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WHITE-COLLAR CRIME

Expert Analysis

Justice Scalia's Approach To Textualism in White-Collar Law

By **Elkan Abramowitz**

And **Jonathan Sack**

White-collar criminal law is characterized by broadly worded statutes subject to varying interpretation. This feature of white-collar criminal statutes has given rise to a pattern of expansive interpretation by prosecutors and periodic narrowing by the Supreme Court. "Textualism" in statutory interpretation—generally speaking, a focus on the objective meaning of statutory language in context—has now become an essential feature of this pattern.

The late Justice Antonin Scalia was the leading expositor of textualist methodology over the last several decades.[1] Whatever one's view of textualism and of Justice Scalia, every judge and every lawyer (for the government and the defense) must now reckon with the precise language of the statute at issue and be prepared to analyze the relevant words of the statute in context. In light of Justice Scalia's recent death, and the ongoing debate over his judicial philosophy, this article will reflect on the justice's influence on the interpretation of white-collar statutes—in particular, two obstruction of justice provisions. We focus on the obstruction statutes because they exemplify the open-textured language that often defines white-collar crimes and highlight the significant impact of Justice Scalia's textualism.

Textualism 101

Justice Scalia recently described textualism as "the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[2] Importantly, "neither a word nor a sentence may be given a meaning that it cannot bear."[3]

Scalia's approach seeks to eliminate or significantly reduce the role of interpretive considerations extrinsic to the text—most notably, "legislative intent," the "purpose" of a statute, and policy consequences. He rejected "legislative intent" as an invitation to conclude "that the law means what you think it ought to mean."[4] We are "a nation of laws, not of men," Scalia argued, only if judges give effect to the text adopted by democratically elected lawmakers—and not the "lawmakers' unenacted desires."[5]

Because "words are given meaning by their context, and context includes the purpose of the text," textualism "considers the purpose" of statutes.[6] However, a textualist in good standing constrains the role of purpose in her analysis. Scalia wrote that a statute's purpose must be derived from the text itself and not extrinsic sources (like legislative history); it must be defined "precisely" and "as concretely as possible, not abstractly"; and it may be used only to decide among "textually permissible readings"—not to "contradict text or to supplement it."[7] Finally, Scalia called on judges not to depart from the fair meaning of the text on policy grounds or to avoid undesirable consequences.[8]

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Two Examples

Justice Scalia had a knack for explaining his approach with vivid examples. In *Riggs v. Palmer*, a grandson poisoned his grandfather to prevent the grandfather from changing his will to disinherit the grandson.[9] The New York Court of Appeals acknowledged that the grandson was entitled to his grandfather's property "according to the letter" of the statute of wills, but still held he could not inherit. The court reasoned that a "legislative intention" to the contrary would be "inconceivable," and, further, statutes may be "controlled in their operation" by the common law principle that "[n]o one shall…take advantage of his own wrong."

In his treatise on statutory interpretation, Scalia argues that the Court of Appeals got it wrong: a matter not covered by a statute—in *Riggs*, an exception for murderous heirs—is simply not part of the statute. In Scalia's view, the "search for what the legislature 'would have wanted' is invariably either a deception or delusion."[10]

Scalia cites his dissent in *United States v. Smith*[11] as a prime illustration of textualism.[12] In *Smith*, the statute provided for an increased jail term if, "during and in relation to…[a] drug trafficking crime," the defendant "uses…a fire arm."[13] The Supreme Court held that the increase applied to a defendant who offered to exchange a gun for cocaine, reasoning that bartering a gun can reasonably be described as a "use" of a gun. Justice Scalia dissented, arguing that the "ordinary meaning of the phrase 'uses a firearm'" controls. As Scalia put it: "When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall."

The 'Exculpatory No'

In the white-collar context, Justice Scalia's construction of the false statement statute, 18 U.S.C. §1001, in *Brogan v. United States*[14] is a classic example of textualist analysis. Section 1001 is written in broad terms. It prohibits knowingly making "any false…statements" to government officials in any federal investigation—including non-custodial, informal interviews. Before *Brogan*, most federal appellate courts had adopted the "exculpatory no" doctrine, which provided that a simple denial of guilt does not fall within the statute.

Justice Scalia rejected the non-textual considerations invoked to support the doctrine. The defendant argued that the historical purpose of the statute was to prevent "the perversion of governmental functions" by deceptive statements, and a mere denial of guilt does not pervert a

ELKAN ABRAMOWITZ *and* JONATHAN SACK *are members of Morvillo Abramowitz Grand Iason & Anello P.C..* CURTIS LEITNER, *an associate at the firm, contributed to this article.*

government function. Scalia responded that the court cannot "restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy."

The defendant also argued that the "exculpatory no" doctrine was necessary to prevent prosecutors from manufacturing crimes. For example, if a criminal case is time-barred, the prosecutor need only elicit a false denial to create a fresh obstruction violation, carrying a potential prison term of five years. Scalia held that complaints about prosecutorial overreach should be directed at the Congress that wrote the statute—not the court.

'United States v. Aguilar'

Turning to obstruction, the evolution of the Supreme Court's interpretation of the obstruction statutes shows the impact of Justice Scalia's textualism. In *United States v. Aguilar*,[15] the Supreme Court significantly narrowed the catchall obstruction statute,[18] U.S.C. §1503, which punishes whoever "corruptly…influences, obstructs, or impedes…the due administration of justice," or "endeavors to" do so. The court decided *Aguilar* in 1995, nine years into Scalia's 30-year tenure as a justice.

The Aguilar decision grafted a "nexus" requirement onto Section 1503: A corrupt endeavor "must have the natural and probable effect of interfering with the due administration of justice." Justice William Rehnquist's majority opinion adopted the nexus standard without analyzing the text of Section 1503. Nor did Rehnquist consider the broader context of the statute, such as the language of the other clauses in Section 1503 or the surrounding obstruction statutes. Rehnquist reasoned that the court should exercise "restraint" when "assessing the reach of a criminal statute" in order to defer to the "prerogatives of Congress" and to achieve the goal of "fair warning" to criminal defendants.

Justice Rehnquist provided an example to illustrate the overbreadth of the statute. If a specific intent to obstruct were sufficient for liability (without any nexus to a judicial proceeding), "a man could be found guilty under §1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts."

The court held that the defendant's conduct did not satisfy the nexus requirement. The defendant, a federal judge, lied to FBI agents while he was aware of an ongoing grand jury investigation into his conduct. However, he did not know whether the agents had been subpoenaed or otherwise directed to appear before the grand jury. (Interestingly, the government could not charge the defendant with a false statement violation because, at the time, the "exculpatory no" doctrine barred his prosecution under Section 1001.)[16] The court ruled that the "use" that would "be made of [the defendant's] false testimony" was "speculative," and therefore his false statement did not have the "natural and probable effect" of interfering with the grand jury's investigation.

Justice Scalia dissented on straightforward textualist grounds. He argued that the text of Section 1503 contains no requirement that obstructive conduct have the "natural and probable effect of interfering" with an investigation. The statute therefore applies to corrupt endeavors that "would only unnaturally and improbably be successful" at obstructing justice. To the textualist, the untoward consequences suggested by the court's husband-lying-to-wife hypothetical do not warrant "importing extratextual requirements in order to limit the reach" of the statute.

Aguilar Redux: 'Yates'

In 2015, 20 years after *Aguilar*, the Supreme Court narrowed the obstruction provision added by Sarbanes-Oxley, 18 U.S.C. 1519, which provides for up to 20 years imprisonment for anyone who tampers with "any record, document, or tangible object with the intent to…obstruct" a federal investigation or proceeding. In *Yates v. United Sates*,[17] the government charged a fisherman with violating Section 1519 because he directed a crewmember to throw undersized fish overboard in order to thwart an investigation into the size of his catch. The court held that the undersized fish were not "tangible objects" under Section 1519 because a fish is not "used to record or preserve information."

'Yates' demonstrates not only how accepted the textualist method has become but also how textualism does not always lead to the same outcome. Older debates about text versus purpose, and text versus legislative intent, are now recast as debates over the "context" of statutory language.

Although Justice Scalia was once again in the minority, the terms of the debate had changed. Both the plurality (Justice Samuel Alito joined the plurality in a concurrence) and dissenting opinions engaged in a detailed analysis of the text of Section 1519 and its broader context. For example, Justice Ruth Bader Ginsburg's plurality opinion argued that the caption of Section 1519 refers to "records" and not objects; that a literal interpretation of "tangible object" would render a contemporaneously added obstruction provision, Section 1512(c), superfluous; and that a literal interpretation would also render Congress's reference to "records" and "documents" superfluous because records and documents are subsumed by the phrase "tangible objects."

The dissent engaged in a competing textualist analysis. It argued that a literal reading of "tangible object" was supported by, for example, the breadth of the term "any," which proceeds the phrase "tangible object"; and the meaning of the phrase "tangible object" in the obstruction provision of the Modal Penal Code—not to mention the 15 state statutes modeled on it—which clearly applies to physical objects.

Yates demonstrates not only how accepted the textualist method has become but also how textualism does not always lead to the same outcome. Older debates about text versus purpose, and text versus legislative intent, are now recast as debates over the "context" of statutory language. The plurality argued that the "context" of Section 1519—which broadly applies "to federal investigations or proceedings of every kind, including those not yet begun"—counseled a "narrower reading" of the phrase "tangible object." The dissent said that the plurality's narrow interpretation of Section 1519 incorrectly assumed that "breadth [is] equivalent to ambiguity." As the dissent noted, "Section 1519 is very broad. It is also very clear."

Conclusion

A revealing aspect of *Yates*, and of Justice Scalia's impact on statutory interpretation, is that he did not write an opinion. Justice Kagan wrote the Yates dissent. Justices Ginsburg and Kagan, whose judicial philosophies are regarded as poles apart from Justice Scalia, authored dueling textualist opinions. Justice Rehnquist's analysis in *Aguilar*, which gave short shrift to the statutory text 20 years earlier, now seems wholly out of a place in the interpretive landscape drawn by Justice Scalia.

1. Cass Sunstein, "The Scalia I know Will Be Greatly Missed," Bloomberg View (Feb. 13, 2016); Jeffrey Rosen, "What Made Antonin Scalia Great," The Atlantic (Feb. 15, 2016).
2. Antonin Scalia and Bryan A. Garner, "Reading Law" (Thomson/West 2012), at 33.
3. Scalia and Garner, supra n. 2, at 31.
4. Antonin Scalia, "A Matter of Interpretation: Federal Courts and the Law" (Princeton University Press 1997), at 18.
5. Id. at 29.
6. Scalia and Garner, supra n. 2 at 56.
7. Id. at 56-57.
8. Scalia, supra n. 4 at 20.
9. 115 N.Y. 506, 509 (1889).
10. Scalia and Garner, supra n. 2, at 93-100.
11. 508 U.S. 223 (1993).
12. See Scalia, supra n. 4, at 23-24; Scalia and Garner, supra n. 2, at 32.
13. 18 U.S.C. §924(c).
14. 522 U.S. 398 (1998).
15. 515 U.S. 593 (1995).
16. Julie Rose O'Sullivan, "The Federal Criminal 'Code' is a Disgrace: Obstruction Statutes as Case Study," 96 J. Crim. L. & Criminology 643, 710 (2006)
17. 135 S. Ct. 1074 (2015).