© Imillian | AdobeStock

Justice Scalia and the Interpretation of Criminal Statutes

The late Justice Antonin Scalia once joked that he "should be the pinup of the criminal defense bar."[1] Although he described himself as "socially a law and order conservative,"[2] on the bench he did indeed often come down on the side of the accused.

Scalia spoke for the Court in *Crawford v. Washington*[3] when it overruled *Ohio v. Roberts*[4] and reinvigorated the Confrontation Clause. He again spoke for the Court when it extended *Crawford* to expert witnesses in *Melendez-Diaz v. Massachusetts*.[5] He also helped to establish, in the *Apprendi* line of cases, that the Sixth Amendment right to jury trial bars punishment exceeding the otherwise applicable statutory or guideline maximum, on the basis of facts found only by the court.[6]

Scalia wrote majority opinions holding that a "search" under the Fourth Amendment occurs when a thermal-imaging device is aimed at a home to ascertain the relative heat of rooms inside,[7] or when an electronic tracking device is attached to the undercarriage of a vehicle and used to monitor its movements.[8] His initially dissenting view that the definition of "violent felony" in the Armed Career Criminal Act is unconstitutionally vague[9] later prevailed in his opinion for a six-Justice majority in *Johnson v. United States*.[10]

In *Morrison v. Olson*,[11] decided in 1988, Scalia alone dissented from the rejection of a constitutional attack on the independent counsel provisions of the Ethics in Government Act of 1978.[12] He protested that the conduct of criminal investigations and prosecutions is an executive function,[13] but Congress had "effectively compelled a criminal investigation of a high-level appointee of the president in connection with his actions arising out of a bitter power dispute between the president and the Legislative Branch."[14] The case, he wrote, involved "[p]ower. The allocation of power among Congress, the president, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish. … Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing. … But this wolf comes as a wolf."[15]

The next Term, Scalia again was the sole dissenter in *Mistretta v. United States*,[16] when the Court rebuffed contentions that the federal sentencing guidelines violate the separation of powers and impermissibly delegate legislative power. As he saw it, the establishment of the United States Sentencing Commission did not involve "commingling" the powers of two branches in a single agency, but instead "the creation of a new Branch altogether, a sort of junior-varsity Congress."[17] Fifteen years later, the *Apprendi* doctrine adopted in the interim led five Justices, including Scalia, to strike down as unconstitutional the provisions of the Sentencing Reform Act of 1984 making the Commission's sentencing guidelines mandatory.[18] A different five-Justice

BY PAUL MOGIN

majority, not including Scalia, ruled that the remedy for this constitutional defect was to sever the provision of the Act making the guidelines mandatory and henceforth treat them as advisory.[19]

Despite the importance of his opinions in constitutional cases, Justice Elena Kagan has predicted that Scalia's "long-lasting legacy" will be that "he changed the way the entire court does *statutory* interpretation."[20] Scalia called himself a "textualist."[21] Emphasizing that textualism "begins and ends with what the text says and fairly implies,"[22] he defined it as "the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[23] He insisted that "[p]urpose sheds light only in deciding which of various *textually permissible meanings* should be adopted."[24] He vigorously opposed reliance on legislative history to determine the meaning of a statute.[25]

In large part because of Justice Scalia, today "statutory text is far more prominent on the Court's interpretive agenda," as Professor Jonathan Siegel has observed.[26] "The Court consults legislative history, but does not bathe in it for dozens of pages. The Court feels obliged to examine and respect statutory text far more than it did before Justice Scalia's arrival."[27]

In federal criminal cases, Scalia's approach to statutory interpretation — as well as his abiding concern for the separation of powers — led him to urge revival of the rule of lenity, narrowing of liability for mail and wire fraud (which had effectively become the equivalent of common law offenses), and rejection of deference to administrative interpretations of criminal statutes. It is worth reviewing in some detail what he had to say about these subjects.

Rule of Lenity

In general, Scalia viewed "presumptions and rules of construction that load the dice for or against a particular result" as "a lot of trouble" for "the honest textualist."[28] But he made an exception for the rule of lenity, i.e., the principle that, when a criminal statute is unclear as to its scope, the severity of the authorized punishment, or the number of offenses that can be charged, the ambiguity should be resolved in the defendant's favor.[29] Emphasizing that the rule is "almost as old as the common law itself,"[30] he "suppose[d] that it is validated by sheer antiquity."[31]

When Scalia joined the Supreme Court in 1986, the doctrine that ambiguity in criminal statutes should be resolved in the defendant's favor had long been in decline. Professor Francis Allen observed the following year that the doctrine had "suffered significant erosion in the present century," and that "the tendency appears to have accelerated in the decades just past."[32] Professor John Calvin Jeffries, Jr. had written in 1985 that "strict construction" of criminal statutes "survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation."[33] And Judge Harry Edwards, after examining nearly 100 federal cases in which reviewing courts in the 1980s had "paid lip service" to the rule of lenity, concluded that, "almost without exception, courts have found the rule to be altogether *inapplicable* to the facts before them."[34]

At first, Scalia championed the rule of lenity mainly in dissent. "If the rule of lenity means anything," he wrote in 1990, "it means that the Court ought not … use an ill-defined general purpose to override an unquestionably clear term of art, and (to make matters worse) give the words a meaning that even one unfamiliar with the term of art would not imagine. The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted."[35]

Nine years later, only Justices Scalia and Thomas dissented when the Court engrafted the concept of conditional intent onto the federal carjacking statute, which prohibits taking a car, by force and violence or intimidation, "with the intent to cause death or serious bodily harm."[36] According to the majority, the statute was "most naturally read to encompass the *mens rea* of both conditional and unconditional intent."[37] The majority deemed it sufficient, therefore, that "at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver *if necessary to steal the car*."[38] Scalia protested that the text was more naturally read *not* to permit conviction on the basis of conditional intent, and that, "[e]ven if ambiguity existed, … the rule of lenity would require it to be resolved in the defendant's favor."[39] He added that if the rule was no longer good law, the Court should "say so."[40]

Scalia's forceful advocacy of the rule was likely one of the reasons the Court eventually began to give it greater weight. As Judge Jeffrey Sutton noted in 2013, the Court "has found lenity-triggering ambiguity in criminal laws more readily of late than it did in the past."[41] It relied on the rule in each of the following cases:

- a 2000 decision holding that the government is not deprived of "property" under the mail fraud statute when it issues a license;[42]
- a 2005 decision holding that the "corrupt persuasion" prong of 18 U.S.C. § 1512(b)(2), which prohibits "corruptly persuad[ing]" another to withhold a document from, or alter an object for use in, an official proceeding, applies only to "persuaders conscious of their wrongdoing";[43]
- a 2008 decision rejecting the government's construction of the word "proceeds" in the federal money laundering statute, in which Scalia wrote that the rule "not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain," but "also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead";[44]
- a 2010 decision reining in the "honest services" statute;[45]
- a 2014 decision, written by Scalia, construing a mandatory-minimum provision of the Anti-Drug Abuse Act of 1986;[46] and
- a 2015 decision concluding that the phrase "tangible object" in 18 U.S.C. § 1519, a law added to Title 18's Obstruction of Justice Chapter by the Sarbanes-Oxley Act, does not make Section 1519 "a coverall spoliation of evidence statute," but is instead limited, in the plurality's view to items "used to record or preserve information,"[47] and in Justice Alito's view to items "similar to records or documents."[48]

Mail and Wire Fraud

The principle that "[t]here are no common law offenses against the United States …"[49] dates back more than two centuries to the 1812 decision in *United States v. Hudson & Goodwin*.[50] But as Professor Dan

Kahan has pointed out, the principle "obscures much more than it illuminates,"[51] for although "Congress must speak before anyone can be convicted of a federal crime, … so long as Congress … utter[s] even a single word, the judiciary will obligingly write the sentence — indeed, the paragraph, the book, and the screenplay — that brings a criminal prohibition to life."[52] Among the examples Kahan cites are the mail and wire fraud statutes, the conspiracy-to-defraud clause of the general conspiracy statute, the National Stolen Property Act, and the federal theft statute.[53]

Scalia undertook a sustained effort to alter the interpretation of the most important of those provisions — the mail and wire fraud statutes (18 U.S.C. §§ 1341 & 1343). When he joined the high court in September 1986, mail fraud and wire fraud had each become, in the words of Judge Ralph Winter, "essentially a common law crime."[54] As four Justices had noted, "the Courts of Appeals ha[d] 'tolerated an extraordinary expansion'" of the two statutes "'to permit federal prosecution for conduct that some had thought was subject only to state criminal or civil law.'"[55] No wonder the chief of Business Frauds Prosecutions for the United States Attorney's Office in Manhattan wrote that, although federal prosecutors of white collar crime "may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,'" the mail fraud statute was their "true love."[56]

Less than three months into Scalia's tenure, the Court considered two related petitions for certiorari challenging the "intangible rights" doctrine. Beginning in the 1940s, the lower courts had extended the mail and wire fraud statutes, which by their terms were limited to "any scheme or artifice to defraud, or for obtaining money or property," to schemes directed at such "intangible rights" as "the right to conscientious, loyal, faithful, disinterested and honest government,"[57] a private or public employer's right to the honest services of its employee,[58] and "an electoral body['s] … political rights to fair elections."[59] The Justices had bypassed many opportunities to examine the "intangible rights" doctrine,[60] but this time, in *McNally v. United States*, [61] they granted review.

When *McNally* was decided in 1987,[62] only two Justices supported the "intangible rights" doctrine. Justice Stevens, joined by Justice O'Connor, maintained in dissent that "the mail fraud statute [was] written in broad general language" and is "most appropriately interpreted as [an] implicit delegation[] of authority to the courts to fill in the gaps in the common law tradition of case-by-case adjudication."[63]

Justice Scalia opposed reliance on legislative history to determine the meaning of a statute.

Speaking through Justice White, seven Justices disagreed. Construing the statute as "limited in scope to the protection of property rights,"[64] they jettisoned the "intangible rights" doctrine.[65] They declined to read the statute "in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards of disclosure and good government for local and state officials,"[66] and instead interpreted it to reach no further than "frauds involving money or property."[67]

Scalia not only joined the majority opinion in *McNally* but also dissented in two later decisions in which the government's interpretation of the mail and wire fraud laws narrowly prevailed.[68] He made his displeasure with the government's view of those offenses apparent in other ways as well. At oral argument in one mail fraud case, he remarked to Deputy Solicitor General Michael Dreeben, "You don't read the statute too closely, do you?"[69]

It was thus not surprising that Scalia played an important part when the Supreme Court confronted the 1988 statute (18 U.S.C. § 1346) that Congress enacted after *McNally* to restore to the mail and wire fraud laws one intangible right recognized, but not well defined, in the pre-*McNally* case law: "the intangible right of honest services."[70] He was the first Justice to urge review of a vagueness challenge to Section 1346. Dissenting in 2009 from a denial of certiorari, he wrote that Section 1346 "has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior,"[71] that "[t]here is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common law crime of unethical conduct,"[72] and that "[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail."[73]

When the Court later considered a former Enron executive's challenge to Section 1346 in *Skilling v. United States*,[74] Scalia joined in the rejection of the government's broad construction of the law. He took strong exception, however, when a six-Justice majority read a bribery-or-kickback limitation into Section 1346 to save it from the charge of unconstitutional vagueness. Complaining that "[t]he Court replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster,"[75] and that "the Court today adds to our functions the prescription of criminal law,"[76] Scalia said he knew "of no precedent for such 'paring down'"[77] and disputed that the Court possessed "the power, in order to uphold an enactment, to rewrite it."[78]

Administrative Interpretations

Scalia's belief that legislatures should decide what acts are criminal also led him to oppose judicial deference to an *agency's* interpretation of a criminal statute.

When five Boeing executives resigned or took early retirement to accept jobs in the Reagan administration, Boeing made severance payments to mitigate the substantial loss in compensation they would suffer upon changing jobs. *Crandon v. United States*[79] brought before the justices the government's contention (advanced in a civil suit for a constructive trust) that the payments violated a criminal conflict-of-interest law, 18 U.S.C. § 209(a). The majority opinion in *Crandon* rejected the government's interpretation of Section 209(a) without addressing whether the administrative interpretation of the law was entitled to deference, but Scalia took on the issue in a concurrence.

Although the government's position was supported by "innumerable advisory opinions" of the attorney general, the Office of Legal Counsel, the Office of Government Ethics, and others, Scalia wrote that those opinions did not amount to "an administrative interpretation that is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*"[80] In his view, *Chevron* did not apply because Section 209(a) is "a criminal statute" and "is not administered by any agency but by the courts."[81] The Department of Justice was obligated, he acknowledged, "to determine for itself what this statute means, in order to decide when to prosecute," but he emphasized that "we have never thought that interpretation of those charged with prosecuting criminal statutes is entitled to deference."[82] Indeed, because the Department "knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought," its interpretation was "not even deserving of any persuasive effect."[83]

Scalia's concurrence in *Crandon* was the support Chief Justice Roberts relied upon nearly a quarter-century later in *United States v. Apel*,[84] when he wrote for the Court that it had "never held that the government's reading of a criminal statute is entitled to any deference."[85] In *Apel*, a defendant attempted to bolster his interpretation of Title 18's prohibition against reentering a military installation after being ordered not to do so by a person in command, by citing the United States Attorneys' Manual and opinions of the Air Force Judge Advocate General. The Court in turn later relied upon *Apel* in *Abramski v. United States*,[86] in discussing a statutory construction that the Bureau of Alcohol, Tobacco, Firearms and Explosives had once embraced in a circular and an official form.[87] The Court declared that "criminal laws are for courts, not for the government, to construe."[88]

But what if the agency's interpretation of a criminal statute is found in a regulation, rather than materials of the kind involved in *Crandon, Apel*, and *Abramski*? In Scalia's view, interpretations in regulations were not entitled to deference, either, where criminal liability was at stake.

In a 1995 decision, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,[89] the Court accorded "some degree of deference" — the Court did not say how much — to an Interior Department regulation implementing a provision of the Endangered Species Act that could be enforced either civilly or criminally.[90] In a footnote, the Court said 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."[91] In dissent, Scalia, joined by Chief Justice Rehnquist and Justice Thomas, maintained that the regulation was not a reasonable interpretation of the Act[92] and did not address whether deference would have been warranted if the interpretation had been reasonable.

Scalia did not view *Sweet Home Chapter* as having resolved whether a regulation interpreting a criminal statute is entitled to deference. In a 2014 case, *Whitman v. United States*,[93] he said in a statement respecting the denial of certiorari (which was joined by Justice Thomas) that he would be receptive to granting a petition raising that question.[94] In *Whitman*, an insider trading case, the Second Circuit's decision rested in part on deference to the SEC's interpretation of Section 10(b) of the Securities Exchange Act of 1934.[95]

With his typical directness, Scalia asserted in *Whitman* that "*Babbitt*'s drive-by ruling" regarding the rule of lenity "deserves little weight,"[96] in part because the opinion's comment about the rule "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its

interpretation in both settings."[97] He acknowledged that "Congress may make it a crime to violate a regulation," but said it was "quite a different matter for Congress to give agencies — let alone for us to *presume* that Congress gave agencies — powers to resolve ambiguities in criminal legislation."[98] The Court's footnote in *Babbitt* had said the regulation at issue there was clear enough to serve the rule of lenity's purpose of providing fair notice to potential violators,[99] but Scalia emphasized that the rule also "vindicates the principle that only the *legislature* may define crimes and fix punishments."[100]

It remains to be seen whether Scalia's position regarding regulations that interpret criminal statutes will prevail. Plainly, however, his successor, Justice Gorsuch, is also concerned about letting crimes be defined by regulation.

As a circuit court judge, Justice Gorsuch warned: "The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they had experienced at the hands of a whimsical king."[101] Their "attention to the separation of powers was driven," he explained, "by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions."[102] He went on to ask, "might not that concern take on special prominence today, in an age when federal law contains so many crimes — *and so many created by executive regulation* — that scholars no longer try to keep count and actually debate their number?"[103]

Recent decades have witnessed a stunning proliferation of new federal crimes,[104] as well as continued efforts to advance broad theories of mail and wire fraud and other ill-defined offenses.[105] Justice Scalia wisely insisted on reviving the rule of lenity, confining mail and wire fraud to fraud as traditionally understood, and not ceding the construction of criminal laws to agencies. His insights on these subjects will be cited by criminal defense attorneys for many years to come.

Notes

1. Terry Baynes, *Fanning Furor, Justice Scalia Says Appeals Court Judge Lied*, REUTERS (Sept. 17, 2012), https://www.reuters.com/article/us-usa-court-scalia/fanning-furor-justice-scalia-says-appeals-court-judge-lied-idUSBRE88H06X20120918.

2. *Interview with Brian Lamb* (July 29, 2012), https://www.c-span.org/video/?307035-1/justice-antonin-scalia-1936-2016.

3. 541 U.S. 36 (2004).

4. 448 U. S. 56 (1980).

5. 557 U.S. 305 (2009); *see also Coy v. Iowa*, 487 U.S. 1012 (1988). He also provided the critical fifth vote for the defense in other important Confrontation Clause cases. *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Idaho v. Wright*, 497 U.S. 805 (1990).

6. *See Cunningham v. California*, 549 U.S. 270, 288–93 (2007); *United States v. Booker*, 543 U.S. 220, 243–44 (2005); *Blakely v. Washington*, 542 U.S. 296, 301–05 (2004) (Scalia, J., for the Court); *Ring v. Arizona*, 536 U.S. 584, 589 (2002); *id.* at 610–12 (Scalia, J., joined by Thomas, J., concurring); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *id.* at 498–99 (Scalia, J., concurring); *see also Alleyne v. United States*, 570 U.S. 99 (2013) (holding that any fact that increases mandatory minimum must be found by jury); *cf. United States v. Rodriguez-Moreno*, 526 U.S. 275, 283 (1999) (Scalia, J., joined by Stevens, J., dissenting) (objecting to loose construction of Venue Clause of Sixth Amendment); *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995) (Scalia, J., for the Court) (holding that Sixth Amendment right to jury trial entitles defendant to jury determination of materiality in prosecution under 18 U.S.C. § 1001, and explaining that right to jury trial "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties'" (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1779, 1780, at 540–41 (4th ed. 1873))).

7. *Kyllo v. United States*, 533 U.S. 27 (2001).

8. *United States v. Jones*, 565 U.S. 400 (2012).

9. *Sykes v. United States*, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting); *see also James v. United States*, 550 U.S. 192, 230 (2007) (Scalia, J., joined by Stevens & Ginsburg, JJ., dissenting).

10. 135 S. Ct. 2551 (2015). The Court heavily relied upon *Johnson* earlier this year when, construing a similarly worded provision of the Immigration and Nationality Act, it rebuffed the government's attempt to deport a man twice convicted of first-degree burglary. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018); *id.* at 1224, 1231 (Gorsuch, J., concurring in part and concurring in the judgment).

11. 487 U.S. 654 (1988).

12. *Id.* at 697.

13. *Id.* at 705–06.

14. *Id.* at 703.

15. *Id.* at 699.

16. 488 U.S. 361, 413 (1989).

17. *Id.* at 427.

18. *See Booker*, 543 U.S. at 243–44.

19. *Id.* at 245.

20. *Scalia Won Battle over Statutory Interpretation, Kagan Says*, Law 360 (Sept. 13, 2016) (emphasis added).

21. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 24 (1997).

22. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012).

23. *Id.* at 33.

24. *Id.* at 57.

25. *E.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 518–28 (1993) (op. concurring in the judgment); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617–22 (1991) (op. concurring in the judgment); *Blanchard v. Bergeron*, 489 U.S. 87, 97–99 (1989) (op. concurring in part and concurring in the judgment). Scalia endorsed a limited use of legislative history in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989). *Id.* at 527 (op. concurring in the judgment) ("I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule.").

26. Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 Geo. Wash. L. Rev. 857, 873 (2017).

27. *Id.*

28. Scalia, A Matter of Interpretation, at 27–28.

29. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83–84 (1955).

30. Scalia, A Matter of Interpretation, at 29.

31. *Id.*

32. Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 Ariz. L. Rev. 385, 398 (1987).

33. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 198–99 (1985).

34. *United States v. Nofziger*, 878 F.2d 442, 456 (D.C. Cir. 1989) (Edwards, J., dissenting); *see also* Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2428 (2006) (analyzing 48 cases implicating rule of lenity decided by Supreme Court during William Rehnquist's tenure as Chief Justice (1986 to 2005) and concluding that "many of the cases holding lenity inapplicable did so on the basis of implausible findings of statutory clarity").

35. *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., joined by O'Connor & Kennedy, JJ., dissenting).

36. *Holloway v. United States*, 526 U.S. 1 (1999).

37. *Id.* at 8.

38. *Id.* at 12 (emphasis added).

39. *Id.* at 20 (Scalia, J., dissenting).

40 *Id.* at 21; *see also Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., joined by Rehnquist, C.J., and Ginsburg, J., dissenting); *United States v. O'Hagan*, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part); *Smith v. United States*, 508 U.S. 223, 246–47 (1993) (Scalia, J., joined by Stevens & Souter, JJ., dissenting); *Evans v. United States*, 504 U.S. 255, 289 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).

41. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 735 (6th Cir. 2013) (concurring op.).

42. *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

43. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

44. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.); *see also id.* at 515.

45. *Skilling v. United States*, 561 U.S. 358, 410–11 (2010).

46. *Burrage v. United States*, 571 U.S. 204, 216 (2014).

47. *Yates v. United States*, 135 S. Ct. 1074, 1088–89 (2015) (plurality op.).

48. *Id.* at 1090 (Alito, J., concurring in the judgment). Scalia dissented in *Yates*. *See also Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) ("A broad interpretation [of 26 U.S.C. § 7212(a), prohibiting obstruction of the due administration of the Internal Revenue Code] would also risk the lack of fair warning and related kinds of unfairness. …").

49. *United States v. Britton*, 108 U.S. 199, 206 (1883).

50. 11 U.S. (7 Cranch) 32.

51. Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 Buff. Crim. L. Rev. 5, 6 (1997).

52. *Id.* at 6; *see also id.* at 6–7 ("[F]ederal criminal law consists of a muscular body of judge-made doctrine stretched out over a skeletal statutory frame.").

53. *Id.* at 7–8.

54. Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L. J. 945, 955 (1993).

55. *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., joined by Brennan, Blackmun & Powell, JJ., dissenting) (quoting *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting)).

56. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980) (footnotes omitted).

57. *United States v. Mandel*, 591 F.2d 1347, 1359 (4th Cir.), *on rehearing en banc*, 602 F.2d 653 (4th Cir. 1979); *see United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974).

58. *United States v. Von Barta*, 635 F.2d 999, 1005–07 (2d Cir. 1980); *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976).

59. *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir. 1984); *accord United States v. States*, 488 F.2d 761, 765–66 (8th Cir. 1973).

60. *See, e.g.*, *Margiotta v. United States*, 461 U.S. 913 (1983); *Mandel v. United States*, 445 U.S. 961 (1980).

61. *McNally v. United States*, 479 U.S. 1005 (1986).

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

63. *Id.* at 373 (Stevens, J., joined by O'Connor, J., dissenting).

64. *Id.* at 360.

65. *Id.* at 356–60.

66. *Id.* at 360.

67. *Id.* at 359.

68. *See Pasquantino v. United States*, 544 U.S. 349, 372 (2005) (Ginsburg, J., joined by Breyer, J., and in part by Scalia & Souter, JJ., dissenting); *Schmuck v. United States*, 489 U.S. 705, 722 (1989) (Scalia, J., joined by Brennan, Marshall & O'Connor, JJ., dissenting).

69. Tr. of Oral Arg., *Cleveland v. United*

States (No. 99-804), 2000 U.S. TRANS LEXIS 52, at *37 (Oct. 10, 2000).

70. Anti-Drug Abuse Act, Pub. L. 100 -690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.

71. *Sorich v. United States,* 555 U.S. 1204, 1205 (2009).

72. *Id.* at 1207.

73. *Id.*

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

75. *Id.* at 422 (Scalia, J., joined by Thomas, J., and in pertinent part by Kennedy, J., concurring in part and concurring in the judgment).

76. *Id.* at 424.

77. *Id.*

78. *Id.* at 423–24.

79. 494 U.S. 152 (1990).

80. *Id.* at 177 (Scalia, J., joined by O'Connor & Kennedy, JJ., concurring in the judgment).

81. *Id.*

82. *Id.*

83. *Id.* at 178.

84. 571 U.S. 359 (2014).

85. *Id.* at 369.

86. 134 S. Ct. 2259 (2014).

87. *See* Br. of Pet'r, *Abramski* (No. 12-1493), at 7–8.

88. *Abramski*, 134 S. Ct. at 2274.

89. 515 U.S. 687 (1995).

90. *Id.* at 703.

91. *Id.* at 704 n.18.

92. *Id.* at 715–17.

93. 135 S. Ct. 352 (2014).

94. *Id.* at 354.

95. *Id.* at 353.

96. *Id.*

97. *Id.* at 353–54.

98. *Id.* at 353.

99. 515 U.S. at 704 n.18.

100. *Whitman*, 135 S. Ct. at 354.

101. *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc), *rev'd*, 136 S. Ct. 1113 (2016).

102. *Id.* at 673.

103. *Id.* (emphasis added).

104. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum No. 26, at 1 (Heritage Foundation June 16, 2008).

105. *E.g.*, *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004) (affirming mail fraud convictions for participation in scheme by which impostors were paid to sit for Test of English as a Foreign Language, in order to create false appearance that defendants and others had achieved acceptable scores on test exam, so that they could remain eligible to live in United States under student visas); *United States v. Montemayor*, 712 F.2d 104 (5th Cir. 1983) (holding that mother's statements to state agency to obtain certificates of Texas birth for her children were statements in "matter within the jurisdiction" of federal department or agency (federal immigration service) and thus could support conviction under 18 U.S.C. § 1001). ■

About the Author

Paul Mogin is a Senior Counsel in the firm of Williams & Connolly, where his practice principally involves civil and criminal litigation. He served as a law clerk for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit from 1980 to 1981 and as a law clerk for Justice Thurgood Marshall from 1982 to 1983.


NACDL MEMBER

Paul Mogin
Williams & Connolly LLP
Washington, DC
202-434-5020
EMAIL PMogin@wc.com