Legal Backgrounder

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Going Overboard: *United States v. Yates* and DOJ's "Most Serious Offense" Charging Policy

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A case currently pending before the U.S. Supreme Court, *Yates v. United States*, has attracted a significant amount of attention because of the evident mismatch between the nature of Mr. Yates's legal transgression and the severity of the charges brought by the federal government, as noted by parties ranging from Justice Scalia to *The New York Times* op-ed page. The government's decision to charge Mr. Yates with the "most serious offense" available comported with a long-standing Department of Justice charging guideline. This Legal Backgrounder discusses this guideline—contained in the United States Attorneys' Manual—in the context of the Yates prosecution, explains why the policy is inconsistent with the goals of justice, and urges the Justice Department to cease its application.

On August 17, 2007, John L. Yates boarded *Miss Katie*, the commercial fishing vessel he captained, and went on an expedition for red grouper in the Gulf of Mexico. While at sea, a field officer with the Florida Fish and Wildlife Conservation Commission (a state agency) boarded *Miss Katie* and noted that 72 of the grouper were less than 20 inches long, the minimum legal size for the fish. The officer issued Yates a citation and instructed him to take the fish to port for seizure. When Yates arrived at port, three small fish had been replaced with legal-sized fish. After questioning, a crew member admitted to officials that Yates directed him to throw the undersized grouper overboard.

Yates was criminally charged under three federal statutes.[1] First, he was charged with making a false statement under 18 U.S.C. § 1001 for telling a Fish and Wildlife agent that all of the fish were still onboard. Second, he was charged with destroying property to prevent seizure under 18 U.S.C. § 2232(a). Sections 1001 and 2232(a) both carry a maximum sentence of five years.

Finally, Yates was charged under 18 U.S.C. § 1519, the "anti-shredding" provision of the Sarbanes-Oxley Act ("SOX"). SOX was enacted "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation."[2] Section 1519, which prohibits the tampering with or destruction of "any record, document, or tangible object" with the intent to impede or obstruct an investigation, had the narrow purpose of eliminating a loophole in existing law regarding the destruction of

[1] Yates's underlying conduct was also subject to a modest civil penalty: it violated the Magnuson-Stevens Act, which prohibits "failing to make fish or documents available for inspection," a civil violation with a fine beginning at $500. Southeast Region Magnuson–Stevens Act Penalty Schedule, available at http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (last visited Dec 17, 2014).

[2] *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014).

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evidence.[3] A conviction carries a 20-year maximum prison sentence.[4] Yates argued before the district court that § 1519 was "aimed solely at destruction of records and documents," and was inapplicable to fish.[5] The court disagreed, and Yates was convicted on all three counts.

Yates appealed his conviction under § 1519 to the Eleventh Circuit, which rejected his argument that the statute did not apply to the destruction of fish. The court concluded that fish were "tangible objects" within the meaning of the statute, and that Yates was responsible for the destruction of three of them. "When the text of a statute is plain […] we need not concern ourselves with contrary intent or purpose revealed by the legislative history," the Eleventh Circuit concluded.[6]

The Supreme Court granted certiorari on the question of whether the meaning of "tangible objects" under § 1519 is limited to the destruction of recordkeeping objects, as Yates argued. The parties' briefs and much of oral argument naturally focused on the proper scope of the statute, while many *amici* expressed concerns about overcriminalization based upon the Eleventh Circuit's broad reading of § 1519.[7] During oral argument, however, several Justices across the ideological spectrum expressed serious concerns with the government's decision to charge Yates under § 1519 in the first place. Chief Justice Roberts said the charge made Yates "sound like a mob boss."[8]

Justice Ginsburg wondered why the government pursued a charge with a 20-year maximum when, she noted, § 2232, with a five-year maximum, "clearly covers the situation." Justice Scalia appeared worried overcharging was becoming a trend—he referenced another recent case, *Bond v. United States*,[9] where the federal government charged a spurned wife with a violation of the Chemical Weapons Convention Implementation Act for a poor attempt at giving her husband's mistress an uncomfortable rash—before asking: "[w]hat kind of a mad prosecutor would try to send this guy up for 20 years?"[10] The government's response was straightforward: any DOJ lawyer following departmental policy.

Assistant to the Solicitor General Roman Martinez responded to Scalia's rhetorical question by explaining that the government charged Yates under § 1519 because it was the harshest applicable statute. Referring to the U.S. Attorneys' Manual, which reflects DOJ policy for prosecutors, Martinez said, "The general guidance that's given is that the prosecutor should charge […] the offense that's the most severe under the law."[11] For Yates, Martinez continued, "that was section 1519."[12]

Section 9-27.300 of the U.S Attorneys' Manual is entitled "Selecting Charges—Charging Most Serious Offenses."[13] It provides, "Once the decision to prosecute has been made, the attorney for the government

[3] *See* 18 U.S.C. § 1519 (providing a person who "knowingly … destroys … any … tangible object" violates the statute).

[4] *See* 18 U.S.C. § 1519 (providing "[w]hoever 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.").

[5] Petition for Writ of Certiorari, *Yates v. United States,* No.13-7451, at *6 (Nov. 13, 2013).

[6] *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013).

[7] *See, e.g.,* Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petition For A Writ of Certiorari, *Yates v. United States*, 13-7451, at 19 (Feb. 5, 2014) ("If § 1519 is read to encompass the destruction of fish, the statute truly knows no bounds."); Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner, *Yates v. United States*, 13-7451 (July 7, 2014) (arguing that § 1519 is too indefinite to put public on notice of what conduct is illegal, and is thus void for vagueness).

[8] *Id*. at 30.

[9] 134 S. Ct. 2077 (2014)

[10] Transcript of Oral Argument at 27-28, *Yates v. United States*, _ U.S. _ (2014) (No. 13-7451).

[11] *Id*. at 28-29.

[12] *Id*. at 29.

[13] U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.300 (updated Dec. 2014), *available at* http://www.justice.gov/

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."[14] Martinez eventually argued that § 1519 was appropriate for Yates, noting that he disobeyed an explicit instruction by a law enforcement officer to preserve evidence and enlisted another person in a "convoluted cover-up scheme,"[15] but that did not address Justice Ginsburg's concern about why the charge under § 2232 was not sufficient, nor Justice Scalia's concern about exposing Yates to a potential 20-year sentence.

Martinez acknowledged Yates did not deserve 20 years and noted that the government only sought a sentence within the guideline range of 21-27 months (the district court sentenced Yates to 30 days in jail). But this hardly allayed the Court's concerns, nor did it explain why the government charged § 1519 in the first instance. Chief Justice Roberts was concerned about the enormous leverage pursuing the "most serious offense" can give the government over potential defendants. "The point is that . . . 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 a year . . . ?"[16] The Chief Justice's comment calls to mind the case of Aaron Swartz, who hacked a database of academic journals and on whom the government piled charges exposing him to as much as 50 years in jail, even though the U.S. Attorney stated that she would have sought only a six-month prison term if he had pled guilty. Swartz tragically committed suicide before his case went to trial.

Aside from the problems of leverage and overkill raised by the Court in *Yates*, another problem with DOJ's "most serious offense" charging policy is that it undermines the critical and unique duty of prosecutors to seek justice, not merely "win" their cases.[17] The Department might respond by arguing that its charging policy does require prosecutors to take individual factors into account in their charging decisions. Indeed, the direction within § 9-27.300 of the U.S. Attorneys' Manual to charge defendants with the violation that yields the highest range under the sentencing guidelines is followed by:

> [A] faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case […] and maximize the impact of Federal resources on crime.[18]

On May 10, 2010, Attorney General Eric Holder issued a memorandum on Department Policy on Charging and Sentencing, asserting that "equal justice depends on individualized justice," but then reaffirming the "long-standing principle" that "federal prosecutors should ordinarily charge 'the most serious offense'"[19] as set forth in § 9-27.300. At best, the Attorney General sent a mixed message to prosecutors; notwithstanding the command to assess each case individually, the direction to "ordinarily" pursue the most serious offense undeniably puts a finger on the scale in favor of bringing the higher charge. In *Yates*, Assistant Solicitor General Martinez, in fact, described charging the most severe offense as "the default principle."[20] The guidance to prosecutors thus invokes Henry Ford's famous quote about the Model T: customers could choose any color paint they wanted, as long as it was black.

usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.300.

[14] *Id*.

[15] Transcript of Oral Argument at 29-30, *Yates v. United States*, _ U.S. _ (2014) (No. 13-7451).

[16] *Id*. at 31.

[17] *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("[T]he citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.")

[18] U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.330, *supra* note 13.

[19] Memorandum from Eric H. Holder, Jr., Attorney General, U.S. Dep't of Justice, to All Federal Prosecutors (May 10, 2010) *available at* http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf.

[20] Transcript of Oral Argument at 29, *Yates v. United States*, _ U.S. _ (2014) (No. 13-7451).

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Yet another problem with the Justice Department's making the violation carrying the most severe penalty the presumptively "correct" charge to pursue is that it disregards the fundamental sentencing principal of proportionality. As articulated in the United States Sentencing Guidelines, that principle describes "a system that imposes appropriately different sentences for criminal conduct of differing severity."[21] Proportionality is also central to the Eighth Amendment's protection against cruel and unusual punishment.[22] Embodied in the Eighth Amendment is the "precept . . . that punishment for crime should be graduated and proportioned to [the] offense."[23] The official policy of starting from the harshest penalty possible and giving leeway to scale back is not in line with this constitutionally-rooted principle.

Arguably, prosecutors could avoid instances of overreach, such as *Yates*, through proper application of the "consistent with the nature of the defendant's conduct" language of the U.S. Attorneys' Manual. It seems self-evident that applying SOX § 1519 to allegations involving inappropriately-sized fish is *not* "consistent with the nature of defendant's conduct." However, the more effective approach, and one that could reconcile the Justice Department's contradictory directions to prosecutors, would be to repeal the policy that prosecutors "should ordinarily charge the most serious offense." It is unnecessary and, as the Justices pointed out, creates a risk of overcharging or unfair leverage for the government in the plea-bargaining process. An "individualized assessment" of the facts and circumstances of a case should lead to the pursuit of the most serious charge when the circumstances warrant, making the "default position" articulated by Assistant Solicitor General Martinez superfluous.

For a select class of offenders, the Attorney General appears to have done that already. In an August 12, 2013 memorandum to U.S. Attorneys and DOJ's Criminal Division, Holder instructed prosecutors not to charge the "most serious offense" for "certain nonviolent, low-level drug offenders" facing mandatory minimum prison sentences.[24]

The Attorney General's memo thus implicitly validates the Court's concerns in *Yates*—that in some cases, the highest applicable charge is simply unjust. This particular exception might be justified by virtue of the fact that mandatory minimums limit the court's discretion for sentencing, but its goals can be accomplished by repealing the most severe offense policy altogether. Once again, an individualized assessment that a nonviolent low-level drug offender is not deserving of the mandatory minimum sentence he would face if charged with "the most serious offense" could be handled simply by not pursuing the highest applicable charge in that particular case. There is no reason to limit to this one group of offenders the appropriate exercise of prosecutorial discretion in deciding not only whether to charge, but also with what to charge a particular individual.

If the Department of Justice *did* abolish the "most serious offense" charging policy, prosecutors could focus on a true assessment of individual culpability and fairness in making charging decisions. A fisherman who throws three undersized fish overboard would be subject to a civil penalty or, at most, a five-year sentence for obstructing a lawful seizure, instead of facing a disproportionate, draconian, 20-year term derived from a statute designed to safeguard investors in public companies, merely because it carried the harshest penalty.[25]

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[21] U.S. Sentencing Guidelines Manual ch.1, pt.3, the basic approach (policy statement) (2014). *See also United States v. Reyes*, 8 F.3d 1379, 1385 (9th Cir. 1993).

[22] *Graham v. Florida*, 560 U.S. 48, 59 (2010).

[23] *Weems v. United States*, 217 U.S. 349, 367 (1910).

[24] Memorandum from Eric H. Holder, Jr., *supra* note 19.

[25] Notably, Michael Oxley, who authored § 1519, submitted an *amicus* brief assuring the Court the Sarbanes-Oxley Act did not intend to punish defendants like Yates. Brief for the Honorable Michael Oxley as *Amicus Curiae* in Support of Petitioner, *Yates v. United States*, _ U.S. _ (No. 13-7451).

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