

“WHAT KIND OF A MAD PROSECUTOR”¹ BROUGHT US THIS WHITE COLLAR CASE

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I. INTRODUCTION

Throughout history, there has been a long line of cases where prosecutors have attempted to stretch statutes to cover conduct that they consider criminal.² Clearly, prosecutors have enormous discretion to pick and choose whom to charge, what to charge,³ when to charge,⁴ and whether to proceed against individuals or entities.⁵ Likewise, prosecutors decide who will receive immunity,⁶ who will get a plea benefit,⁷ and whether a pending case will be dismissed.⁸

1. Transcript of Oral Argument at 28, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451) (“What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?”).

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2. *See, e.g.*, *Cleveland v. United States*, 531 U.S. 12, 15, 27 (2000) (addressing prosecution under the mail fraud statute for an alleged false statement on a video poker machine license application); *McDonnell v. United States*, 136 S. Ct. 2355, 2361, 2370, 2372 (2016) (declining the prosecutor’s “expansive interpretation” of an “official act”); *United States v. Czubinski*, 106 F.3d 1069, 1071, 1076 (1st Cir. 1997) (finding that prosecution for browsing files containing tax information does not meet the elements of wire fraud).

3. *See United States v. Batchelder*, 442 U.S. 114, 123–26 (1979) (discussing the broad prosecutorial power to select charges).

4. *See United States v. Mandujano*, 425 U.S. 564, 595 (1976) (discussing prosecutorial authority in when to bring criminal charges).

5. *See, e.g.*, Ellen Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1531 (2000) (discussing prosecutorial discretion and the need for ethical decision-making); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521, 1523–37 (1981) (discussing the breadth of prosecutorial discretion).

6. *See Robert L. Misner, Recasting Prosecutorial Discretion*, 86 *J. CRIM. L. & CRIMINOLOGY* 717, 741 (1996) (discussing decisions within prosecutorial discretion, including immunity grants).

7. *See Darryl K. Brown, Judicial Power to Regulate Plea Bargaining*, 57 *WM. & MARY L. REV.* 1225, 1272 (2016) (discussing the breadth of prosecutorial discretion).

8. *See, e.g.*, *Best v. City of Portland*, 554 F.3d 698, 702 (7th Cir. 2009) (“[U]nder Indiana law, a prosecutor may voluntarily dismiss an indictment or information before trial for any reason and

Although prosecutors do not have “unfettered” discretion,⁹ there are very few restrictions on their discretionary power.¹⁰ It is not prohibited for prosecutors to act arbitrarily,¹¹ and few defendants have succeeded in the dismissal of an indictment absent a showing that the alleged conduct did not match the crime charged or was a result of vindictive action.¹²

This Essay examines prosecutorial discretion that stretches statutes beyond statutory language, congressional intent, or policy. Although cases of prosecutorial stretching occur throughout the context of criminal law, this piece focuses on the stretching of statutes in the white collar context.

In the past, stretching of statutes or creative prosecutions was sometimes justified with claims that existing statutes did not cover the misconduct.¹³ For example, prior to the passage in 1970 of the Racketeered Influenced Corrupt Organization Act (RICO),¹⁴ individuals engaged in organized crime were commonly indicted and convicted for tax crimes.¹⁵ Likewise, prior to the passage of the Computer Fraud and Abuse Act,¹⁶

without court approval.”). Prosecutors also have discretion with respect to many related decisions, such as whether to give a defendant a 5K1.1 motion for substantial assistance, a motion that can reduce the sentence. Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1260 (1994) (discussing the discretion afforded to prosecutors in filing a motion that serves as an exception to the legislative restrictions of mandatory-minimum sentences).

9. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“[A]lthough prosecutorial discretion is broad, it is not ‘unfettered.’”) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

10. Prosecutorial discretion is limited by the use of improper factors. See *United States v. LaBonte*, 520 U.S. 751, 762 (1997) (“[D]iscretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.”). Additionally, there are ethical restrictions that apply to prosecutorial decision-making. See MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2016) (stating that prosecutors shall “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”). See STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9 (AM. BAR ASS’N 1993), for more extensive guidance.

11. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (citing *Wayte*, 598 U.S. at 608).

12. The Supreme Court has held that there is no presumption of vindictiveness. *United States v. Goodwin*, 457 U.S. 368, 384 (1982). In *United States v. Armstrong*, the Supreme Court held that “[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary.’” *Armstrong*, 517 U.S. at 465 (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926)).

13. See, e.g., Tod H. Flaming, Comment, *The National Stolen Property Act and Computer Files: A New Form of Property, a New Form of Theft*, 1993 U. CHI. L. SCH. ROUNDTABLE 255, 256, 290 (1993) (discussing *Dowling v. United States*, 473 U.S. 207 (1985), and noting the confusion lower courts faced in addressing stolen computer files under the National Stolen Property Act).

14. 18 U.S.C. §§ 1961–1968 (2012).

15. Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 630 (2005) (prosecuting individuals for lesser charges than the conduct warrants).

16. 18 U.S.C. § 1030 (2012).

prosecutors used the National Stolen Property Act¹⁷ and Wire Fraud¹⁸ statutes to proceed against computer misconduct.¹⁹ But the growth of criminal statutes makes looking beyond the explicit language of the legislation less warranted.²⁰

This Essay looks at three areas of white collar crime that have seen prosecutorial statute stretching: fraud,²¹ obstruction-of-justice,²² and bribery.²³ Within each of these areas, there are many examples of both historical and recent cases requiring judicial oversight to halt prosecutorial practices.²⁴ This Essay concludes by noting that prosecutors who stretch statutes do a disservice to our judicial system. It is important to strictly

17. 18 U.S.C. §§ 2311, 2314–2315 (2012).

18. 18 U.S.C. § 1343 (2012).

19. See Flaming, *supra* note 13, at 255 (discussing the difficulty of charging computer crimes under the National Stolen Property Act). Both of these statutes continue to be used by prosecutors when charging computer misconduct. See, e.g., United States v. Agrawal, 726 F.3d 235, 237 (2d Cir. 2013) (discussing charges brought under the Economic Espionage Act and the National Stolen Property Act); United States v. Aleynikov, 676 F.3d 71, 74–75 (2d Cir. 2012) (rejecting charges brought under the Economic Espionage Act, National Stolen Property Act, and the Computer Fraud and Abuse Act); United States v. Czubinski, 106 F.3d 1069, 1071 (1st Cir. 1997) (discussing wire fraud and computer fraud charges brought under 18 U.S.C. §§ 1343, 1346, and 18 U.S.C. § 1030(a)(4)).

20. See BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010), http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf (discussing an estimated 4,450 criminal statutes by the end of 2007); Jim E. Levine, *From the President: Faces of Overcriminalization*, CHAMPION, Nov. 2010, at 1, 5 (noting that there are an estimated 4,450 federal crimes and "quite possibly as many as 300,000 federal regulations that can be enforced criminally"); John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 547 (2005) (discussing how to limit the expansion of federal criminal law); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) ("Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over.").

21. Although the focus here is on the mail and wire fraud statutes, 18 U.S.C. §§ 1341–1342, it is recognized that many of the fraud statutes that exist in the federal criminal code are modeled after these two statutes. See, e.g., 18 U.S.C. § 1344 (bank fraud statute).

22. Although there are many obstruction-of-justice statutes in the United States Code, a more recent statute is selected here, 18 U.S.C. § 1519 (2012), to demonstrate prosecutorial statutory stretching.

23. There are many bribery statutes in the United States Code. The focus here is on 18 U.S.C. § 201 (2012).

24. Prosecutorial statutory stretching is not limited to these white collar areas, nor are all cases of prosecutorial stretching rejected by the courts. See, e.g., United States v. McNab, 331 F.3d 1228, 1247 (11th Cir. 2003) (affirming a conviction under the Lacey Act for an alleged violation of Honduran law); *id.* (Fay, J., dissenting) (pointing out that the Honduran government found the alleged violation to be "null and void").

construe white collar statutes to assure that criminal conduct is recognized and conformity with the law is promoted.²⁵

II. WHITE COLLAR STRETCHING

A. Fraud

The mail fraud statute, one provision within the 1872 recodification of the Postal Act, was met with some uncertainty in the initial prosecutions.²⁶ In its inception it was clear that a key component of the mail fraud statute was the use of the Post Office Establishment.²⁷ Mail fraud cases that were not directly tied to the Post Office and did not have the Post Office as an integral part of the fraud were not encompassed within the statute.²⁸ One initial case was *United States v. Owens*, a case in which an individual sent slips of paper and a fifty-cent coin in the mail, claiming the payment paid off a \$162.50 debt to a distillery company.²⁹ The court rejected this Indictment being the basis for a mail fraud charge, holding that, “[i]f such is the scope of the section named, it may draw within federal cognizance nearly all the commercial correspondence of the country as to disputed demands and the value of remittances.”³⁰ Thus, the court was unwilling to stretch the statute as desired by the government.³¹

Later in the history of the mail fraud statute, in *McNally v. United States*,³² we again see the Court putting a halt to prosecutorial stretching. This case arose from prosecutors bringing a criminal indictment premised on “intangible rights,” a theory that the government had been using for several years in mail fraud cases.³³ The problem was that the statute did not authorize prosecutions premised on “intangible rights,” and a 1909 amendment to mail fraud required proof of a deprivation of “money or

25. This Essay is not exclusively focused on the Rule of Lenity, which “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 553 U.S. 507, 514 (2008). Rather, the focus is on the prosecutor who stretches a statute to fit alleged misconduct that is not encompassed within the law, intent, or the policy rationale for it being part of the criminal code.

26. 18 U.S.C. § 1341. *See also* Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 227 (1992) (noting that courts ruled inconsistently on early mail fraud statute cases).

27. *See* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 783–85 (1980) (noting that the initial mail fraud statute looked at the intentional misuse of the mails).

28. *See* Podgor, *supra* note 26, at 227 (discussing the history of the mail fraud statute).

29. *United States v. Owens*, 17 F. 72, 73 (E.D. Mo. 1883).

30. *Id.* at 74.

31. *Id.*

32. *McNally v. United States*, 483 U.S. 350, 352 (1987).

33. *Id.* *See also id.* at 362 n.1 (listing the many cases brought by the government using an intangible rights theory).

property.”³⁴ Despite this lack of statutory authority to proceed against defendants premised upon a deprivation of intangible rights, the government prosecuted an alleged self-dealing patronage scheme under this theory, presenting it in both the indictment³⁵ and later in a jury instruction.³⁶ The case, when reversed by the Supreme Court, was a huge loss to the government, as it required re-examination of many prosecutions that had used this improper theory.³⁷ Although Congress eventually responded with a new statute, 18 U.S.C. § 1346,³⁸ a statute that provided the government with legislative authority to include schemes to defraud the intangible right to honest services, the initial stretching of the statute without this statutory authority resulted in failed prosecutions and overturned convictions.³⁹

Prosecutors again tried to stretch the mail fraud statute in *Cleveland v. United States*.⁴⁰ The indictment charged Carl W. Cleveland with an alleged false statement on an application license for video poker machines.⁴¹ This time the government argued that since intangible property could suffice for a mail fraud conviction, the government should be allowed to use mail fraud for misstatements on license applications.⁴² The Court held otherwise, reminding the government that although intangible property will match the money or property element of the mail fraud statute, a license application was a regulatory matter and not intangible property.⁴³ Thus, the government’s attempt to say that intangible rights were the same as intangible property failed. The Court noted that it rejected “the Government’s theories of property rights not simply because they stray from traditional concepts of property[,]” but also because it “resist[ed] the Government’s reading of § 1341 because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear

34. *Id.* at 350; 18 U.S.C. § 1341 (2012).

35. *McNally*, 483 U.S. at 354.

36. *Id.*

37. See generally Craig M. Bradley, *Foreword: Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 574 (1988) (discussing cases post-*McNally*).

38. Passed as part of the Anti-Drug Abuse Act of 1988, 18 U.S.C. § 1346 provides that, “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346 (2012).

39. See M. Diane Duszak, Note, *Post-McNally Review of Invalid Convictions Through the Writ of Coram Nobis*, 58 FORDHAM L. REV. 979, 979–80 (1990) (discussing the use of *coram nobis* to void convictions following the Supreme Court’s decision in *McNally*).

40. *Cleveland v. United States*, 531 U.S. 12, 15 (2000).

41. *Id.*

42. In *Carpenter v. United States*, the Supreme Court reaffirmed that § 1341, the mail fraud statute, and § 1343, the wire fraud statute, required a deprivation of property. *Carpenter v. United States*, 484 U.S. 19, 27–28 (1987). In *Carpenter*, the Court allowed the use of intangible property, permitting the statute to cover confidential business information. *Id.*

43. *Cleveland*, 531 U.S. at 20.

statement by Congress.”⁴⁴ The Court was unwilling to stretch the statute as proposed by the government to a “vast array of conduct traditionally policed by the States.”⁴⁵

With the passage of the intangible rights statute, 18 U.S.C. § 1346,⁴⁶ prosecutors again attempted to stretch the mail fraud statute, this time using the congressional fix that allowed for intangible rights prosecutions. The Court took three cases, *Skilling v. United States*,⁴⁷ *Black v. United States*,⁴⁸ and *Weyhrauch v. United States*,⁴⁹ to examine the government’s actions. The new statute, 18 U.S.C. § 1346, had been a subject of concern,⁵⁰ as it encouraged prosecutors to bring cases for any deprivation of honest services. Although some justices would have preferred to toss out § 1346 as vague,⁵¹ the consensus chose a narrower path and retained the statute.⁵² The Supreme Court’s solution was a gift to prosecutors in that it left the statute standing; the Court merely constrained the statute by requiring a showing of bribery or kickbacks when prosecutors premised the case on the intangible right to honest services.⁵³ Although some cases were reversed after *Skilling*, the Supreme Court’s decision left Jeffrey Skilling in prison, albeit with a new sentence.⁵⁴

Although the focus of this piece is on examples of statutes stretched by prosecutors, it should be noted that not all mail fraud Supreme Court decisions have restricted prosecutorial discretion. In some instances, interpretive guidance is offered that allows convictions to stand or be reversed.⁵⁵ That said, the need to limit prosecutors to the statute’s terms is seen in many lower court decisions that have dismissed or reversed mail fraud or wire fraud convictions following prosecutions that attempted to

44. *Id.* at 24.

45. *Id.* at 27.

46. *Supra* note 38.

47. *Skilling v. United States*, 561 U.S. 358, 368 (2010).

48. *Black v. United States*, 561 U.S. 465, 465 (2010).

49. *Weyhrauch v. United States*, 561 U.S. 476 (2010).

50. *See Sorich v. United States*, 523 F.3d 702 (7th Cir. 2008), *cert. denied*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting) (noting that 18 U.S.C. § 1346 has been used to “impose criminal penalties upon a staggeringly broad swath of behavior”).

51. *Skilling*, 561 U.S. at 415 (Scalia, J., concurring).

52. *Id.* at 412.

53. *Id.* at 408–09.

54. *See United States v. Skilling*, 638 F.3d 480, 488 (5th Cir. 2011) (finding instruction to be harmless error after Supreme Court remand, but vacating the initial sentence).

55. There are many affirmed convictions and some that provide future guidance to prosecutors on the contours of the statute. For example, the Supreme Court has spoken as to when the alleged conduct will be “in furtherance” of the scheme to defraud. *Schmuck v. United States*, 489 U.S. 705, 707 (1989). The Court has also advised prosecutors of the need to include an element of “materiality” when proceeding with a mail or wire fraud prosecution. *Neder v. United States*, 527 U.S. 1, 4 (1999).

stretch the statute.⁵⁶ Prosecutors unsuccessfully attempted to obtain mail fraud convictions in cases where the conduct involved puffery,⁵⁷ deceit,⁵⁸ a promotion scheme,⁵⁹ payment of attorney bills,⁶⁰ mere browsing,⁶¹ and cases involving civil contract claims.⁶² The Supreme Court has also restricted the prosecutors' attempts to use mail fraud with an extortion scheme.⁶³

Recently, prosecutors have used the mail and wire fraud statutes in cases that could easily be the subject of a civil action.⁶⁴ Traditionally, contract breaches were not considered part of criminal law.⁶⁵ Yet, the government has recently advanced a case that falls outside the typical criminal realm, requiring a jury to deliberate as to whether conduct between

56. See, e.g., *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1179–80 (2d Cir. 1970) (finding that mere “white lies” that are “not directed to the quality, adequacy or price of goods to be sold” does not give rise to mail fraud); *United States v. Czubinski*, 106 F.3d 1069, 1071, 1076 (1st Cir. 1997) (declining to extend statutory wire and computer fraud to “[u]nauthorized browsing of taxpayer files”); *McEvoy Travel Bureau v. Heritage Travel, Inc.*, 904 F.2d 786, 791, 794 (1st Cir. 1990) (refusing to extend statutory mail or wire fraud to cover any mail or wire use for illegal purposes).

57. See *Regent Office Supply Co.*, 421 F.2d at 1179–80 (finding that although “‘white lies’ [are] repugnant to ‘standards of business morality,’” this mere puffing is insufficient for mail fraud).

58. See *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (finding deceit insufficient to maintain mail or wire fraud prosecution).

59. See *United States v. Goodman*, 984 F.2d 235, 240 (8th Cir. 1993) (“Without some objective evidence demonstrating a scheme to defraud, all promotional schemes to make money, even if ‘sleazy’ or ‘shrewd,’ would be subject to prosecution on the mere whim of the prosecutor.”).

60. See *United States v. D’Amato*, 39 F.3d 1249, 1261 (2d Cir. 1994) (finding it improper to use a false pretenses theory for payment of attorney’s fees).

61. See *Czubinski*, 106 F.3d at 1076 (“Mere browsing of the records of people about whom one might have a particular interest, although reprehensible, is not enough to sustain a wire fraud conviction on a ‘deprivation of intangible property’ theory.”).

62. See *McEvoy Travel Bureau v. Heritage Travel, Inc.*, 904 F.2d 786, 791, 794 (1st Cir. 1990) (finding that a mere breach of contract was not sufficient for mail fraud).

63. See *Fasulo v. United States*, 272 U.S. 620, 625, 629 (1929) (finding that it was not a scheme to defraud for the purposes of mail fraud to “[make] use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm.”).

64. See *United States v. Jasen*, No. 8:15-CR-214-T-27TBM, 2015 WL 5190645, at *1, *7 (M.D. Fla. Sept. 4, 2015) (denying defendant’s motion to dismiss an indictment for wire fraud arising out of defendant’s alleged failure to disclose the existence of a sinkhole in a real estate transaction). The defendants in the *Jasen* case were convicted. Shannon Behnken, *Spring Hill Couple Accused of Lying About Sinkhole Found Guilty*, NEWS CHANNEL 8 (Oct. 8, 2015, 1:15 pm), <http://wfla.com/2015/10/08/spring-hill-couple-accused-of-lying-about-sinkhole-found-guilty/>. The case is currently on appeal to the Eleventh Circuit. *Jasen*, 2015 WL 5190645, *appeal docketed*, No. 16-10582 (11th Cir. Feb. 11, 2016).

65. See *United States ex rel. O’Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 658 (2d Cir. 2016) (“[T]he common law does not permit a fraud claim based solely on contractual breach . . .”). See also Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis*, 28 GA. ST. U.L. REV. 559, 568 (2012) (discussing how under the common law, “[c]rimes stand apart from both torts and contracts”).

civil parties rises to the level of criminal fraudulent activity.⁶⁶ In reversing the conviction in *United States v. Weimert*,⁶⁷ the Seventh Circuit concluded that the mail and wire fraud statutes cannot “be stretched to criminalize deception about a party’s negotiating positions, such as a party’s bottom-line reserve price or how important a particular non-price term is.”⁶⁸ The court stated that, “Congress could not have meant to criminalize deceptive misstatements or omissions about a buyer’s or seller’s negotiating positions Such deceptions are not criminal.”⁶⁹ The court noted that this was a matter “for the corporate boardroom and civil law, not a federal criminal trial.”⁷⁰

B. Obstruction

One does not need to look far to see prosecutors stretching white collar criminal statutes in the obstruction-of-justice arena.⁷¹ Obstruction of justice, like perjury and false statements, is a commonly used criminal charge by prosecutors in white collar cases.⁷² An obstruction-of-justice charge allows for efficient prosecution as opposed to having to prove complex financial fraud.

Although there are historical cases that demonstrate prosecutions exceeding the boundaries of an obstruction-of-justice statute, a prominent

66. *United States v. Weimert*, 819 F.3d 351, 353–54 (7th Cir. 2016).

67. *Id.* at 370.

68. *Id.* at 357.

69. *Id.*

70. *Id.* at 370. In *Countrywide Home Loans*, the Second Circuit noted that, “[o]nly if a contractual promise is made with no intent ever to perform it can the promise itself constitute a fraudulent misrepresentation.” *Countrywide Home Loans*, 822 F.3d at 662.

71. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005) (reversing an obstruction-of-justice conviction). The government’s case against Lauren Stevens, former counsel at GlaxoSmith Kline, was premised on claims that she obstructed justice. The initial case was dismissed for improper jury instructions to the grand jury. *United States v. Stevens*, 771 F. Supp. 2d 556, 564, 568 (D. Md. 2011). When refiled and tried, Judge Titus eventually granted an acquittal finding that, “a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her” William F. Gould & Michael M. Gaba, *United States v. Lauren Stevens: How FDA’s Questions About Off-Label Promotion Led to the Criminal Prosecution of a Company Lawyer*, FOOD & DRUG L. INST.: UPDATE, Sept./Oct. 2011, at 7, 10, <https://www.hklaw.com/files/Publication/e3d2ad67-4de9-4988-b70f-f5b5b93d0db4/Presentation/PublicationAttachment/724f94e4-a0d4-406a-980c-0120833ab472/4410%5B1%5D.pdf> (quoting Order on Rule 29, *Stevens*, 771 F. Supp. 2d). See also Ellen Podgor, *Hon. Titus Calls for Acquittal in Lauren Stevens Case*, WHITE COLLAR CRIME PROF BLOG (May 10, 2011), http://lawprofessors.typepad.com/whitecollarcrime_blog/2011/05/hon-titus-calls-for-acquittal-in-lauren-stevens-case.html (discussing the court order acquitting Lauren Stevens).

72. See Ellen S. Podgor, *White-Collar Crime and the Recession: Was the Chicken or Egg First?*, 2010 U. CHI. LEGAL F. 205, 217 (2010) (discussing the use of certain offenses for efficiency purposes).

Supreme Court case, *United States v. Yates*,⁷³ provides an eye-opening example of improper prosecutorial statutory stretching in this area.

John Yates, a fisherman, was charged and convicted of violating 18 U.S.C. § 1519, an obstruction-of-justice statute passed as part of the Sarbanes-Oxley Act of 2002.⁷⁴ The legislation was “designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation.”⁷⁵

Yates was alleged to have failed to follow the instructions of an Officer of the Florida Fish and Wildlife Conservation Commission in bringing back to shore undersized grouper fish that he and his crew had caught.⁷⁶ Instead, some of the fish were thrown overboard.⁷⁷ One of the two charges levied against him for this conduct was a violation of 18 U.S.C. § 1519.⁷⁸ Yates’s argument was that fish are not comparable to documents and therefore are not covered as “tangible objects” prohibited by the statute.⁷⁹ The government used the literal definition of this term, arguing that fish met the definition of a “tangible object.”⁸⁰

The Court rejected the government’s argument, finding that, “[t]angible object’ in § 1519 . . . is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.”⁸¹ The Court provided an in-depth statutory interpretation analysis, looking at the legislative history, surrounding words, *noscitur a sociis*, and *eiusdem generis*.⁸² The Court examined the statute under Model Penal Code terms⁸³ and also referenced the importance of the Rule of Lenity in interpreting criminal statutes.⁸⁴ Justice Alito, concurring in the result, provided additional statutory interpretation considerations, including reference to the title of the statute. He noted that, “[d]estruction, alteration, or falsification of records in Federal investigations and bankruptcy’ [in

73. *Yates v. United States*, 135 S. Ct. 1074 (2015).

74. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 800 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.).

75. *Yates*, 135 S. Ct. at 1079.

76. The state officer had been “deputized as a federal agent by the National Marine Fisheries Service,” providing the basis here for federal jurisdiction. *Id.* at 1079–80.

77. *Id.* at 1080. By the trial of the indictment, the regulation on fish size had changed and the fish Yates caught were no longer below the limits. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1081.

82. *Id.* at 1084–87.

83. *Id.* at 1087–88.

84. *Id.* at 1088.

§ 1519's title] . . . points toward filekeeping, not fish."⁸⁵ In the end, the Court did not accept the government's expansive definition.⁸⁶

Even the four-person dissent was bothered by this prosecution.⁸⁷ Finding that a fish was in fact a "tangible object," the dissent noted that "whatever the wisdom or folly of § 1519, this Court does not get to rewrite the law."⁸⁸ The dicta in the dissent provides insight into the dismay that the Court had with this case. The "real issue" the dissent had was "overcriminalization and excessive punishment in the U.S. Code."⁸⁹ It gave "prosecutors too much leverage and sentencers too much discretion."⁹⁰ The dissent stated, "And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code."⁹¹

Justice Scalia best expressed the stretching of this statute in oral argument, when he asked the Assistant Solicitor General Roman Martinez: "No, I'm not talking about Congress. I'm talking about the prosecutor. What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?"⁹² The dissenting justices, including Justice Scalia, recognized the absurdity of the prosecutor's stretching of the statute.⁹³ Although as a strict constructionist Justice Scalia preferred the correction to be with Congress, the discretionary prosecutorial role here did not go unnoticed.

C. Bribery

Bribery under 18 U.S.C. § 201 is yet another area where prosecutorial stretching has occurred.⁹⁴ A key component under this statute is the requirement that "[t]he benefit provided to the public official must be connected to an actual or proposed exercise of governmental authority to violate § 201."⁹⁵

85. *Id.* at 1090 (Alito, J., concurring) (emphasis omitted) (quoting 18 U.S.C. § 1519 (2012)).

86. *Id.* at 1088.

87. *Id.* at 1101 (Kagan, J., dissenting).

88. *Id.*

89. *Id.* at 1100.

90. *Id.* at 1101.

91. *Id.*

92. Transcript of Oral Argument at 28, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451).

93. *Yates*, 135 S. Ct. at 1100.

94. 18 U.S.C. § 201 (2012).

95. ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, *WHITE COLLAR CRIME* 195 (2013).

Former Virginia Governor Robert McDonnell and his wife were indicted and convicted on bribery charges related to their alleged acceptance of money and gifts from a local businessman.⁹⁶ A key issue in the case was whether the trial court had properly defined "official act" in the instructions to the jury.⁹⁷ In a unanimous decision of the Supreme Court, McDonnell's conviction was reversed.⁹⁸

In *McDonnell v. United States*, the Court rejected the trial court's instruction regarding how to define "official act" under § 201(a)(3).⁹⁹ The Court stated that, "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'"¹⁰⁰

But this was not the first time that the Supreme Court needed to engage in an exercise of statutory interpretation to define this term. In *McDonnell*, the Court reminded readers that it had previously rejected an expansive definition of the words "decision" and "action" in the case of *United States v. Sun-Diamond Growers of California*.¹⁰¹ *Sun-Diamond* offered extensive guidance on what did and did not constitute an "official act."¹⁰² In this regard, the *McDonnell* Court stated that, "[i]t is apparent from *Sun-Diamond* that hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a 'decision or action' within the meaning of § 201(a)(3), even if the event, meeting, or speech is related to a pending question or matter."¹⁰³ The Court noted that "[i]nstead, something more is required: § 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so."¹⁰⁴

In finding what is insufficient to reach the level of an "official act," the Court noted that the "Government's expansive interpretation of 'official act' would raise significant constitutional concerns."¹⁰⁵ The Court was unwilling, as it also was in *Sun-Diamond*, to leave the decisions to prosecutors' discretion "to protect against overzealous prosecutions under § 201."¹⁰⁶ The Court vacated Governor McDonnell's convictions due to

96. *McDonnell v. United States*, 136 S. Ct. 2355, 2361 (2016).

97. *Id.* at 2367, 2375.

98. *Id.* at 2360, 2375.

99. *Id.*

100. *Id.* at 2368.

101. *Id.* at 2370 (citing *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999)).

102. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 400 (1999).

103. *McDonnell*, 136 S. Ct. at 2370.

104. *Id.*

105. *Id.* at 2372.

106. *Id.* at 2373.

jury instructions incorrectly defining “official act.”¹⁰⁷ The Department of Justice decided not to prosecute this case a second time.¹⁰⁸

III. CONCLUSION

One might say that the cases from these three areas are important, because through statutory interpretation they provide prosecutors with the contours of what is and is not criminal. But the stretching of statutes also creates problems. It means that prosecutors are proceeding against individuals who may be unaware that their conduct is criminal, thus, potentially violating the due process rights of these individuals. It also means that valuable resources are being spent on uncertain conduct, diminishing the ability to spend the time and energy prosecuting conduct that does firmly meet the statute.

Achieving compliance with the law in the white collar area can best be accomplished by demonstrating to others the ramifications of violating a criminal statute. When the wrongdoer is unclear or unaware that the activities in question violate the law, it is difficult to achieve general or specific deterrence. Thus, when prosecutors stretch a statute to encompass specific activities, the court must not only resolve and review the legal issues presented on appeal, but it also must curb prosecutors when they have exceeded the boundaries of the statute. This is especially problematic when the court finds itself telling the government that it has exceeded the scope of the statute multiple times.

Creativity in prosecution should not be welcomed. Rather, prosecutors should limit their cases to clear violations of the applicable law.

It is equally troubling to see a world filled with extensive white collar misconduct. Yet, when the government is using its statutory tools to bring a case about destruction of fish under a statute that was enacted to halt the destruction of documents in cases such as Arthur Andersen LLP’s activities post-Enron, it is problematic. That the *Yates* case would be the prosecution’s choice leaves questions about judgment calls in the use of prosecutorial discretion.

While proceeding with cases such as seen in *Yates*, other conduct is not being prosecuted. For example, Bernard Madoff was involved in clear-cut

107. *Id.* at 2373, 2375.

108. Matt Zaposky, Rachel Weiner & Rosalind S. Helderman, *Prosecutors Will Drop Cases Against Former Va. Governor Robert McDonnell, Wife*, WASH. POST (Sept. 8, 2016), https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa_story.html.

criminal conduct in creating and operating a Ponzi scheme.¹⁰⁹ If the government had uncovered the conduct earlier, it might have reduced the number of victims. It was not until Bernard Madoff's sons came forward and turned him in to the government,¹¹⁰ resulting in his pleading guilty and receiving a 150-year sentence, that the criminal justice provided general and specific deterrence for this conduct.¹¹¹ A report revealed that Madoff's fraud had gone on for many years before he was convicted.¹¹²

Stretching statutes will not achieve the efficiency that the government desires.¹¹³ The most important part of prosecution is punishment and deterring future conduct.¹¹⁴ It is important that individuals accused of committing a crime know that their conduct is wrongful.¹¹⁵ The law cannot achieve specific and general deterrence without giving fair warning that certain conduct is criminal.¹¹⁶ While stretching criminal statutes appears to offer a tough-on-crime approach, it does little to ultimately curtail future criminality.

109. Ellen S. Podgor, *100 Years of White Collar Crime in "Twitter,"* 30 REV. LITIG. 535, 546 (2011).

110. *Sons Called in FBI to Arrest Bernie Madoff*, 60 MINUTES OVERTIME (Nov. 5, 2011), <http://www.cbsnews.com/news/sons-called-in-fbi-to-arrest-bernie-madoff/>.

111. See Podgor, *supra* note 109, at 546–48 (describing discovery of the Madoff scheme as the event that triggered detection of other Ponzi schemes).

112. U.S. SEC. AND EXCH. COMM'N, OFFICE OF INVESTIGATIONS, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME 21 (2009), <https://www.sec.gov/news/studies/2009/oig-509.pdf>.

113. This Essay is not advocating for an increased number of criminal statutes as a resolution for prosecutorial stretching. Overcriminalization already creates significant problems in our criminal justice system. See Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 598 (2011) (discussing the history of the "overcriminalization" and "smart on crime" movements).

114. Ellen Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 745 (2007).

115. *Id.*; Kent Greenawalt, *Punishment*, in CRIMINAL LAW: CASES AND MATERIALS 38, 93 (Joshua Dressler & Stephen P. Garvey eds., 7th ed. 2016).

116. Greenawalt, *supra* note 115, at 93.

