



SOME REFLECTIONS ON *YATES* AND THE STATUTES WE THREW AWAY

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YOU HAVE SEEN A LOT of articles about *Yates v. United States*,¹ the recent Supreme Court case about whether it is a federal crime to throw away undersized fish. Some have been written to make serious points about criminal justice: there are too many crimes; the penalties are too high; the range of penalties is too broad; the prosecutors have too much discretion (or too much zeal). Others have been written to poke fun, because throwing away fish is the sort of thing we can all smile about. The puns almost write themselves.

This article has a serious point to make, but it's not about criminal justice or fish. It's about us, as a legal community, and how when it comes to statutes we increasingly have lost our way.

It's trendy to write about statutory interpretation these days – the “legislative purpose” crowd and the “plain meaning” crowd, dictionaries and canons, all the doctrines and devices we have developed

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¹ 135 S. Ct. 1074 (2015).

over the years. But we are blissfully unaware of the instructions laid down by Congress on how to read statutes; we have forgotten they exist. That, I submit, is the lesson of *Yates*. And it is a profound one. As recently as 1996 the Solicitor General stood up and told the Court it was bound by a congressional instruction (even though it worked against the government's argument to do so). Those days are gone. There was a congressional instruction in *Yates*, but the Solicitor General did not mention it. Neither did anyone else.

Congressional instructions can take many forms, such as “this Act is to be construed broadly” or “this Act shall not be construed to create a private right of action.” Just as Congress can fix rules of evidence and rules of procedure, Congress can fix rules of interpretation.² And Congress has done this with enthusiasm. The word “construed” appears more than 4,000 times in the United States Code; the phrase “rule of construction” more than 500 times.

Did you know it is the policy of the United States to use all practicable means and measures to stimulate a high rate of productivity growth, and “the laws, rules, regulations, and policies of the United States shall be so interpreted as to give full force and effect to this policy”? See 15 U.S.C. § 2403.

Did you know that no Act of Congress shall be construed “to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance,” unless the Act specifically relates to the business of insurance? See 15 U.S.C. § 1012.

Did you know that Congress has forbidden the use of some specific pieces of legislative history? Section 105(b) of the Civil Rights Act of 1991 provides: “No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15726 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove* – Business necessity/cumulation/alternative business practice.”³

² See generally Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

³ Pub. L. 102-166; 105 Stat. 1075; 42 U.S.C. 1981 note.

CHAPTER-AND-HEADING INSTRUCTIONS IN STATUTES

My topic here is a congressional instruction with a fairly ancient pedigree. In 1873, when Congress enacted the very first federal code – the Revised Statutes of the United States of America, or simply the Revised Statutes – it included a section 5600 as follows:

The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed.⁴

Simply put, when we are trying to determine the meaning of a provision of the Revised Statutes, we are not to consider the title under which it was placed. Section 5600 is approaching 150 years old, and it is still in force, because a handful of sections of the Revised Statutes are still in force (although most of us have forgotten they are part of the Revised Statutes). Section 1979 of the Revised Statutes, for example, is litigated just about every day in the federal courts; chances are you know it as “section 1983,” its unofficial number in title 42 of the United States Code. While you can find a version of section 1979 in the Code today (as 42 U.S.C. § 1983), you can’t find section 5600. The Office of Law Revision Counsel decided many years ago to drop it from the Code, but it has never been repealed. It applies only to section 1979 and the other sections of the Revised Statutes that are still in effect today – but it applies. Unless, of course, we forget it’s there.

Congress has included similar congressional instructions for many titles of the United States Code, including the first two titles to be enacted into positive law – titles 18 and 28 on June 25, 1948. The one for title 18 is contained in section 19 of the 1948 Act. It says:

⁴ 18 Stat. 1085. The Revised Statutes contains 74 subject matter “Titles.” Section 1979, for example, is in title XXIV, “Civil Rights.”

No inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, in which any particular section is placed, nor by reason of the catchlines used in such title.⁵

We can still find this language in the small print at the beginning of title 18. It has no official title 18 section number – but it has the same force as section 5600, and it has the same meaning. Simply put, when we are trying to determine the meaning of a provision of title 18, we are not to consider the chapter in which it was placed. And more than that – in this regard the instruction in section 19 goes beyond the instruction in section 5600 – we are not to consider the section or chapter headings (the “catchlines”) in title 18, either.

Congress has included chapter-and-heading instructions in other codes, too. The Judicial Code of 1911 has a provision similar to section 5600.⁶ The tax code of 1939 has an unusually broad chapter-and-heading instruction:

The arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference, implication or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion thereof, nor shall any outline, analysis, cross reference, or descriptive matter relating to the contents of said Title be given any legal effect.⁷

Congress hasn’t stopped creating chapter-and-heading instructions. Instructions have been included in other projects, from 1949 with title 14 (Coast Guard) through 2002 with title 40 (Public Buildings, Property, and Works).⁸

⁵ See Act June 25, 1948, ch. 645, § 19, 62 Stat. 862. For the corresponding title 28 provision, see Act June 25, 1948, ch. 645, § 33, 62 Stat. 869.

⁶ See section 295 of the Judicial Code of 1911, 36 Stat. 1167-1168.

⁷ 53 Stat. 1a.

⁸ See Act August 4, 1949, ch. 393, § 3, 63 Stat. 557 (title 14 (Coast Guard)); Act August 31, 1954, ch. 1158, § 5, 68 Stat. 1025 (title 13 (Census)); Act August 10,

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Each of these instructions can be found in the small print at the beginning of the positive-law title to which it relates, with one exception.⁹ In the Internal Revenue Code of 1954 is a chapter-and-heading instruction with a title 26 section number. It shows up in our code books not in the small print but as 26 U.S.C. § 7806(b). This is the most prominent chapter-and-heading instruction of all, and also perhaps the most sweeping. It forbids us from considering chapter placement and headings (“descriptive matter”); it forbids us from considering the table of contents and other tables; and it even forbids us from considering the notes and tables in the legislative history:

No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.¹⁰

1956, ch. 1041, § 49, 70A Stat. 640 (chapter 47 (Uniform Code of Military Justice) of title 10 (Armed Forces)); Pub. L. 89-554, § 7(e), Sept. 6, 1966, 80 Stat. 631 (title 5 (Government Organization and Employees)); Pub. L. 90-620, § 2(e), Oct. 22, 1968, 82 Stat. 1306 (title 44 (Public Printing and Documents)); Pub. L. 91-375, § 11(b), Aug. 12, 1970, 84 Stat. 785 (title 39 (Postal Service)); Pub. L. 95-473, § 3(e), Oct. 17, 1978, 92 Stat. 1466 (title 49 (Transportation)); Pub. L. 97-258, § 4(e), Sept. 13, 1982, 96 Stat. 1067 (title 31 (Money and Finance)); Pub. L. 98-89, § 2(e), Aug. 26, 1983, 97 Stat. 598 (title 46 (Shipping)); Pub. L. 105-354, § 4(e), Nov. 3, 1998, 112 Stat. 3245 (title 36 (Patriotic and National Observances, Ceremonies, and Organizations)); Pub. L. 107-217, § 5(f), Aug. 21, 2002, 116 Stat. 1303 (title 40 (Public Buildings, Property, and Works)).

⁹ I do not mean to suggest that these are the only chapter-and-heading instructions in federal law, but they are the only ones in positive-law titles of the Code. For an example of a chapter-and-heading instruction in a non-positive-law title of the Code, see section 6001(c) of the Oil Pollution Act of 1990 (33 U.S.C. § 2751(c)).

¹⁰ 26 U.S.C. 7806(b).

CHAPTER-AND-HEADING INSTRUCTIONS IN CASE LAW

Statutes like these fly somewhat in the face of conventional wisdom, to be sure. Courts ordinarily view headings and chapter placement as fair game when interpreting statutes. In 1998, for example, the Supreme Court held in *Almendarez-Torres v. United States* that “the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.”¹¹ But here’s the rub: the statute in *Almendarez-Torres* (8 U.S.C. § 1326) is in the Immigration and Nationality Act, which has no chapter-and-heading instruction. Neither did the two cases it relied on, *Trainmen*¹² and *National Center for Immigrants’ Rights*.¹³

We used to honor chapter-and-heading instructions. Consider *United States v. Dixon*, a Supreme Court case from 1954. The defendant was convicted of a crime, but he argued that the statute authorized only a forfeiture, not a criminal prosecution, because (among other things) the heading was “Forfeitures and seizures,” with no mention of creating a new crime. The Court rejected the argument, finding that Congress had forbidden it from considering the heading:

The only suggestion on the face of the statute that § 3116 was meant to be remedial and nothing more comes from its caption, “Forfeitures and seizures”, supplied by the codifiers in 1939. But in enacting the Code Congress provided that “The arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference, implication or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion thereof, nor shall any outline, analysis, cross reference, or descriptive matter relating to the contents of said Title be given any legal effect.”¹⁴

¹¹ 523 U.S. 224, 234 (1998) (internal quotation marks omitted).

¹² *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519 (1947).

¹³ *INS v. National Center for Immigrants’ Rights, Inc.*, 502 U.S. 183 (1991).

¹⁴ *United States v. Dixon*, 347 U.S. 381, 385-386 (1954).

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Before *Dixon*, the Court acknowledged the force of such provisions in a number of other cases involving a number of different codification projects.¹⁵

But the Court has not recognized the force of a chapter-and-heading provision since *Dixon* in 1954. The Court had a clear opportunity to do so in a tax case in 1996, when the Solicitor General argued that a statute imposed an “excise tax.” Though it would have been helpful to the Solicitor General’s position to rely on the chapter heading (“Miscellaneous Excise Taxes”), the Solicitor General declined to do so, drawing the Court’s attention to the congressional instruction in section 7806(b). It was an astute gesture but ultimately a quixotic one, because the Court merely noted the instruction without addressing the merits of it.¹⁶ The Court then ruled against the Government. Perhaps that is where we really began to veer off course.

The lower federal courts have acknowledged the force of the tax code provision, even in some very recent cases. In litigation over the Affordable Care Act, for example, the Eleventh Circuit declined to consider the chapter placement or heading of the so-called “individual mandate” in determining whether it was a “tax”.¹⁷ Other ap-

¹⁵ See, e.g., *Ex parte Collett*, 337 U.S. 55, 59 (1949) (“To accept this contention, we would be required completely to disregard the Congressional admonition that ‘No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 * * * in which any section is placed * * *.’”); *United States v. Gradwell*, 243 U.S. 476, 481 (1917) (“no inference or presumption of legislative construction is to be drawn from the chapter headings under which it is found in the Criminal Code (§ 339) . . .”); *United States v. Cress*, 243 U.S. 316, 331 (1917) (declining to consider the chapter placement and heading of a section in the Judicial Code of 1911); *Hyde v. United States*, 225 U.S. 347, 360-361 (1912) (declining to consider the chapter placement of a section in the Revised Statutes); *Doyle v. State of Wisconsin*, 94 U.S. 50, 51 (1876) (same).

¹⁶ See *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 222-223 (1996) (“ . . . although the section occurs in a subtitle with a heading of ‘Miscellaneous Excise Taxes,’ the Government has disclaimed reliance on the subtitle heading as authority for its position in this case, recognizing the provision of 26 U.S.C. 7806(b) that no inference of legislative construction should be drawn from the placement of a provision in the Internal Revenue Code.”).

¹⁷ See *Florida ex rel. Atty. Gen. v. United States Department of Health and Human*

pellate decisions have also acknowledged the force of the tax code provision.¹⁸

But other chapter-and-heading instructions have faded from memory. Perhaps they simply don't have the same visibility; they are found only in the small print. You have to be comfortable with the statute book to find them (or to know in advance they are there), and as a legal community we no longer are.

The title 18 provision has not been applied by a federal court of appeals since 1960, when the Ninth Circuit gave it effect in *Duncan v. Madigan*, declining to consider an argument that a criminal provision should be read as limited to youthful offenders because it was placed into a chapter generally relating to youthful offenders.¹⁹ It should be noted that the statute in *Madigan* wasn't in the original title 18 in 1948, but was added to the title in 1952.²⁰

The companion provision in title 28 has not been invoked by a majority opinion of a federal court of appeals since 1951, when the

Services, 648 F.3d 1235, 1319 (11th Cir. 2011) (“The Code itself makes clear that Congress’s choice of where to place a provision in the Internal Revenue Code has no interpretive value”).

¹⁸ See, e.g., *Security State Bank v. C.I.R.*, 214 F.3d 1254, 1257-58 (10th Cir. 2000) (“The Commissioner correctly points out that, when examining the Internal Revenue Code, “[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of [the Code].”); *In re Juvenile Shoe Corp. of America*, 99 F.3d 898, 901 (8th Cir. 1996) (“We are not guided by the placement of the statute because the placement of a provision in the Internal Revenue Code gives no inference of legislative construction.”).

¹⁹ See *Duncan v. Madigan*, 278 F.2d 695, 696 (9th Cir. 1960).

²⁰ Perhaps an argument could be made that the chapter-and-heading instruction for title 18 applies only to the 1948 original text, but the Ninth Circuit in *Madigan* did not limit it in that way. The fact is that chapter headings and section titles are very rarely settled by policymakers for policy reasons; they are almost always left to the judgment of the congressional drafting offices, either the Office of the Law Revision Counsel (in the case of codification projects) or the Offices of Legislative Counsel (in other cases). It would be odd to distinguish between law revision headings and legislative counsel headings, and it would be odd, within the same text, to say that some headings have value and others do not.

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Sixth Circuit gave it effect.²¹ Interestingly enough, the code of the Virgin Islands also has chapter-and-heading instructions, and the courts of appeals have diligently applied those instructions.²² But there are only a handful of appellate cases, other than cases involving the tax code, in which a court of appeals has ever applied a federal chapter-and-heading instruction.²³

District court decisions applying a congressional chapter-and-heading instruction (other than the instruction in the tax code) are equally rare. A case from 1978 involving the postal service code (title 39) appears to be the most recent example.²⁴ It's been more than 50 years since a district court applied the title 18 instruction.²⁵

²¹ See *Steckel v. Lurie*, 185 F.2d 921, 923 (6th Cir. 1951). *But see* *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1058 (9th Cir. 2013) (Tashima, J., dissenting) (“Congress provided equally definitive guidance in the actual text of the 1948 Act. In an uncodified provision, Congress instructed, “No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any [] section is placed.”) & *id.* at 1078 (Bea, J., dissenting) (referring to the congressional instruction and stating that the majority “simply ignores this Act of Congress, perhaps because it cuts directly against the majority’s desired result: interpretive value based on the statute’s placement. [] Congress clearly stated that the placement . . . was not intended to change the way it should be interpreted.”).

²² See, e.g., *Coffelt v. Fawkes*, 765 F.3d 197, 203 n.7 (3d Cir. 2014) (identifying the instruction in the Virgin Islands Code and stating, “Thus, we afford no weight whatsoever” to the heading of the statute at issue in the case); *Todman v. Todman*, 571 F.2d 149 (C.A. Virgin Islands 1978).

²³ The cases involving titles 18 and 28 were mentioned above; the remaining cases, in reverse chronological order, are: *International Ass’n of Independent Tanker Owners v. United States*, 148 F.3d 1053, 1059 n.5 (9th Cir. 1998) (the chapter-and-heading provision in the Oil Pollution Act of 1990, 33 U.S.C. § 2751(c)); *United States v. RSR Corp.*, 664 F.2d 1249, 1251 n.3 (5th Cir. 1982) (title 49); *Johnson v. United States*, 38 App. D.C. 347, 1912 WL 19482 at *5 (D.C. Cir. 1912) (the Federal Criminal Code of 1909); *Schmidt v. United States*, 133 F. 257 (9th Cir. 1904) (section 5600 of the Revised Statutes); *United States v. Marsh*, 106 F. 474 (5th Cir. 1901) (same).

²⁴ *United Parcel Service v. United States Postal Service*, 455 F. Supp. 857, 876 n.21 (E.D. Pa. 1978) (referring to the title 39 instruction and concluding, “Congress has expressly forbidden us from treading this uncertain path of statutory interpretation”).

²⁵ See *United States v. Grieco*, 25 F.R.D. 58, 60 (S.D.N.Y. 1960) (“The catchline of the section . . . might lend some color to [the defendant’s] theory but section 19

NO ONE IN *YATES* DISCUSSES THE INSTRUCTION

This brings us to *Yates*, the ship captain, who threw away his fish so he wouldn't have to face the consequences. He was convicted under a statute, 18 U.S.C. § 1519, which makes it a crime to destroy a “tangible object,” among other things. The Supreme Court agreed to review whether destruction of fish falls within the purview of the statute. Relying heavily on the chapter placement and section heading, a divided Court concluded that no crime was committed; a fish is not a “tangible object.”

I take no position here on whether *Yates* was decided wrongly or rightly. I am frankly not sure whether following the congressional instruction would have changed the outcome (though it would have changed the analysis). I simply observe that while a congressional instruction on how to interpret title 18 exists, no one mentioned it (and everyone violated it). Congress put the instruction in our statute book, but we have thrown it away.

The statute of conviction in *Yates* was signed into law as part of the Sarbanes-Oxley Act of 2002.²⁶ Section 802 of that Act added two new sections to chapter 73 (“OBSTRUCTION OF JUSTICE”) of title 18. It begins this way:

SEC. 802. CRIMINAL PENALTIES FOR ALTERING DOCUMENTS.

(a) IN GENERAL. — Chapter 73 of title 18, United States Code, is amended by adding at the end the following:

“§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

“Whoever 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

of the act adopting title 18 U.S. Code provides that no inference of a legislative construction is to be drawn by reason of any such catchline.”); *but see* Feliciano v. United States, 297 F.Supp. 1356, 1358 (D.C. Puerto Rico 1969) (mentioning the title 18 provision in passing).

²⁶ Pub. L. 107-204; 116 Stat. 745.

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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.

“§ 1520. Destruction of corporate audit records . . .”

After trial, Yates moved for acquittal, arguing that section 1519 is “a records-keeping statute aimed solely at destruction of records and documents,” and fish are not records.

You might think someone at some point in the process would point out that Congress has forbidden us from considering the headings and placement of provisions in title 18. In a world where we were comfortable with our own statute book, someone would do this, surely. We would have learned about congressional instructions like this in law school or very early in federal practice. But we no longer live in that world, and no one did.

The trial judge mused about the inferences that could be drawn from the heading of section 1519:

. . . [I]f you look at the title for at least a clue as to what Congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say throwing away a fish is a falsification of a record.²⁷

Yates, in the Supreme Court, relied heavily on the heading of section 1519. “Congress could not have meant for the destruction of fish to fall under section 1519,” he wrote. “Section 1519 [is] entitled ‘Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy”²⁸ He continued:

The statute’s title, in its entirety, applies *exclusively* to records (whether paper or electronic). Not only is the word *records* specified to be the subject of the statute, the overall context of the title makes clear that the words *destruction*, *alteration*, and

²⁷ Petition for Writ of Certiorari, 2013 WL 8350082 at *6 (quoting from transcript).

²⁸ Yates’ cert petition at 9 (emphasis in original). See also *id.* at 14 (reiterating the heading of section 1519, re-emphasizing the term “records,” and arguing that “it is evident that the statute is concerned only with records . . .”).

falsification can be understood only as applying to records and the like.”²⁹

The Solicitor General’s office, rather than pointing out (like it had done in 1996) that we are forbidden from considering headings and chapter placement within title 18, argued the converse – that the headings and chapter placement were not only relevant, but *decisive*:

Chapter 73 sets forth criminal offenses encompassing “Obstruction of Justice.” 18 U.S.C. 1501 et seq. It addresses a wide array of activities calculated to thwart the administration of justice or to improperly influence official proceedings. *Ibid.* Within Chapter 73, Section 1519 targets one particular method of obstructing justice – destroying evidence. . . .

The objective of both Chapter 73 and Section 1519 is to protect the integrity of government operations, promote fairness to all parties in official proceedings, and ensure that government determinations of factual matters are accurate and true. Those goals are threatened by the destruction of any relevant evidence, regardless of its particular form. . . .

In short, the unambiguous meaning of the statutory language fully comports with the structure and purpose of Section 1519 and Chapter 73. *That is enough to resolve this case.*³⁰

The Supreme Court split 4-1-4, but tilted in favor of *Yates*: the captain did not violate section 1519 when he threw away the fish. Justice Ginsburg, writing the plurality opinion, invoked *Almendarez-Torres* and proceeded to rely on the heading and placement of section 1519:

We note first § 1519’s caption: “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.” That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. . . . If Congress indeed meant to make § 1519 an all-encompassing ban on the spoliation of evidence, as the dissent believes Congress did, one would have expected a clearer indication of that intent.

²⁹ *Id.* at 15 (emphasis in original).

³⁰ Brief of the United States at 17-18, 2014 WL 4089202 (emphasis added).

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Section 1519's position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind. Congress placed § 1519 (and its companion provision § 1520) at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts. . . . But Congress did not direct codification of the Sarbanes-Oxley Act's other additions to Chapter 73 adjacent to these specialized provisions. Instead, Congress directed placement of those additions within or alongside retained provisions that address obstructive acts relating broadly to official proceedings and criminal trials . . . Congress thus ranked § 1519, not among the broad proscriptions, but together with specialized provisions expressly aimed at corporate fraud and financial audits. This placement accords with the view that Congress' conception of § 1519's coverage was considerably more limited than the Government's.

Justice Alito, concurring in the judgment, indicated that to him the case turned on three factors – “the statute's list of nouns, its list of verbs, and its title” which combined to tip the case in favor of Yates. After addressing the nouns and verbs, he wrote:

Finally, my analysis is influenced by § 1519's title: “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.” (Emphasis added.) This too points toward filekeeping, not fish. . . . The title is especially valuable here because it reinforces what the text's nouns and verbs independently suggest – that no matter how other statutes might be read, this particular one does not cover every noun in the universe with tangible form.

But if the chapter-and-heading instruction for title 18 means anything, it means we are not permitted to do what the plurality and concurring opinions did.

Writing for the dissenters, Justice Kagan argued that headings and chapter placement should not be given so much weight. Had she been aware of the congressional instruction, she could have argued that headings and chapter placement in title 18 should be given no weight at all. But she wasn't, and she didn't.

THE SILENCE OF THE DEEP

Again, I am not sure *Yates* was wrongly decided. Rather than building a case for *Yates* on the heading of section 1519, the case could have been built on the heading of section 802 of Sarbanes-Oxley (“CRIMINAL PENALTIES FOR ALTERING DOCUMENTS”).³¹ But we do not read section 802, because we do not trouble to read the Statutes at Large.³²

A recent book co-authored by Justice Scalia – who joined Justice Kagan’s dissent in *Yates* – observed that legislative drafters sometimes provide a disclaimer that headings are for convenience only and do not affect interpretation. Accordingly, the book says, “Be sure to check your text or code or compilation for such a disclaimer.”³³ But in *Yates* no one did this – not even Justice Scalia – and everyone did what Congress told us not to do. That’s how we operate these days.

Check the text for a disclaimer? Read the statute book? I guess we have bigger fish to fry.



³¹ The chapter-and-heading instruction in title 18 applies only to title 18. If section 802 of Sarbanes-Oxley inserts a new provision into title 18, we are forbidden from considering the title 18 headings and placement – but the heading of section 802 and the arrangement of Sarbanes-Oxley are fair game.

³² Cf. Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283 (2007).

³³ See Justice Antonin Scalia and Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 221 (2012).