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INSIGHT: Will SCOTUS Rule on Agency Deference for Dual Civil and Criminal Regimes



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In *Kisor v. Wilkie*, a narrow U.S. Supreme Court majority preserved *Auer* deference, under which courts defer to reasonable agency interpretations of their own ambiguous regulations.

Notwithstanding the result, the high court's willingness to revisit a longstanding administrative law doctrine signals that the court may be open to considering an administrative deference question that has never been settled: Is it appropriate to defer to agency interpretations of laws or regulations that provide for both criminal and administrative enforcement?

Agencies routinely interpret federal statutes in adopting regulations. In some instances, Congress provides for criminal penalties for violation of statutes it directs agencies to implement, and of agency regulations that implement those statutes.

For example, the Commodity Futures Trading Commission, Federal Energy Regulatory Commission, and Securities and Exchange Commission have promulgated regulations proscribing fraud and manipulation, which implement Congress's general prohibitions of that conduct, and can be enforced administratively or civilly by those agencies, or by the Department of Justice through criminal prosecutions.

Rule of Lenity Deference to agency interpretations of laws or rules that carry both criminal and civil penalties is controversial because in criminal cases the rule of lenity calls for ambiguity in statutes or regulations to be resolved in favor of the defendant.

In *Whitman v. United States*, a case the Supreme Court declined to review, the late Justice Antonin Scalia in a separate opinion criticized the appeals court's

deference to the SEC's interpretation of the federal securities laws in upholding the defendant's criminal securities fraud conviction, arguing that such deference allows agencies to create new crimes and undermines the rule of lenity.

The Supreme Court has not articulated an entirely consistent view on how the rule of lenity should apply in the interpretation of criminal-civil statutes and rules.

In the 1990 case *Crandon v. United States*, a civil lawsuit alleging violations of a statute that prohibits a private party from paying, and a government employee from receiving, supplemental compensation for the employee's government service, the court held that because the "[g]overning standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage."

But five years later in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the court declined to apply the rule of lenity in affirming a Department of the Interior regulation defining "harm" under the Endangered Species Act of 1973, an act with both criminal and civil applications, asserting that it had "never suggested that the rule of lenity should provide the standard for reviewing *facial* challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."

Nearly a decade later, in *Leocal v. Ashcroft*, the court reversed a deportation order based on a legal permanent resident's DUI conviction, which an immigration judge and the Board of Immigration Appeals had classified as a "crime of violence." Notwithstanding that *Leocal* was a civil proceeding, the court applied the rule of lenity in the petitioner's favor: because the statute at is-

sue had both criminal and noncriminal applications, the court reasoned that it had to interpret the statute consistently.

Recently, in *United States v. Davis*, the court provided a window into how it might resolve the conflict between the rule of lenity and deference to agency interpretations, in considering whether to apply the doctrine of constitutional avoidance to preserve a criminal statute's constitutionality. The court explained that, on one hand, the court has sometimes adopted the narrower of two alternative constructions of a criminal statute to avoid having to hold it unconstitutional; but, on the other hand, applying the doctrine of constitutional avoidance to *expand* the reach of a criminal statute would run afoul of the rule of lenity.

The rule of lenity thus provided a basis to reject the government's request to apply the constitutional avoidance canon. Attempts to rely on an agency's *more expansive* reading of a statute or rule carrying criminal penalties could suffer the same fate.

Nondelegation Doctrine The nondelegation doctrine could also play a role in resolving interpretive questions about "dual hat" criminal-regulatory statutes. The doctrine has rarely resulted in invalidation of a federal statute, but several justices indicated this term in *Gundy v. United States* their inclination to reinvigorate the doctrine.

Congress generally cannot delegate its legislative power to another branch, although it can delegate rule-making authority to agencies subject to an "intelligible principle." This is a flexible standard, and courts have been reluctant to strike down congressional delegations of authority to agencies, largely in light of the need for agencies' expertise in implementing Congress's laws.

If Congress intends that an agency use its expertise to issue rules and guidance to implement its laws, and sets sufficient parameters for the agency to follow, denying deference could frustrate Congress's intent and require Congress to legislate at a level of specificity it may not always be competent to achieve.

Yet deference to agency interpretations of laws that carry both criminal and administrative penalties may

also conflict with the principle that only legislatures can define crimes, as Justice Scalia suggested in *Whitman*.

The issue is particularly acute where Congress delegates to agencies a mandate to give substantive content to general prohibitions, and provides criminal punishment for violation of the statute and implementing regulations.

Agencies can argue from these broad delegations that Congress intended deference to their further definitions of the prohibitions, but the prospect of criminal enforcement renders that deference troubling under lenity and separation-of-powers principles.

Given that the law is still unsettled on the amount of deference, if any, courts owe to agency interpretations of laws or rules with criminal and administrative applications, it is surprising that lenity and separation-of-powers challenges are not raised more frequently.

Perhaps the higher burden of proof in criminal cases results in fewer cases that would be vulnerable to such challenges, or defendants prioritize other arguments and strategies that they deem more likely to succeed. Even Justice Scalia did not object to *denying* *Whitman*'s certiorari petition because *Whitman* never sought review based on issues of deference.

Nonetheless, the court's willingness to revisit *Auer* deference in *Kisor* suggests that the court may be receptive to squarely addressing the clash between agency deference and the rule of lenity in an appropriate case in a future term.

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