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Ripple Effects from the High Court's Fishing Case

The justices' narrow reading of a Sarbanes-Oxley provision could doom future obstruction charges.

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The U.S. Supreme Court recently issued a decision with fairly narrow facts but potentially broad implications for the reach of federal obstruction charges. Last month, in *Yates v. United States*, the court reversed the U.S. Court of Appeals for the Eleventh Circuit, holding that a statute, which has been widely used in criminal prosecutions over the past decade, must be read more narrowly with regard to so-called "tangible objects" used to obstruct justice.

The case giving rise to the Supreme Court opinion was prosecuted under the Sarbanes-Oxley anti-shredding provision. This felony statute, passed in the wake of the Enron Corp. collapse and other corporate fraud scandals, provides up to 20 years of imprisonment for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation.

The alleged conduct of the defendant in this case, however, fell somewhat far afield from the typical corporate obstruction of the post-Enron era. John Yates was not a corporate executive, accountant or bookkeeper, but rather a captain of a commercial fishing boat. When confronted for inspection of the size of his fish by the National Marine Fisheries Service, he allegedly threw several dozen undersized grouper into the Gulf of Mexico, thereby making them unavailable for inspection by the federal authorities.

The government charged Yates and proceeded to trial under the argument that by throwing the fish overboard he had knowingly destroyed a "tangible object" with the intent to impede a federal investigation. Yates was convicted and sentenced to 30 days in jail. The case drew wide attention and was cited by some as an instance of overreaching by the government with a statute that was not intended to apply to the act of throwing fish into the sea.

COURT NARROWS READING

The Supreme Court, in a 5-4 decision that produced no majority opinion, shot down the government's reading of the anti-shredding statute. Justice Ruth Bader Ginsburg, joined by three other justices, concluded that the obstruction section's catch-all phrase "tangible object" must be limited to physical items that record or store data. The four-justice plurality opinion refused to mechanically apply the dictionary definition of "tangible object," instead analyzing the phrase in context.

Looking to the obstruction section's title, its placement among other narrowly drawn obstruction statutes, and its use of language specific to record-keeping, the justices concluded that "tangible object" refers only to items similar in nature to a "record" or a "document." The plurality reasoned that broader interpretation would not only violate congressional intent but would also render superfluous two broader obstruction provisions of the law. Accordingly, Ginsburg recognized "that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover-ups" and therefore a "tangible object, we hold, must be one used to record or preserve information."

Justice Samuel Alito concurred in the judgment in a separate opinion, concluding that an analysis of the plain reading of the statute's nouns, verbs and title made it clear that it should not apply to the conduct at issue in *Yates*. As he explained, a "fish does not spring to mind" as an example of a "tangible object" within the context of the law. Rather, the phrase is meant to refer to a "record" or a "document," such as a hard drive containing email. He observed that one does not "alter" or "falsify" a fish in the same way that one would a record or document.

Justice Elena Kagan dissented, joined by the remaining three justices. The dissent relied on the dictionary definition of "tangible object" that was rejected by the plurality opinion. Under the dictionary definition, a tangible object means "any object capable of being touched." The dissent observed that "tangible object" is routinely understood by both state and federal courts to include all physical objects, a reading that



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is supported by the section's use of the word "any" before the list of nouns in which "tangible object" appears. The dissent concluded that the plurality decision, in failing to follow the dictionary definition of the phrase at issue, creates more ambiguity, not less.

Obstruction charges have long been a favorite in the toolbox of charges available to prosecutors, particularly in investigations in which evidence of the suspected underlying wrongful conduct is elusive. Following the adage that it is not the conduct but the cover-up that gets one in trouble, prosecutors often bring obstruction charges to address "post-conduct activity" such as concealment, destruction or falsification of potential evidence.

In holding that the obstruction section "is better read to cover only objects one can use to record or preserve information, not all objects in the physical world," the plurality opinion limited the broad use in which the obstruction statute has increasingly been used by prosecutors. The decision limits obstructive conduct to record-keeping, documentary or informational content, and excludes a broad reading of other tangible objects.

The holding will likely be tested in future cases. As noted in the dissent, the plurality decision may foreclose obstruction cases, such as a prosecution for burning a human body to obstruct a murder investigation or repainting a van to cover up evidence of arson.

However, going forward there is a potentially broad impact. In the wake of the *Yates* decision, prosecutors may be limited in their prosecutions under the obstruction statute to charge only conduct relating to papers, records and electronic files, or some type of tangible object that its operator uses to record or store information.



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