

UNIVERSITY *of* PENNSYLVANIA

JOURNAL *of* LAW & PUBLIC AFFAIRS

Vol. 3

May 2018

No. 1

THE SESSIONS MEMORANDUM AND THE LAWS OF PHYSICS: HOW AG SESSIONS' POLICY ON FEDERAL CHARGING COULD ACCELERATE AN EMERGING DOCTRINE OF STATUTORY INTERPRETATION BASED ON PRINCIPLES OF OVER-CRIMINALIZATION AND ABUSE OF PROSECUTORIAL DISCRETION

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Sir Isaac Newton's third law of motion—to every action, there is an equal and opposite reaction—has been used for centuries to explain the relationship between an object's movement in space and its effect on its surroundings.¹ Newton's third law also could explain the relationship between the executive branch's assertion of prosecutorial authority and the Supreme Court's emerging over-criminalization doctrine of statutory interpretation.

Consider Attorney General Jeff Sessions' new Department of Justice policy on charging as a force. The Sessions Memo directs federal prosecutors to charge and pursue the most serious, readily provable offense, except in the exceptional case.²

Sessions' policy is notable, considering the growing bipartisan consensus that the federal criminal code has grown unreasonably in recent years, both

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¹ See generally Sir Isaac Newton, *Axioms or Laws of Motion*, in THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY (Andrew Motte trans., 1729).

² Memorandum from Attorney General Jeff Sessions to All Federal Prosecutors (Sessions Memo) (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

in the number of laws that impose criminal penalties and in the reach of a statute.³ Sessions, however, seeks to “fully utilize[] the tools Congress has given.”⁴

Indeed, while Sessions authorizes prosecutors to deviate from the most serious offense policy if a prosecutor exercises “good judgment,”⁵ he fails to provide any guidance on what “good judgment” entails. Moreover, Sessions requires prosecutors to seek approval and document the file whenever they fail to charge the most serious, readily provable offense.⁶ An ordinary prosecutor would read Sessions’ words as discouraging leniency. And, in many cases, far from exercising discretion, prosecutors will use the Sessions Memo as justification to over-charge offenses.

If the Sessions policy encouraging overcharging is an action, then recent history tells us that accelerated development of the Supreme Court’s doctrine of statutory interpretation based on principles of over-criminalization and abuse of prosecutorial discretion is the likely reaction. Indeed, although the Court has traditionally understood prosecutorial discretion to be outside of judicial scrutiny,⁷ in recent years the Court has decided a string of recent cases limiting the statute’s scope—*Bond*,⁸ *Yates*,⁹ *McDonnell*,¹⁰ and *Maslenjak*,¹¹—where the driving force underscoring the Court’s decision centered on an abuse of prosecutorial discretion. Examining each case shows how the Court has used statutory interpretation as a reaction to the action of prosecutorial overreach.

In *Bond v. United States*, a jilted wife attempted to injure her husband’s lover by placing household chemicals on a doorknob, a mailbox, and the woman’s car door, hoping that her husband’s lover would be poisoned.¹² Prosecutors charged Bond under the mail fraud statute, and also charged her with violating provisions under the Chemical Weapons Convention Implementation

³ See generally *Criminal Justice Reform Initiative*, HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE, <https://judiciary.house.gov/issue/criminal-justice-reform-initiative/> (providing areas of reform, including sentencing reform, over-criminalization, prison reform, civil asset forfeiture reform, and improved criminal procedures).

⁴ Sessions Memo, *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ The Court has concluded that “[t]his broad discretion . . . is particularly ill-suited to judicial review,” and that the factors that a court would consider to review such a prosecutorial decision “are not readily susceptible to the kind of analysis the courts are competent to undertake.” *Wayte v. United States*, 470 U.S. 598, 607 (1985).

⁸ *Bond v. United States*, 134 S.Ct. 2077 (2014).

⁹ *Yates v. United States*, 135 S.Ct. 1074 (2015).

¹⁰ *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

¹¹ *Maslenjak v. United States*, 137 S. Ct. 1918 (2017).

¹² *Bond*, 134 S. Ct. at 2085-86.

Act.¹³ In a unanimous 9-0 decision, the Court reversed Bond's conviction under the Implementation Act.¹⁴ The Court found it "surprising" that the government would charge Bond with using a chemical weapon, reflecting a concern of prosecutorial abuse.¹⁵ Writing for the majority, Chief Justice Roberts stated: "Prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State."¹⁶

The Court's decision in *Bond* also represents the first time the Court has expressed that, "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition."¹⁷ This dissonant analysis was the bedrock of the Court's opinion, which held that the Implementation Act's phrase "chemical weapon" did not include Bond's use of household chemicals to injure her husband's lover.¹⁸

One term after *Bond*, the Court addressed another quirky prosecution in *Yates v. United States*.¹⁹ Yates, a commercial fisherman, was accused of catching, and then disposing of, three undersized red grouper in the Gulf of Mexico.²⁰ Prosecutors charged Yates with violating 18 U.S.C. § 1519, commonly known as the "anti-shredding provision" of the Sarbanes-Oxley Act, which was enacted in the wake of the Enron document shredding scandal.²¹

The question in *Yates* was whether an undersized fish fell within the meaning of the phrase "tangible object" in § 1519.²² In a 5-4 plurality decision, the Court determined that a fish is not a tangible object.²³

Despite the divided result, the Justices seemed to agree about the issues of over-criminalization and prosecutorial abuse. At the *Yates* oral argument, Chief Justice Roberts expressed concern that federal prosecutors would enjoy "extraordinary leverage" should the Court give "tangible object" its "broadest interpretation."²⁴ Justice Kennedy and Justice Breyer echoed similar concerns,

¹³ *Id.* at 2085 (referring to the Chemical Weapons Convention Implementation Act, which is codified at 18 U.S.C. § 229(a)(1)).

¹⁴ *Id.* at 2083.

¹⁵ *Id.* at 2085.

¹⁶ *Id.* at 2093.

¹⁷ *Id.* at 2091.

¹⁸ *Bond*, 134 S. Ct. at 2090-94.

¹⁹ *Yates*, 135 S. Ct. 1074.

²⁰ *Id.* at 1078.

²¹ *Id.* at 1081.

²² *Id.* at 1081.

²³ *Id.* at 1081.

²⁴ Transcript of Oral Argument at 31, *Yates v. United States*, 135 S.Ct. 1074 (2015) (No. 13-7541).

while Justice Alito noted that the government's expansive reading of the phrase would allow the statute to be applied in many trivial matters.²⁵

The late Justice Scalia took issue directly with the charging decision, despairingly asking the government if that “mad” prosecutor was “the same guy that brought the prosecution in *Bond*?”²⁶ In frustration, he asked, “who do you have out there that exercises prosecutorial discretion?”²⁷ And, perhaps prophetically, he noted that if the government continued to bring cases like *Yates*, “we’re going to have to be much more careful about how extensive statutes are.”²⁸ Even Justice Kagan in her dissent acknowledged that “§ 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion[,]” and “is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.”²⁹

A year after *Yates*, the Court, in *McDonnell v. United States*, reversed the conviction of former Virginia Governor Robert McDonnell for performing an “official act” under the federal bribery statute³⁰ in exchange for loans and gifts.³¹ This statute makes it a crime for “a public official or person selected to be a public official, directly or indirectly, corruptly” to demand, seek, receive, accept, or agree “to receive or accept anything of value” in return for being “influenced in the performance of any official act.”³²

The charges against Governor McDonnell related to his acceptance of \$175,000 in loans, gifts, and other benefits from a constituent, Virginia businessman Jonnie Williams, who served as the chief executive officer of the Virginia-based nutritional supplement company Star Scientific.³³ Star Scientific hoped that Virginia’s public universities would perform research studies related to one of its products, and Williams wanted Governor McDonnell’s assistance in obtaining those studies.³⁴

In an 8-0 unanimous decision, the Court held that an “official act” is a decision or action on a “question, matter, cause, suit, proceeding or controversy,” and that to qualify as an “official act,” the public official must decide

²⁵ *Id.* at 50.

²⁶ *Id.* at 28.

²⁷ *Id.* at 27.

²⁸ *Id.* at 29.

²⁹ *Yates*, 135 S.Ct. at 1101.

³⁰ 18 U.S.C. § 201.

³¹ *McDonnell*, 136 S. Ct. at 2361.

³² *Id.* at 2365 (referring to 18 U.S.C. § 201).

³³ *Id.* at 2364-67.

³⁴ *Id.*

or take an action on that question or matter, or agree to do so.³⁵ The Court concluded that Governor McDonnell's act of setting up a meeting, talking to other officials, and organizing an event did not amount to an "official act."³⁶

Prosecutorial abuse was a core issue in the Court's *McDonnell* analysis. The Court expressed concern that the government's expansive interpretation of "official act" would make "nearly anything a public official accepts—from a campaign contribution to lunch—count as a quid; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—count as a *quo*."³⁷ But the "basic compact underlying representative government," the Court wrote, "assumes that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm."³⁸ The Court worried that the government's position "could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame."³⁹

Maslenjak v. United States is the most recent example of prosecutorial abuse (force) resulting in the Court limiting the reach of a criminal statute (reaction).⁴⁰ In 1998, Maslenjak, an ethnic Serb from modern-day Bosnia, was granted refugee status after he falsely told immigration officials he feared persecution in his home region in Bosnia during the Bosnian civil war due to his ethnicity, when he had been a member of the Serbian military unit.⁴¹ In 2007, Maslenjak was convicted on two counts of making false statements for his failure to disclose that he had served as an officer in a Serbian military.⁴² The government separately charged Maslenjak with two counts under 18 U.S.C. § 1425(a)—which makes it a crime to "knowingly procure[]" naturalization "contrary to law,"—for denying having given false information to immigration officials.⁴³ Because Maslenjak was convicted under federal law, the government was authorized to strip Maslenjak of his U.S. citizenship.⁴⁴

³⁵ *Id.* at 2367-68.

³⁶ *Id.*

³⁷ *McDonnell*, 136 S.Ct. at 2372.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Maslenjak*, 137 S. Ct. 1918.

⁴¹ *Id.* at 1923.

⁴² *Id.*

⁴³ *Id.* at 1922.

⁴⁴ *Id.* at 1923-24.

At issue in *Maslenjak* is whether § 1425(a)'s phrase "knowingly procure . . . contrary to law," could apply to an immaterial false statement.⁴⁵ At oral argument before the Supreme Court, the Government claimed that any misstatement to an official during the naturalization process could cause an individual to have his or her citizenship revoked under § 1425, regardless of the statement's materiality.⁴⁶ The Government argued, "Congress has required that individuals who seek th[e] high privilege [of citizenship] must scrupulously comply with every rule governing the naturalization process."⁴⁷

At oral argument, several Justices posited hypotheticals, highlighting the vast reach of § 1425.⁴⁸ The government's responses to those hypotheticals left the Court concerned about the government's power under the statute.⁴⁹ Justice Breyer, for instance, told the Government that, "it's, to me, rather surprising that the government of the United States thinks that Congress is interpreting this statute and wanted it interpreted in a way that would throw into doubt the citizenship of vast percentages of all naturalized citizens."⁵⁰ He opined that the Government's interpretation of §1425 "would raise a pretty serious constitutional question."⁵¹

Building upon Justice Breyer's concern, Justice Roberts addressed the root of the problem as he saw it: abuse of prosecutorial discretion.⁵² Justice Roberts stated:

I don't think this is problem . . . of a constitutional statute, but it is certainly a problem of prosecutorial abuse.

If you take the position that refusing to – not answering about the speeding ticket or the nickname is enough to subject that person to denaturalization, the government will have the opportunity to denaturalize anyone they want, because everybody is going to have a situation where they didn't put in something like that – or at least most people. And then the government can decide, we are going to denaturalize you for other reasons than what might appear on your naturalization form, or we're not. And that to me

⁴⁵ *Id.* at 1924.

⁴⁶ Transcript of Oral Argument at 27-30, *Maslenjak v. United States*, 137 S.Ct. 1918 (2017) (No. 16-309) (hereinafter cited as "Maslenjak Transcript").

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 27-28.

⁴⁹ *Id.* at 28.

⁵⁰ *Id.* at 32.

⁵¹ *Id.* at 53.

⁵² Maslenjak Transcript at 54.

is – is troublesome to give that extraordinary power, which, essentially, is unlimited power, at least in most cases, to the government.⁵³

The Justices once again returned to themes of over-criminalization and prosecutorial abuse. Chief Justice Roberts asked whether the naturalization form, which requires an applicant to list every crime he “committed, assisted in committing, or attempted to commit a crime or offense for which you were not arrested,” would require him to disclose that, “some time ago, outside the statute of limitations, I drove 60 miles an hour in a 55-mile-an-hour zone.”⁵⁴ He further asked, “if I answer that question no, 20 years after I was naturalized as a citizen, you can knock on my door and say, guess what, you’re not an American citizen after all?”⁵⁵

Counsel for the Government responded that “that is how the government would interpret that, that it would require you to disclose those sorts of offenses.”⁵⁶ The Government’s response left Justice Roberts incredulous, causing him to reply: “Oh, come on! You’re saying that on this form, you expect everyone to list every time in which they drove over the speed limit!”⁵⁷

The Government’s failure to alleviate the Justices’ concern about prosecutorial abuse was directly expressed in the Court’s majority opinion. The Court held that the most natural understanding of “knowingly procure . . . contrary to law,” is that the illegal act must have somehow contributed to the obtaining of citizenship.⁵⁸ Indeed, in rejecting the Government’s argument, the Court explained that, “by so wholly unmooring the revocation of citizenship from its award, the Government opens the door to a world of disquieting consequences—which . . . would give prosecutors nearly limitless leverage—and afford newly naturalized Americans precious little security.”⁵⁹ By seeking the broadest interpretation of §1425(a), the Government effectively forced the Court to hold that the statute does not go as far as the Government claims.⁶⁰

Bond, Yates, McDonnell, and Maslenjak represent the kind of action–reaction relationship that occurs when federal prosecutors abuse prosecutorial discretion. The message from the Court has been clear: If the Justice Department uses the criminal code with unreasonable force by failing to exercise

⁵³ *Id.*

⁵⁴ *Id.* at 27.

⁵⁵ *Id.* at 27-28.

⁵⁶ *Id.* at 28.

⁵⁷ *Id.*

⁵⁸ *Maslenjak*, 137 S. Ct. at 1924.

⁵⁹ *Id.* at 1927.

⁶⁰ *Id.* at 1927-28.

sound discretion, the Court will respond to that force by using one of its most powerful tools, statutory interpretation, to narrow the scope and reach of the statutes in a prosecutor's arsenal.

Because Sessions' policy endorses broad exercise of prosecutorial powers, his policy is likely to accelerate the Court's development of its over-criminalization doctrine of statutory interpretation. For instance, one can easily foresee this particular Justice Department aggressively use the criminal code to target journalists who report on information obtained from leaks, and for the Court to protect journalists from prosecutorial abuse.⁶¹

Sessions, and indeed any federal prosecutor, should take a lesson from physics. If Sessions' goal is for prosecutors to "fully utilize[] the tools Congress has given,"⁶² he may do well to heed the lessons from *Bond* on through *Maslenjak* and advise his prosecutors as to the meaning of "good judgment," and provide prosecutors with reasonable guidance on when to deviate from the most serious readily provable offense policy. If Sessions fails to do so, the laws of judicial physics dictate that the Court will scale back the power of prosecutors—an intended result he surely wishes to avoid.

⁶¹ See, e.g., James P. Freeman, *Will Trump Use the Espionage Act Against Journalists?*, NEW BOSTON POST (Aug. 4, 2017), <http://newbostonpost.com/2017/08/04/will-trump-use-the-espionage-act-against-journalists/> (describing how Obama's use of the Espionage Act opened the door for the current government to use the Espionage Act to prosecute journalists responsible for what President Trump defines as "fake news").

⁶² Sessions Memo, *supra* note 2.