term, the overarching theme in *Yates* may well have been a concern with overcriminalization, overly aggressive prosecutions based on questionable interpretations that have the effect of expanding the scope of federal criminal statutes, and a concern about the government having too much leverage to induce guilty pleas from people who might otherwise have eminently defensible cases. When that happens, a majority of the Supreme Court appears willing to rein in the government. After all, while it should not be unduly onerous for the federal government to prosecute those who engage in what is arguably criminal conduct, it shouldn't be like shooting fish in a barrel either.