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WHITE-COLLAR CRIME

Expert Analysis

Missing Fish, Obstruction Statute And Prosecutorial Discretion

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White-collar criminal practitioners spend much of their time arguing about how prosecutors should exercise their discretion in making charging decisions, often against the backdrop of broad and uncertain criminal statutes. When the Supreme Court grapples with the same issue, however, significant new criminal law doctrine may emerge. That potential became apparent most recently in the oral argument of *Yates v. United States*, the peculiar case of a fisherman prosecuted for obstruction of justice under Section 1519 of the Sarbanes-Oxley Act for throwing undersized fish back into the sea.

The Supreme Court's consideration of *Yates*, and its decision in another recent case, *Bond v. United States*, suggest that some members of the court are deeply troubled by the combination of the vast reach and severity of federal criminal law and the breadth of prosecutorial discretion. The court is not alone. Practitioners, scholars and commentators alike have expressed concerns about the nation's current criminal scheme that, according to recent estimates, includes more than 4,450 federal criminal laws and an additional 300,000 federal regulations that may trigger criminal sanctions.[1] Reflecting an unusual confluence of interest on the political left and right, last year Congress held hearings titled "Over-Criminalization of Conduct/Over-Federalization of Criminal Law" and "Reining in Overcriminalization."[2]

The court's activity and comments on over-criminalization and prosecutorial discretion may have the effect of spurring action by the political branches. But as we saw in the court's buildup to the Booker decision curbing the impact of the federal sentencing guidelines, the court's activity may also presage a doctrinal revision by the court itself to strengthen judicial restraints on the criminal justice system. No obvious easy solution presents itself, however. Potential judicial remedies carry their own problems and weaknesses.

'Bond v. United States'

In the case decided last term, *Bond v. United States*,[3] prosecutors charged a jilted wife with a violation of the Chemical Weapons Convention Implementation Act of 1998, a statute enacted to implement a treaty to combat terrorism and the use of weapons of mass destruction. Bond had engaged in an "amateur attempt…to injure her husband's lover," by spreading toxic chemicals, some obtained from her chemical manufacturer employer, and some obtained online via Amazon.com, on the woman's car, mailbox and door knobs in hopes that she would develop an uncomfortable rash. With the exception of one minor burn suffered by the woman, the attempts were unsuccessful.

Bond pleaded guilty, reserving her right to assert on appeal that the statute did not reach her conduct. The Supreme Court reversed Bond's conviction. The law at issue prohibits the possession and use of "chemical weapons," broadly defined to include any chemical that "can cause death, temporary incapacitation or permanent harm to humans or animals." The court found that the improbably broad reach of the term "chemical weapon" rendered the statute ambiguous. Writing for the majority, Chief Justice John Roberts concluded, "In sum, 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."[4]

The statute's broad definition of chemical weapon was not sufficient

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to "constitute a clear statement that Congress meant the statute to reach local criminal conduct." The court would not accept a reading of a federal chemical weapons statute that would make a violator of a parent who "considers poisoning the [children's gold]fish with a few drops of vinegar."[5]

The Case of the Missing Fish

The court accepted review in *Yates v. United States* to consider similar questions regarding the government's application of a broadly worded statute. In *Yates*, an officer deputized by the National Marine Fisheries Service boarded a commercial fishing boat harvesting red grouper in the Gulf of Mexico for a routine inspection. The officer found that a total of 72 red grouper were smaller than the 20-inch minimum size limit set forth in a federal regulation. Placing those fish in wooden crates left aboard the vessel, the officer gave the boat's captain, John Yates, a citation for the undersized fish and directed him to return to port, where the Fisheries Service would seize the fish.

Before returning to port, Yates directed his crew to throw the undersized fish overboard and replace them with other red grouper. When federal officers re-measured the fish upon return, only 69 fish measured less than 20 inches, and the majority of the fish in the wooden crates measured close to 20 inches. After questioning, one of the crew members admitted that Yates had directed the fishy switch.

Yates was charged with, among other crimes, violation of 18 U.S.C. §1519, a felony punishable by up to twenty years' imprisonment. Section 1519 was enacted as part of the Sarbanes-Oxley Act in the aftermath of the Enron scandal. Section 1519, titled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," was described in legislative reports as an "anti-shredding provision."[6] The provision criminalizes the knowing destruction of "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."

At trial, Yates argued that Section 1519 was "aimed solely at destruction of records and documents, and could not be applied to a situation, as here, where it was fish which were destroyed."[7] The trial court rejected his legal argument and the jury found Yates guilty. He was sentenced to 30 days imprisonment.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit also rejected Yates' claim. The court found that "[w]hen the text of a statute is plain,… we need not concern ourselves with contrary intent or purpose revealed by the legislative history." Giving the statutory phrase its ordinary and natural meaning, the court concluded that "tangible object" unambiguously applied to fish and any other object "having or possessing physical form."[8]

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Supreme Court Arguments in 'Yates.' In the Supreme Court, Yates' arguments focused on the background of the statute and the other statutory language around the term "tangible object" to assert that the phrase as used in Section 1519 should be read as a thing "used to preserve information, such as a computer, server, or similar storage device." During oral argument, the justices questioned Yates' position, raising hypotheticals where the "tangible object" destroyed was a gun or knife or other piece of evidence. But several justices strongly suggested that the government's application of the statute to Yates' conduct did not make sense.

During the government lawyer's presentation, Justice Antonin Scalia noted that although Yates only received a sentence of 30 days, he could have gotten 20 years, asking, "What kind of a mad prosecutor would…risk sending him up for 20 years?" and "Is this the same guy that brought the prosecution in *Bond* last term?"[9] Justice Ruth Bader Ginsburg questioned whether the Justice Department gave guidance as to how to proceed "when there are…overlapping statutes?"[10] Government counsel explained the United States Attorney's Manual familiar guidance that once the decision is made to charge, the prosecutor should charge the most severe offense under the law. Scalia responded that he then would "have to be much more careful" about "how much coverage I give to severe statutes."[11]

Chief Justice Roberts opined that the breadth of Section 1519 gave prosecutors "extraordinary leverage" to extract guilty pleas. Justice Stephen Breyer raised the point that where a statute is so broad that it presents a real risk of arbitrary enforcement, the void for vagueness doctrine is implicated.[12]

Justice Samuel Alito said that government counsel was "really asking the Court to swallow something that is pretty hard to swallow," which is that a statute with a potential 20-year sentence could apply "in really trivial matters" and that Justice Department policy was that it "has to be applied in every one of those crazy little cases." When government counsel explained that the policy to charge the most serious offense applies only once the decision is made to charge at all, Justice Anthony Kennedy responded that government counsel's position nevertheless meant that the concept of prosecutorial discretion had no substance and "we should just not use the concept or refer to the concept any more." In response to government counsel's retort that Yates had not argued the issue of prosecutorial discretion, Breyer, referring to a hypothetical

de minimis case where the statute might literally apply, asked how the court should proceed if "there is a genuine concern" with the exercise of prosecutorial discretion in such cases, "but it wasn't argued here?"[13]

Yates has been seized upon as an opportunity to examine larger questions about the breadth of federal criminal law. Amicus briefs in support of Yates include those filed by the National Association of Criminal Defense Lawyers, former Congressman Michael G. Oxley—co-author of the Sarbanes-Oxley Act, the Chamber of Commerce of the United States of America, and a group of 18 professors of criminal law "from across the political and ideological spectrum," plus many more. As stated by the NACDL's amici brief, Yates' conviction "is but one more example of the over-criminalization epidemic."[14]

Possible Solutions

The argument in *Yates* raises questions about steps the court might take to apply some limits to prosecutorial discretion. One method—putting some teeth into the doctrine requiring the "strict construction" of criminal statutes—follows from Scalia's comments. Strict construction is cited often throughout the amicus briefs. As the law professors argue, the solution is "to revitalize a fundamental maxim of criminal law: 'Penal statutes must be construed strictly.'" They write,

> [T]he principle is more than just a set of disparate rules. As we explain, it is a comprehensive approach to reviewing criminal statutes. It protects against broad, severe application of criminal statutes, unless Congress clearly intended such a result.[15]

A problem with the efficacy of strict construction, however, may be that in fact, a vast number of unmistakably broad criminal statutes are on the books. As Justice Elena Kagan noted during oral argument in *Yates*, "Congress gives very strict penalties to lots of minor things…but that's, you know, that's what it does."[16] Further, it is hard to see how a revitalized "strict construction" doctrine would function as anything more than a way for appellate courts, on a one-off basis, to exclude from the reach of a statute the rare case or category of case with highly unusual facts, like *Bond* or *Yates*.

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Focusing on Breyer's suggestion, the void-for-vagueness doctrine provides that a statute is invalid if it fails "to provide a person of ordinary intelligence fair notice of what is prohibited, or if it is so standardless that it authorizes or encourages seriously discriminatory enforcement."[17] The doctrine has been criticized as amorphous and withered in the criminal context, "alive in theory, but not terribly supportive of liberty in practice."[18] Although the doctrine has potential for use in unusual cases, the Supreme Court would need to develop a wholly new analytical framework for the doctrine to become a potent tool.

Another potential judicial check on prosecutorial discretion would be the courts' use of their general "supervisory power" over the administration of criminal justice in the federal courts.[19] The supervisory power doctrine, based on the Supreme Court's inherent authority to ensure that "civilized standards of procedure and evidence" are followed by the federal courts, is a concept that defendants have tried to invoke—almost always unsuccessfully—when prosecutors are claimed to have so misused their authority as to threaten to make the courts party to a blatantly unjust proceeding. As decisions over the years have found in strictly limiting its reach, a court's use of supervisory power to second-guess what it views as an overzealous prosecutorial charging decision would raise serious constitutional separation of powers issues, begging the question whether the discretion of a member of the judicial branch may properly be substituted for that of the executive.

Conclusion

The Supreme Court's decision in *Bond* and the comments of the justices during the argument in *Yates* make clear that members of the court have serious concerns with the unfettered exercise of prosecutorial discretion in the context of a seemingly ever-expanding set of broad and uncertain federal criminal statutes. A judicial remedy is not obvious or clear-cut. Whether and how the court might use its decision in *Yates* as a step toward such a remedy is well worth watching.

1. Brief for Eighteen Criminal Law Professors as Amici Curiae in Support of Petitioner, *Yates v. United States*, 13-7451, at 11-12 (July 7, 2014).
2. See Robert J. Anello and Richard F. Albert, "Overcriminalization of Non-Violent Conduct: Time for Real Reform," NYLJ (June 4, 2013).
3. 134 S. Ct. 2077 (2014).
4. Id. at 2093.
5. Id. at 2090-91.
6. S. Rep. No. 107-146, at 14 (2002).
7. Petition for Writ of Certiorari, *Yates v. United States*, No. 13-7451, at p. 6 (Nov. 13, 2013).
8. *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013).
9. Transcript, *Yates v. United States*, 13-7451, at 16 (Nov. 5, 2014). 27-28.
10. Id.
11. Id. at 29, 32.
12. Id. at 36.
13. Id. at 50-53.
14. Brief of the NACDL and the American Fuel & Petrochemical Manufacturers as Amici Curiae in Support of Petitioner John Yates, *Yates v. United States*, 13-7451, at 3 (July 7, 2014).
15. Brief for Eighteen Criminal Law Professors at 3.
16. Transcript at 23.
17. *United States v. Williams*, 553 U.S. 285 , 304 (2008).
18. Harvey A. Silverglate and Monica R. Shah, "The Degradation of the 'Void for Vagueness' Doctrine: Reversing Convictions While Saving the Unfathomable 'Honest Services Fraud' Statute," 210 Cato Sup. Ct. Rev. 201 (Sept. 8, 2010).
19. See *McNabb v. United States*, 318 U.S. 332, 340 (1943).