New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
AUGUST 11, 2021

WHITE-COLLAR CRIME

'Van Buren v. U.S.': A Window Into Criminal Law in Barrett Era?

White-Collar Crime columnists Robert J. Anello and Richard F. Albert discuss the U.S. Supreme Court's recent 'Van Buren' decision, which fits into a pattern of the court's modern criminal law jurisprudence that, while purporting to use only traditional tools of statutory interpretation and to eschew policy judgments, nevertheless appears motivated by concerns about the ever-expanding reach and severity of federal criminal law.

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This column has previously joined the widespread prognostication about what the advent of the Supreme Court's new majority may mean for the evolution of the law. See Anello and Albert, "Implications of a More Conservative Supreme Court for White-Collar Practitioners," New York Law Journal (Oct. 8, 2020). Although it is too early to render judgment, the court's June 3, 2021 decision in *Van Buren* v. United States, 141 S. Ct. 1648 (2021), one of Justice Amy Coney Barrett's first majority opinions and her first addressing criminal law as a member of the court, provides some clues. In narrowly construing a provision of the Computer Fraud and Abuse Act of 1986 (CFAA) to avoid criminalizing "a breathtaking amount of commonplace computer activity," Justice Barrett's opinion likely will be welcomed by those concerned about overcriminalization and untethered prosecutorial discretion in the federal system.

Indeed, the *Van Buren* decision well fits into a pattern of the court's modern criminal law jurisprudence that, while purporting to use only traditional tools of statutory interpretation and to eschew policy judgments, nevertheless appears motivated by concerns about the ever-expanding reach and severity of federal criminal law. Over the past decade, the Supreme Court increasingly has questioned the Justice Department's broad interpretations of various criminal statutes and their application to novel factual scenarios outside the perceived heartland of conduct at which the laws were aimed. Although in certain instances the court has tackled the overbreadth issue directly—for example, holding that the Armed Career Criminal Act's "residual clause" was void-for-vagueness in Johnson v. United States, 576 U.S. 591 (2015)—more often, the court takes a subtler approach of adopting less-than-obvious narrow interpretations of criminal statutes that appear broadly written. Nevertheless, the court tips its hand by injecting into its mix of textualist tools policy arguments regarding the absurd consequences that could result from the broad interpretations urged by the government. Indeed, one important thread that runs through these decisions is the court's disavowal of the notion that "prosecutorial discretion" provides any meaningful check on the excessive breadth of criminal statutes.

'Van Buren'

Van Buren called upon the court to interpret a provision of the CFAA that imposes criminal liability on anyone who "exceeds authorized access" of a computer, defined to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U. S. C. §§1030(a)(2), (e)(6). Prosecutors had charged police sergeant Nathan *Van Buren* with violating this provision of the CFAA when he ran a license-plate search in a state law enforcement computer database in exchange for money during the course of an FBI sting operation. Specifically, the FBI had deployed Andrew Albo—a supposed friend of *Van Buren*'s whom *Van Buren* had approached regarding a personal loan—to offer *Van Buren* $5,000 in exchange for running a license plate search to determine whether a woman Albo purportedly met at a local strip club was actually an undercover officer. *Van Buren* used his admittedly valid credentials to access the law enforcement

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database from his patrol-car computer and ran the requested search. He was convicted following a jury trial and sentenced to an eighteen-month term of imprisonment.

The Supreme Court reversed *Van Buren*'s conviction over a dissent from Justice Thomas (joined by Justice Alito and Chief Justice Roberts), holding that the "exceeds authorized access" provision "covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend[, but] does not cover those who, like *Van Buren*, have improper motives for obtaining information that is otherwise available to them." *Van Buren*, 141 S. Ct. at 1652. The key language identified by the court was whether Van Buren was "entitled so to obtain" the license plate information—and in particular, the meaning of the word "so." 18 U. S. C. §1030(e)(6). The court ultimately accepted Van Buren's interpretation that the word "so" "refers to information one is … allowed to obtain *by using a computer that he is authorized to access,*" rejecting the government's contention that "so" referred to "information one was … allowed to obtain *in the particular manner or circumstances in which he obtained it*." Van Buren, 141 S. Ct. at 1654. The court similarly rejected the dissent's assertion that, regardless of the meaning of the word "so," Van Buren was not "entitled" to obtain the license plate information because he did so for an admittedly "improper purpose"—selling the information to Albo—in light of a police department policy that forbade employees from accessing the database for any "personal use." See id. at 1656–57.

In reaching this conclusion, the court employed its standard tools of statutory interpretation, scrutinizing the text and looking to, among other things, dictionary definitions, ordinary usage, and the overall statutory structure. But the court did not stop there. Rather, at the end of its opinion, the majority shifted focus, noting that "the Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer activity." Id. at 1661. The majority observed that under the government's interpretation, "millions of otherwise law-abiding citizens are criminals." Id. For example, in the workplace, because employers typically state that computers may be used only for business purposes, "on the Government's reading of the statute, an employee who sends a personal e-mail or reads the news using her work computer has violated the CFAA." Id. Similarly, because many websites authorize a user's access only upon agreement to follow specified terms of service, the government's interpretation of the statute would appear to criminalize violations of those terms. "[I]ndeed, numerous amici explain why the Government's reading of subsection (a)(2) would do just that—criminalize everything from embellishing an online-dating profile to using a pseudonym on Facebook." Id.

The court ultimately disclaimed reliance on these policy concerns, asserting that although "the [potential] fallout underscores the implausibility of the Government's interpretation[,] [i]t is [merely] extra icing on a cake already frosted." Id. (internal quotation marks omitted). But Justice Thomas's dissent, for its part, suggests that the policy arguments appear to be driving the outcome. According to the dissent, although it is "understandable to be uncomfortable" with the sheer number of "federal laws and regulations that trigger criminal penalties" and the fact that "[m]uch of the Federal Code criminalizes common activity[,] … that discomfort does not give us the authority to alter statutes." Id. at 1669 (Thomas, J., dissenting).

Indeed, Van Buren comfortably fits with prior Supreme Court criminal law decisions that hew closely to textual analysis, but nevertheless explain that the disfavored outcome could lead to absurd overcriminalization of essentially trivial acts. As illustrated by the examples discussed below, this pattern has recurred throughout the court's jurisprudence of the last decade.

Other Examples of the Court's Pattern

In 2014, the Supreme Court overturned a conviction in *Bond v. United States*, where prosecutors had charged a jilted wife with violating the Chemical Weapons Convention Implementation Act of 1998 after she spread toxic chemicals on her husband's lover's car door, mailbox, and doorknob, ultimately causing a "minor thumb burn readily treated by rinsing with water." 572 U.S. 844, 848 (2014). Chief Justice Roberts, writing for the majority, interpreted the Act's prohibition against owning or using a "chemical weapon"—defined to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals," 18 U. S. C. § 229F(1)(A)—to exclude Bond's "unremarkable local offense," *Bond*, 572 U.S. at 848. In reaching its conclusion, the court discussed the "ordinary meaning" of the defined term, "the context from which the statute arose," and the fact that the government's broad reading of the statute could "fundamentally upset the Constitution's balance between national and local power." Id. at 861-62, 866. The court, however, also observed that the government's "reading of section 229 … would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room … . Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar." Id. at 862. Justice Scalia, who would have ruled the statute unconstitutional as applied to Bond's conduct, decried the majority's approach as espousing a new principle: "Whatever has improbably broad, deeply serious, and apparently unnecessary consequences … *is ambiguous*!" Id. at 870 (Scalia, J., dissenting). In Justice Scalia's view, "[a]s sweeping and unsettling as the Chemical Weapons Convention

Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it." Id. at 867.

The court took a similar approach in Yates v. United States, 574 U.S. 528 (2015). See Anello and Albert, "Missing Fish, Obstruction Statute and Prosecutorial Discretion," New York Law Journal (Dec. 3, 2014). Prosecutors had charged a fisherman who instructed a crew member to replace undersized grouper with slightly larger fish following an inspection by a National Marine Fisheries Service agent with violating 18 U. S. C. §1519, which prohibits "knowingly alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsif[ying], or mak[ing] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation. Justice Ginsburg, writing for a plurality of the court, concluded that §1519's reference to "tangible object[s]" covers only items that can record or preserve information—not fish. In so holding, the plurality invoked, among other things, canons of interpretation, §1519's title, the overall statutory structure, and the rule of lenity. The plurality also commented on the implications of the government's proffered definition of "tangible object," noting that 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." Yates, 574 U.S. at 548. In dissent, Justice Kagan seized upon this language as "offer[ing] a clue" as to what "accounts for" the court's decision. Id. at 569 (Kagan, J., dissenting). The plurality's emphasis of "the disproportionate penalties §1519 imposes if the law is read broadly … brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code." *Id.* But while she agreed that "§ 1519 is a bad law … [and] an emblem of a deeper pathology in the federal criminal code," she explained that "this Court does not get to rewrite [it]." Id. at 570.

The court took a similar tack in *Marinello v. United States*, 138 S. Ct. 1101 (2018). Prosecutors charged Carlo *Marinello* with running afoul of a provision of the Internal Revenue Code making it a felony to "corruptly … endeavo[r] to obstruct or imped[e] the due administration this title," 26 U.S.C. §7212(a), when he "engaged in at least one of eight different specified activities, including failing to maintain corporate books and records, failing to provide his tax accountant with complete and accurate tax information, destroying business records, hiding income, and paying employees with cash," Marinello, 138 S. Ct. at 1105. In a dissent from a denial of rehearing en banc before the Second Circuit, two judges noted that "[t]he panel opinion [affirming Marinello's obstruction conviction] affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the Supreme Court has repeatedly curtailed." *United States v. Marinello*, 855 F.3d 455, 457 (2d Cir. 2017). True to form, the Supreme Court reversed. In holding that the obstruction statute applied only to "interference with targeted governmental tax-related proceedings, such as a particular investigation or audit," the court analyzed the "literal language of the statute," its "statutory context," and the legislative history. Marinello, 138 S. Ct. at 1104, 1106. The court also noted that under government's interpretation, "the provision could apply to a person who pays a babysitter $41 per week in cash without withholding taxes, leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant." Id. at 1108. The sheer breadth of this interpretation, the majority explained, would risk not providing "fair warning" to potential defendants.

The court's opinion in *Marinello* also includes perhaps its most definitive rejection of the theory that prosecutorial discretion can act as a safeguard against overbroad statutes, explaining that reliance on such discretion places excessive power in the hands of law enforcement "to pursue their personal predilections," thereby inviting "nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system … [W]e cannot construe a criminal statute on the assumption that the Government will use it responsibly." Id. at 1108-09.

Conclusion

The court's *Van Buren* opinion fits squarely into the mold of its recent criminal law decisions that claim to use only traditional tools of statutory interpretation and to eschew policy judgments but nevertheless appear driven in part by concerns about overcriminalization. That Justice Barrett joined that trend in one of her first opinions is notable, although perhaps unsurprising given her ties to Justice Scalia, who regularly expressed skepticism at the ever-expanding breadth of criminal statutes. Time will tell, but *Van Buren* suggests that with the court's new composition of justices, we can expect it to continue to narrowly construe statutes in an effort to avoid criminalizing large swaths of trivial conduct.