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Why *Chevron* Deference for Hybrid Statutes Might Be a No-No

by Jeffrey B. Wall and Owen R. Wolfe

What deference is owed to an agency's interpretation of a statute that has both civil and criminal applications? None, said Supreme Court Justices Antonin Scalia and Clarence Thomas in a concurrence from the Court's denial of *certiorari* in a 2014 case. In their view, ambiguity in so-called hybrid statutes should be resolved in favor of lenity for criminal defendants, rather than by deferring to agencies' interpretations. That approach would represent a significant change in both criminal and administrative law.

Federal courts have deferred to agency interpretations in criminal prosecutions under a host of federal laws that govern everything from securities transactions to the environment and campaign finance.[1] Courts also have deferred to an alphabet soup of regulatory agencies, among them SEC, CFTC, and EPA, in civil enforcement actions brought pursuant to statutory provisions that carry criminal penalties, or in facial challenges to provisions that carry both types of penalties.[2] The question is whether the Supreme Court will answer Scalia and Thomas's call to reconsider deference in those circumstances.

This issue first surfaced not in the Supreme Court, but in the U.S. Court of Appeals for the Sixth Circuit. In *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722 (6th Cir. 2013), the Sixth Circuit considered a provision of the Real Estate Settlement Procedures Act (RESPA) that allows a real estate agent to refer business to a title services company only under certain conditions. The defendants had complied with those conditions, but the question was whether they needed to comply with additional requirements imposed by a Department of Housing and Urban Development (HUD) policy statement. The Sixth Circuit said that HUD's policy statement was not entitled to any deference because it was nonbinding and inconsistent with the statutory scheme.

Although Judge Sutton wrote the panel opinion, he also concurred separately to point out that the RESPA provision is a hybrid: it imposes civil penalties that may be pursued by HUD through enforcement actions *and* criminal penalties that may be pursued by prosecutors. When there is ambiguity in a statute that has both civil and criminal penalties, should an administering agency's interpretation or the rule of lenity resolve any statutory

[1] *See, e.g.*, *United States v. Rajaratnam*, 719 F.3d 139, 157-160 (2d Cir. 2013) (deferring to the SEC's interpretation of § 10(b) of the Securities Exchange Act of 1934); *United States v. Corbin*, 729 F. Supp. 2d 607, 617-619 (S.D.N.Y. 2010) (same); *United States v. Hubenka*, 438 F.3d 1026, 1032-1033 (10th Cir. 2006) (deferring to the United States Army Corps of Engineers' interpretation of the Clean Water Act); *United States v. Flores*, 404 F.3d 320, 326-27 (5th Cir. 2005) (deferring to the ATF's interpretation of federal firearm possession laws); *United States v. Atandi*, 376 F.3d 1186, 1188-1189 (4th Cir. 2004) (same); *In re Sealed Case*, 223 F.3d 775, 779-781 (D.C. Cir. 2000) (deferring to the FEC's interpretation of the Federal Election Campaign Act); *United States v. Kanchanalak*, 192 F.3d 1037, 1047-1050 & n.17 (D.C. Cir. 1999) (same).

[2] *See, e.g.*, *Nat'l Pork Producers Council v. United States EPA*, 635 F.3d 738, 751 (5th Cir. 2011) (deferring in part to the EPA's interpretation of a Clean Water Act permitting provision); *R&W Technical Servs. Ltd. v. CFTC*, 205 F.3d 165, 171-173 (5th Cir. 2000) (deferring to the CFTC's interpretation of the Commodity Exchange Act's antifraud provisions); *Teicher v. SEC*, 177 F.3d 1016, 1019-1021 (D.C. Cir. 1999) (deferring in part to the SEC's interpretation of relevant provisions of the Investment Advisers Act and the Securities Exchange Act of 1934).

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ambiguity? Judge Sutton argued that it has to be one or the other across the board and that lenity should trump deference: "A single law should have one meaning, and the 'lowest common denominator, as it were, must govern' all its applications." *Carter*, 736 F.3d at 730 (quoting *Clark v. Martinez*, 543 U.S. 371, 380 (2005)). If prosecutors may not gap-fill purely criminal laws, Sutton concluded, neither should "housing inspectors and immigration officers and tax collectors [be permitted] to fill gaps in hybrid criminal laws." *Id*. at 730-731.

Justices Scalia and Thomas concluded likewise in the Court's 2014 Term in *Whitman v. United States*, 135 S. Ct. 352 (2014). Douglas Whitman was convicted of multiple counts of securities fraud and conspiracy to commit securities fraud, in violation of § 10(b) of the Securities Exchange Act. 15 U.S.C. § 78j(b). On appeal, he contended that the jury had been improperly instructed on the requirements of § 10(b). He maintained that it should have been required to find that inside information was not merely a factor in his trading decisions, but a *significant* factor. The Second Circuit disagreed, deferring to the SEC's contrary interpretation of § 10(b).[3]

Although the Supreme Court denied Whitman's petition for review, Justice Scalia, joined by Justice Thomas, wrote separately to ask whether "a court owe[s] deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement?" *Whitman*, 135 S. Ct. at 353. In their view, the answer is no. When courts defer to "executive interpretations of a variety of laws that have both criminal and administrative applications," "federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Ibid*. That result "upend[s] ordinary principles of interpretation," because "[t]he rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants." *Ibid*.

Justice Scalia criticized the Court's previous decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), for "deferr[ing], with scarcely any explanation, to an agency's interpretation of a law that carried criminal penalties." *Whitman*, 135 S. Ct. at 353. Although the Court in *Babbitt* had said that the regulation at issue provided "fair warning" to would-be violators, 515 U.S. at 704 n.18, according to Justice Scalia "that is not the only function performed by the rule of lenity." *Whitman*, 135 S. Ct. at 354. "[E]qually important," he explained, the rule of lenity "vindicates the principle that only the *legislature* may define crimes and fix punishments." *Ibid* (emphasis in original). He concluded that "Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy." *Ibid.* Justices Scalia and Thomas agreed that *Whitman* was not an appropriate vehicle for review, but stated that they would be willing to grant a future petition properly presenting the question.

In the wake of *Whitman*, the few lower courts to address the question have recognized the logic of withholding deference when a statutory provision has criminal applications.[4] Although those courts ultimately ruled that they were bound by *Babbitt*, Judge Sutton has disagreed, and no other federal appellate court has yet examined those arguments.[5] As a result, companies and individuals negotiating with regulators and prosecutors about the meaning of federal laws that carry potential criminal penalties should consider noting the increasing uncertainty as to whether the regulators' interpretations should receive any judicial deference.

In litigation under hybrid provisions, companies and individuals should strongly consider raising and preserving challenges to agencies' requests for deference. In this way, eventually the issue is likely to return to the Supreme Court, where the remaining Justices will have to decide whether to take up the Scalia-Thomas call to rein in agency authority in this area.

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[3] *United States v. Whitman*, 555 Fed. Appx. 98, 107 (2d Cir. 2014) (citing *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008) ("SEC rules are entitled to *Chevron* deference.")).

[4] *See Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023-1024 (6th Cir. 2016); *United States v. Scully*, 108 F. Supp. 3d 59, 108-110 (E.D.N.Y. 2015).

[5] *See Esquivel-Quintana*, 810 F.3d at 1030-1032 (Sutton, J., concurring in part and dissenting in part); *see also United States v. White*, 782 F.3d 1118, 1135 n.18 (10th Cir. 2015) (declining to address the issue).

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