

# “Contrary to Law”: Determining the Scope of Qualifying Predicate Offenses for 18 U.S.C. § 545

Arjun Prakash<sup>†</sup>

*This Comment seeks to resolve an ongoing dispute among courts regarding the correct interpretation of “contrary to law” in 18 U.S.C. § 545, a statute that criminalizes the unlawful importation of goods. In particular, courts disagree about whether “contrary to law” includes administrative regulatory violations, which would massively expand the applicability of § 545’s severe criminal penalties.*

*This Comment argues that analyzing previous versions of § 545 and applying canons of statutory interpretation provide support for a narrow interpretation of the statute. But these lines of analysis do not definitively establish that this interpretation is correct. As a result, this Comment considers the implications of the nondelegation doctrine, which provides a more conclusive resolution to the ongoing circuit split. Specifically, because of the structure of § 545 and because the statute itself provides no authority for agencies to promulgate new regulations, allowing administrative violations to serve as predicate offenses for § 545 would potentially permit agencies to independently use this statute to transform civil regulatory violations into criminal offenses. Therefore, to avoid separation of powers concerns, only regulatory violations that are explicitly criminalized by other statutes should qualify as predicate violations that can trigger § 545’s penalties.*

INTRODUCTION .....	2068
I. LEGAL BACKGROUND .....	2073
A. The Fourth, Ninth, and Eleventh Circuits Have All Arrived at Different Understandings of “Contrary to Law” in § 545 .....	2073
1. Under the Fourth Circuit’s approach, violations of regulations with the “force and effect of law” are predicate offenses.....	2074
2. The Ninth Circuit requires regulatory violations to be specifically criminalized by statute.....	2076
3. The Eleventh Circuit has taken a middle ground approach based on the rule of lenity.....	2079
B. Other Circuits Have Not Taken Conclusive Positions on the Meaning of “Contrary to Law” but Still Offer Useful Commentary.....	2081

---

<sup>†</sup> B.A. 2019, Yale University; J.D. Candidate 2023, The University of Chicago Law School. I would like to thank my family for their constant and unwavering support. Also, thank you to Professor Adam Chilton and the editors of the *University of Chicago Law Review* for their help and advice.

II. INTERPRETING § 545 USING PREVIOUS VERSIONS OF § 545 AND COMPARATIVE STATUTORY ANALYSIS .....	2084
A. Federal Courts' Interpretations of "Contrary to Law" in the Previous Versions of § 545 Align with the Ninth Circuit's Current Interpretation.....	2085
B. Applying the Whole Code Rule Provides Further Support for the Ninth Circuit's Understanding of § 545.....	2089
III. SEPARATION OF POWERS CONCERNS .....	2094
A. Background on the Separation of Powers and Administrative Crimes .....	2095
1. Scholarship on the nondelegation concerns posed by administrative crimes.....	2096
2. Supreme Court case law on the constitutionality of administrative crimes.....	2099
B. Applying Separation of Powers Case Law and Doctrine to § 545 Reveals that the Ninth Circuit's Approach Is Correct .....	2102
CONCLUSION .....	2107

## INTRODUCTION

From 2009 to 2015, Sterling Islands, a New Mexico-based corporation, imported "Native American-style jewelry, arts, and crafts" from the Philippines.<sup>1</sup> These imported goods had removable stickers that indicated that they were made in the Philippines but had no permanent country-of-origin markings.<sup>2</sup> After importing these items, Sterling Islands sold them to various customers, often under the pretense that the goods were authentic Native American items.<sup>3</sup> The company made millions of dollars in revenue from these sales before its owner and manager were apprehended by federal authorities.<sup>4</sup>

Sterling Islands' actions were in clear violation of 19 C.F.R. § 134.43, a Department of Treasury regulation requiring Native American-style jewelry to be "indelibly marked with the country of origin."<sup>5</sup> But this regulation does not itself specify a punishment for violators.<sup>6</sup> Given this lack of a built-in punishment, prosecutors used the regulatory violation as a predicate offense<sup>7</sup> to

---

<sup>1</sup> United States v. Sterling Islands, Inc., 391 F. Supp. 3d 1027, 1030 (D.N.M. 2019).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.* at 1030–31.

<sup>4</sup> *See id.* at 1030.

<sup>5</sup> 19 C.F.R. § 134.43(c)(2) (2021).

<sup>6</sup> *See* 19 C.F.R. § 134.43 (2021).

<sup>7</sup> In the § 545 context, a predicate offense is a violation of a different "law" that in turn triggers the criminal penalties that are provided in § 545. For example, the violation of an importation statute other than § 545 would be deemed "contrary to law" and could

indict Sterling Islands and the affiliated individuals under a separate criminal statute,<sup>8</sup> 18 U.S.C. § 545. Section 545 states that anyone who imports goods “contrary to law” is subject to a fine or imprisonment of “not more than 20 years” or both.<sup>9</sup> To determine whether a § 545 violation had occurred, the District of New Mexico had to answer two crucial questions: Is a violation of an administrative regulation “contrary to law” under § 545, and, if so, which regulatory violations qualify as “contrary to law”?<sup>10</sup> Ultimately, the court held that all violations of “agency-promulgated regulations fall within” the scope of “contrary to law,” so a § 545 violation had indeed occurred.<sup>11</sup> But this outcome was by no means guaranteed. Numerous courts have confronted these same two questions and have arrived at several different answers, creating an ongoing circuit split.

18 U.S.C. § 545 was first enacted as § 4 of the Tariff Act of 1866.<sup>12</sup> Congress then reenacted this statutory provision twice more in the Tariff Act of 1922<sup>13</sup> and the Tariff Act of 1930,<sup>14</sup> leaving the language of the provision essentially untouched.<sup>15</sup> Seventy-five years later, Congress reenacted the statute in its current form as 18 U.S.C. § 545 as part of the USA PATRIOT Improvement and Reauthorization Act of 2005.<sup>16</sup> Section 545 has two discrete provisions that apply the statute’s aforementioned penalties—a fine, imprisonment of “not more than 20 years, or both”—to slightly different conduct.<sup>17</sup> The first provision applies the statute’s penalties to

[w]hoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the

---

therefore serve as a predicate offense for § 545. So the defendant could be charged with violating both the underlying predicate statute and § 545.

<sup>8</sup> See *Sterling*, 391 F. Supp. 3d at 1030.

<sup>9</sup> 18 U.S.C. § 545.

<sup>10</sup> See *Sterling*, 391 F. Supp. 3d at 1042.

<sup>11</sup> *Id.* at 1056.

<sup>12</sup> See *United States v. Alghazouli*, 517 F.3d 1179, 1184 (9th Cir. 2008).

<sup>13</sup> Ch. 356, § 593(b), 42 Stat. 858.

<sup>14</sup> Ch. 497, § 593(b), 46 Stat. 590.

<sup>15</sup> See Tariff Act of 1922, ch. 356, § 593(b), 42 Stat. 858, 982; Tariff Act of 1930, ch. 497, § 593(b), 46 Stat. 590, 751.

<sup>16</sup> See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 310, 120 Stat. 192, 242.

<sup>17</sup> 18 U.S.C. § 545.

customhouse any false, forged, or fraudulent invoice, or other document or paper.<sup>18</sup>

This provision has proven uncontroversial, with courts generally recognizing that it specifically “criminalizes smuggling goods into the United States,” a class of activities that is relatively well-defined.<sup>19</sup>

The meaning and boundaries of the second provision, however, are far less clear. The second provision applies § 545’s penalties to

[w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise *contrary to law*, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States *contrary to law*.<sup>20</sup>

The language in this provision has prompted several federal appellate courts to arrive at different interpretations of the range of activities criminalized by § 545’s statutory text.

In particular, the Fourth, Ninth, and Eleventh Circuits have diverged with respect to the meaning of “contrary to law” in this statute. While these courts agree that violations of federal statutes are “contrary to law,” they disagree over whether and which administrative regulatory violations can serve as predicate offenses, triggering the heavy criminal penalties in § 545. The Fourth Circuit, relying on the Supreme Court’s decision in *Chrysler Corp. v. Brown*,<sup>21</sup> asserted that violations of all administrative regulations that have the “force and effect of law” qualify as “contrary to law” under § 545.<sup>22</sup> The Ninth Circuit rejected the Fourth Circuit’s approach and interpreted the statute narrowly, holding that regulatory violations can qualify as “contrary to law” under § 545 only if a separate statute specifically provides criminal penalties for the violations.<sup>23</sup> And rejecting both the Fourth and Ninth Circuits’ approaches, the Eleventh Circuit concluded that the rule of lenity—which counsels that courts should

---

<sup>18</sup> 18 U.S.C. § 545.

<sup>19</sup> *United States v. Heon Seok Lee*, 937 F.3d 797, 812 (7th Cir. 2019), *cert. denied sub nom.*, *Lee v. United States*, 140 S. Ct. 1125 (2020).

<sup>20</sup> 18 U.S.C. § 545 (emphasis added).

<sup>21</sup> 441 U.S. 281 (1979).

<sup>22</sup> *See United States v. Mitchell*, 39 F.3d 465, 469 (4th Cir. 1994).

<sup>23</sup> *See Alghazouli*, 517 F.3d at 1186.

interpret criminal statutes in a manner that favors defendants when there is “grievous ambiguity”—should constrain the interpretation of § 545.<sup>24</sup> Therefore, only regulations that are criminal in nature based on their text or history can be “law” under the importation statute.<sup>25</sup>

Although the subject of the circuit split may appear narrow, it has substantial practical and theoretical implications. Section 545 carries a statutory maximum sentence of twenty years in prison.<sup>26</sup> Therefore, depending on the scope of the statute’s applicability, a prosecutor could seek a lengthy prison sentence for a defendant who had committed only a regulatory offense, which, absent § 545, would result in no prison time. There are thousands of regulations that deal with labelling, shipping, tariff categories, and other minor details related to trade,<sup>27</sup> so a broader or narrower interpretation of § 545 would result in numerous regulations either gaining or losing the possibility of carrying severe criminal sanctions.

Although many § 545 convictions do not result in the full twenty-year statutory maximum sentence, previous cases illustrate that the application of the statute still has important consequences for defendants. For example, the defendants in *United States v. Lawson*<sup>28</sup> were found guilty of violating § 545 because they had unlawfully imported a rhesus macaque monkey.<sup>29</sup> In the absence of § 545, the defendants would have—at the most—faced misdemeanor charges and monetary penalties for their actions. But under § 545 they instead faced felony punishment and were ultimately sentenced to two months in prison followed by a three-year period of supervised release.<sup>30</sup> The defendants argued that they faced “unduly harsh punishment” and that the prosecutors should have charged them under a statute that more specifically dealt with their actions and imposed less serious criminal sanctions.<sup>31</sup> The court rejected their arguments, noting that the government “may generally elect which statute it wishes to charge,”

---

<sup>24</sup> See *United States v. Izurieta*, 710 F.3d 1176, 1181–84 (11th Cir. 2013).

<sup>25</sup> See *id.* at 1182.

<sup>26</sup> 18 U.S.C. § 545.

<sup>27</sup> See, e.g., 19 C.F.R. § 134.43(c) (2021) (specifying marking and labelling requirements for importing Native American–style jewelry).

<sup>28</sup> 618 F. Supp. 2d 1251 (E.D. Wash. 2009).

<sup>29</sup> See *Lawson*, 618 F. Supp. 2d at 1254–55.

<sup>30</sup> See *id.* at 1262; Brief for Appellee at 5, *United States v. Lawson*, 377 F. App’x 712 (9th Cir. 2010) (No. 09-30186).

<sup>31</sup> *Lawson*, 618 F. Supp. 2d at 1261.

even when “one statute imposes felony penalties and the other merely imposes misdemeanor penalties.”<sup>32</sup> The court further held that this discretionary government decision was not subject to judicial review or to the rule of lenity.<sup>33</sup> This case presents the archetypal application of § 545, in which prosecutors employ the statute to elevate the punishments facing defendants who would otherwise face relatively minor sanctions. It also shows how the interpretation of § 545 can be the sole difference between a misdemeanor and a felony conviction. This difference has significant practical consequences not only on defendants’ lives but also on the government’s ability to respond to and potentially deter unlawful conduct.

But beyond this practical importance, courts’ interpretations of “contrary to law” also implicate separation of powers concerns. Specifically, if courts followed the lead of the Fourth Circuit and interpreted § 545 broadly to allow most or all regulatory violations to serve as predicate offenses, executive agencies could promulgate trade-related regulations under existing, delegated statutory authority, creating new § 545 predicate offenses. This could raise concerns about the executive branch overstepping its bounds by creating and defining—rather than just enforcing—criminal law. On the other hand, a narrow interpretation of § 545, similar to the Ninth Circuit’s, that allows very few regulatory violations to serve as predicate offenses could pose the opposite problem by limiting the executive branch’s ability to punish identified wrongdoings and perhaps undermining Congress’s deliberate decision to allow agencies to play an integral role in defining § 545 predicate offenses. These separation of powers concerns are particularly relevant in the current moment because the Supreme Court has expressed a desire to revisit and potentially reinvigate the nondelegation doctrine, which prevents congressional delegations of legislative power to agencies.<sup>34</sup>

Given the important consequences of differing interpretations of “contrary to law” in § 545, this Comment seeks to resolve the ongoing circuit split. Part I of this Comment provides a detailed legal background on the circuit split, discussing the

---

<sup>32</sup> *Id.* at 1261–62 (quoting *United States v. Edmonson*, 792 F.2d 1492, 1497 (9th Cir. 1986)).

<sup>33</sup> *Id.* at 1262.

<sup>34</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *Am. Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir.), *cert. granted sub nom.*, *West Virginia v. EPA*, 142 S. Ct. 420 (2021).

decisions that various circuits have reached on § 545’s scope and the circuits’ underlying rationales. Part II then uses various lines of analysis to begin to resolve the split by evaluating judicial interpretations of § 545’s predecessor statutes and considering the meaning of “contrary to law” in active statutes other than § 545. Though the analysis in Part II provides support for the Ninth Circuit’s narrow interpretation of § 545, it fails to conclusively resolve the circuit split. Therefore, Part III takes a novel approach to understanding § 545 by considering the interplay between the scope of “contrary to law” and separation of powers concerns. This analysis confirms the conclusions drawn in Part II and cements the contention that the Ninth Circuit’s approach is correct. Allowing regulatory violations that are not specifically criminalized in separate statutes to serve as § 545 predicate offenses would give agencies the power to independently create and define crimes, transferring legislative power to the executive branch. Therefore, § 545 should apply only to violations already criminalized by a separate statute.

## I. LEGAL BACKGROUND

Numerous courts have, at least in passing, remarked on the meaning of “contrary to law” in § 545. Only the Fourth, Ninth, and Eleventh Circuits, however, have arrived at firm conclusions on this issue. Part I.A will discuss the position that each of these circuits has taken regarding § 545 and explore the subtle—yet meaningful—differences among the courts’ positions. Then Part I.B will present the positions of circuits that have commented on § 545’s scope but have not taken concrete stances on the meaning of “contrary to law.” Although these other circuits, namely the First, Second, and Seventh, have not articulated firm conclusions, their commentary largely aligns with a broader understanding of § 545, similar to the Fourth Circuit’s position.

### A. The Fourth, Ninth, and Eleventh Circuits Have All Arrived at Different Understandings of “Contrary to Law” in § 545

Although the Fourth, Ninth, and Eleventh Circuits all agree that statutory violations are “contrary to law” under § 545, the courts disagree regarding which regulatory violations are “contrary to law.” This Section will present each of these courts’ positions, starting with the Fourth Circuit’s position, put forth in

1994,<sup>35</sup> then moving on to the Ninth Circuit's 2008 position,<sup>36</sup> and finally discussing the Eleventh Circuit's position, articulated in 2013.<sup>37</sup> Though the differences between the broadest of these interpretations (the Fourth Circuit's)<sup>38</sup> and the narrowest (the Ninth Circuit's)<sup>39</sup> may seem small at first blush, the practical gap between these positions is significant.

1. Under the Fourth Circuit's approach, violations of regulations with the "force and effect of law" are predicate offenses.

The first federal appellate court in recent years to conclusively interpret "contrary to law" in the § 545 context was the Fourth Circuit in *United States v. Mitchell*.<sup>40</sup> Richard Mitchell, an employee of the U.S. Fish and Wildlife Service, had brought animal hides and horns into the United States without following the necessary steps to declare those imports.<sup>41</sup> Mitchell's acquaintance, Don Cox, had illegally hunted the animals from which the hides and horns had been obtained and had enlisted Mitchell to smuggle the goods from Pakistan into the United States.<sup>42</sup> In total Mitchell violated three different regulations: 19 C.F.R. § 148.11, which requires declaration of certain items to Customs officers; 50 C.F.R. § 14.61, which requires the completion of a particular importation form; and 9 C.F.R. § 95.2, which requires that importers show the country of origin of hides and horns.<sup>43</sup> These regulatory violations served as predicate offenses for his conviction under § 545. Mitchell appealed his conviction, arguing that the "'contrary to law' provision of § 545 embraces only conduct that violates acts of Congress, not conduct that violates administrative regulations."<sup>44</sup> He also argued in the alternative that "the 'contrary to law' provision of § 545 is ambiguous concerning whether it includes violations of regulations and that the rule of lenity therefore should apply."<sup>45</sup> The Fourth Circuit rejected both of

---

<sup>35</sup> See *United States v. Mitchell*, 39 F.3d 465, 468–70 (4th Cir. 1994).

<sup>36</sup> See *United States v. Alghazouli*, 517 F.3d 1179, 1187 (9th Cir. 2008).

<sup>37</sup> See *United States v. Izurieta*, 710 F.3d 1176, 1181–82 (11th Cir. 2013).

<sup>38</sup> See *Mitchell*, 39 F.3d at 468–70.

<sup>39</sup> See *Alghazouli*, 517 F.3d at 1183–87.

<sup>40</sup> 39 F.3d 465 (4th Cir. 1994).

<sup>41</sup> See *id.* at 467.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> *Id.* at 468.

<sup>45</sup> *Mitchell*, 39 F.3d at 468.



these arguments and affirmed his conviction.<sup>46</sup> In arriving at this conclusion, the court began by looking for the ordinary meaning of “law.”<sup>47</sup> The court noted that in the dictionary, “law” is “commonly defined to include administrative regulations.”<sup>48</sup>

Then, the Fourth Circuit cited the Supreme Court’s decision in *Chrysler Corp. v. Brown*. In *Chrysler*, the Court evaluated the meaning of “law” in the phrase “authorized by law” in 18 U.S.C. § 1905 and concluded that “properly promulgated, substantive agency regulations have the ‘force and effect of law.’”<sup>49</sup> The *Chrysler* Court further concluded that this “traditional understanding” of the word “law” can be overridden only by a “clear showing of contrary legislative intent” that Congress wanted the word to take on a narrower meaning.<sup>50</sup> The Court then clarified that for a regulation to qualify as having the “force and effect of law” it must satisfy three requirements. The regulation must (1) be a substantive rule that was (2) “promulgated pursuant to a congressional grant of quasi-legislative authority” and (3) “in conformity with congressional-imposed procedural requirements.”<sup>51</sup>

Based on the Supreme Court’s reasoning in *Chrysler*, the Fourth Circuit concluded that the ordinary dictionary and precedent-based meaning of “law” should control because the court’s “review of the available legislative history of § 545 disclose[d] nothing to indicate that Congress clearly intended for the ‘contrary to law’ provision to be limited to statutory violations.”<sup>52</sup> Finally, the court found further support from the Eighth Circuit, which was the only prior court to consider “contrary to law” in this context. Specifically, in *Estes v. United States*,<sup>53</sup> the Eighth Circuit concluded that for purposes of the Tariff Act of 1866, “contrary to law” included administrative regulatory violations.<sup>54</sup>

---

<sup>46</sup> See *id.* at 469–70, 476.

<sup>47</sup> See *id.* at 468. Evaluating the “ordinary meaning” of a statute—what its text means to a lay observer—is a foundational tool of statutory interpretation. It is often the first step that courts take in determining a statute’s meaning. See, e.g., *Moskal v. United States*, 498 U.S. 103, 108 (1990) (“‘In determining the scope of a statute, we look first to its language,’ giving the ‘words used’ their ‘ordinary meaning.’” (first quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981); and then quoting *Richards v. United States*, 369 U.S. 1, 9 (1962))).

<sup>48</sup> *Id.* at 468 (citing *Law*, BLACK’S LAW DICTIONARY (5th ed. 1979)).

<sup>49</sup> *Mitchell*, 39 F.3d at 468 (quoting *Chrysler*, 441 U.S. at 295–96).

<sup>50</sup> *Id.* (quoting *Chrysler*, 441 U.S. at 295–96).

<sup>51</sup> *Id.* at 470 (quoting *Chrysler*, 441 U.S. at 301–02).

<sup>52</sup> *Id.* at 469.

<sup>53</sup> 227 F. 818 (8th Cir. 1915).

<sup>54</sup> See *Mitchell*, 39 F.3d at 469 (citing *Estes*, 227 F. at 821–22).

Thus, the Fourth Circuit in *Mitchell* held that § 545 unambiguously allows for violations of administrative regulations that have the “force and effect of law” to qualify as predicate offenses.<sup>55</sup> Furthermore, the rule of lenity was deemed inapplicable because the statute was unambiguous.<sup>56</sup>

Turning to the facts of the case, the court then applied the Supreme Court’s three-part test from *Chrysler* for determining whether a regulation has the “force and effect of law” and concluded that all three of the regulations that Mitchell had violated satisfied each prong of the *Chrysler* test and properly qualified as “law” under § 545.<sup>57</sup> Given that Mitchell’s regulatory violations were therefore “contrary to law” under § 545, the court upheld his conviction.<sup>58</sup>

2. The Ninth Circuit requires regulatory violations to be specifically criminalized by statute.

More than a decade after *Mitchell*, the Ninth Circuit diverged from the Fourth Circuit to put forth its own interpretation of “contrary to law” under § 545 in *United States v. Alghazouli*.<sup>59</sup> In *Alghazouli*, the defendants imported the chemical R-12 freon from Mexico and sold it to automotive supply dealers for large profits, thereby violating 40 C.F.R. § 82.4, an EPA regulation that prohibits R-12 freon importation.<sup>60</sup> The defendants were convicted under § 545, with their 40 C.F.R. § 82.4 violation serving as the predicate offense.<sup>61</sup> As in *Mitchell*, the court rejected the defendants’ argument that their regulatory violation did not fall within the meaning of “contrary to law” in § 545. However, in arriving at its decision, the Ninth Circuit put forth a much narrower interpretation of “contrary to law” than the one asserted by the Fourth Circuit.

The court began its analysis with the text of § 545, searching for the ordinary meaning of “law.” Here the court’s analysis deviated from the Fourth Circuit’s: the Ninth Circuit noted that although “law” has at times been defined broadly to include administrative regulations, other definitions of “law” define the

---

<sup>55</sup> See *id.* at 469–70.

<sup>56</sup> See *id.* at 470.

<sup>57</sup> See *id.* at 470–71.

<sup>58</sup> See *id.*

<sup>59</sup> 517 F.3d 1179 (9th Cir. 2008).

<sup>60</sup> See *id.* at 1182–83.

<sup>61</sup> See *id.* at 1183.

word only as “a statute.”<sup>62</sup> Thus, the term law did not “have a single clear meaning discernible from the text alone.”<sup>63</sup> Having identified this textual ambiguity, the court then examined what “law” meant in previous versions of § 545—namely, the 1866, 1922, and 1930 Tariff Acts. Because all of these statutory provisions have essentially the same language, the court assumed that Congress intended for “law” to retain the same meaning across the versions.<sup>64</sup> Specifically, the Ninth Circuit cited two Supreme Court opinions—*United States v. Eaton*<sup>65</sup> and *United States v. Grimaud*<sup>66</sup>—that came after the 1866 Tariff Act. The court asserted that both of these decisions “made clear . . . that a criminal conviction for violating a regulation is permissible only if a statute explicitly provides that violation of that regulation is a crime.”<sup>67</sup>

In *Eaton* the Supreme Court dealt with a conviction under the Oleomargarine Act of 1886,<sup>68</sup> a statute that regulated and taxed the margarine industry.<sup>69</sup> Most relevantly, part of this statute applied criminal penalties to any manufacturer or dealer of oleomargarine who knowingly or willfully neglected or refused to do “any of the things required by law” in running his business.<sup>70</sup> The defendant was convicted under this Act for violating a minor bookkeeping regulation.<sup>71</sup> However, the separate statute that promulgated the regulation “did not specify that” violations would be criminal offenses.<sup>72</sup> The Court reversed the conviction and noted that “[i]t would be a very dangerous principle to hold that” compliance with this bookkeeping regulation was “required by law” under the Oleomargarine Act because there must be “sufficient statutory authority . . . for declaring any act or omission a criminal offence.”<sup>73</sup> This reasoning establishes that under the Court’s understanding of the Constitution’s separation of powers, a defendant could not be held criminally liable for violating an

---

<sup>62</sup> *Id.* at 1183–84 (quoting *Law*, BLACK’S LAW DICTIONARY (8th ed. 2004)).

<sup>63</sup> *Id.* at 1184.

<sup>64</sup> *See Alghazouli*, 517 F.3d at 1184–86.

<sup>65</sup> 144 U.S. 677 (1892).

<sup>66</sup> 220 U.S. 506 (1911).

<sup>67</sup> *Alghazouli*, 517 F.3d at 1184.

<sup>68</sup> Oleomargarine Act of 1886, ch. 840, 24 Stat. 209.

<sup>69</sup> *See Eaton*, 144 U.S. at 678.

<sup>70</sup> *Id.* at 684–85.

<sup>71</sup> *Id.* at 678.

<sup>72</sup> *Alghazouli*, 517 F.3d at 1185.

<sup>73</sup> *Id.* (quoting *Eaton*, 144 U.S. at 688).

administrative regulation unless Congress has explicitly criminalized the violation.

And in *Grimaud* the Court dealt with a conviction under the Forest Reserve Act,<sup>74</sup> which expressly stated that violations of regulations promulgated under the Act “shall be punished as is provided in” a separate statute.<sup>75</sup> The defendant, who had violated a regulation created under the Forest Reserve Act, argued that *Eaton* should apply here and “that he could not be convicted of a crime based on the violation of a regulation.”<sup>76</sup> But the Court rejected this argument and noted that “the very thing which was omitted” in the Oleomargarine Act “has been distinctly done” in the Forest Reserve Act.<sup>77</sup> Namely, unlike in *Eaton*, the relevant statute in *Grimaud* specifically criminalized the regulatory violation in question, so criminal convictions for regulatory violations were permissible and did not violate the separation of powers.<sup>78</sup> Citing *Eaton* and *Grimaud* together, the Ninth Circuit in *Alghazouli* asserted that the Supreme Court in the decades following the Tariff Act of 1866 allowed regulatory violations to be charged as criminal offenses under the Act only if a specific statute had separately criminalized the violations.<sup>79</sup>

Building on this idea, the court also cited the Eighth Circuit’s decision in *Estes*. But the Ninth Circuit arrived at a different conclusion than the Fourth Circuit regarding the holding and importance of this case. The Ninth Circuit noted that *Estes* specifically mentioned and analyzed both *Eaton* and *Grimaud*. The court then concluded that the Eighth Circuit had arrived at the holding that the regulatory violations in *Estes* were “contrary to law” under the 1866 Tariff Act only because the regulations the defendant had violated were “fully authorized by law,” and those violations were “made punishable by law.”<sup>80</sup> Therefore, according to the Ninth Circuit, *Estes* stands for the principle that a regulatory violation is “contrary to law” only if a statute specifically criminalizes the violation. Finally, the Ninth Circuit concluded that because these three cases—*Eaton*, *Grimaud*, and *Estes*—were decided before the reenactment of the 1866 Tariff Act, Congress implicitly agreed with the interpretation of “contrary to

---

<sup>74</sup> Ch. 288, 33 Stat. 628 (1905).

<sup>75</sup> *Alghazouli*, 517 F.3d at 1185 (citing *Grimaud*, 220 U.S. at 515).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (citing *Grimaud*, 220 U.S. at 519).

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 1184.

<sup>80</sup> *Alghazouli*, 517 F.3d at 1186 (quoting *Estes*, 227 F. at 821–22).

law” in those cases by choosing not to change the language of the Act when reenacting it.<sup>81</sup>

In addition to this argument about previous interpretations, the Ninth Circuit pointed to the fact that the USA PATRIOT Improvement and Reauthorization Act of 2005, which reenacted<sup>82</sup> § 545, also added a new provision—§ 554—which, like § 545, deals with smuggling.<sup>83</sup> The court stated that § 554 and § 545 are “closely related,” given that both were enacted through the same Act, are codified in the same part of the U.S. Code, and deal with similar subject matter.<sup>84</sup> But whereas § 545 criminalizes importation done “contrary to law,” § 554 criminalizes exportation done “contrary to any law *or regulation*.”<sup>85</sup> According to the court, the close connection and similar language between the statutes indicate that the word “law” has the same meaning in both statutes.<sup>86</sup> Therefore, Congress’s deliberate choice to include “or regulation” in § 554 means that “law” should not be understood to include all regulations in § 545.<sup>87</sup> After making this final supporting point, the court held that only regulations for which there are statutes that specifically criminalize violations can qualify as “law” under § 545.<sup>88</sup> Applying this rule to the case at hand, the court noted that a provision of the Clean Air Act<sup>89</sup> specifically criminalizes violations of 40 C.F.R. § 82.4, the regulation that the *Alghazouli* defendant had violated.<sup>90</sup> Thus, the Ninth Circuit concluded that the defendants’ regulatory violations were in fact “contrary to law” and that § 545 properly applied.

### 3. The Eleventh Circuit has taken a middle ground approach based on the rule of lenity.

In *United States v. Izurieta*,<sup>91</sup> the Eleventh Circuit rejected both the Fourth and Ninth Circuits’ interpretations of § 545 in favor of a middle ground approach. The defendants had imported

---

<sup>81</sup> See *id.*

<sup>82</sup> Cf. *id.* (“Section 310 of the Act amended 18 U.S.C. § 545 by increasing the maximum sentence under § 545 from five to twenty years, but otherwise left § 545 unchanged.”).

<sup>83</sup> See *id.* at 1187.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1186 n.3 (emphasis in original) (citing 18 U.S.C. § 554).

<sup>86</sup> See *Alghazouli*, 517 F.3d at 1187.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> Clean Air Act, 42 U.S.C. §§ 7401–7671q.

<sup>90</sup> See *Alghazouli*, 517 F.3d at 1187–88.

<sup>91</sup> 710 F.3d 1176 (11th Cir. 2013).

cheese, butter, and bread from Central America for distribution and sale in the United States.<sup>92</sup> In the course of their operations, the defendants imported numerous shipments that were found to be tainted with various contaminants, such as *E. coli* and salmonella, but failed to “redeliver, export, and destroy” the tainted products, as required by FDA regulation 19 C.F.R. § 141.113.<sup>93</sup> Although this regulatory violation would by itself only have given “rise to a civil remedy of liquidated damages in the amount of three times the value of the goods,” the violation was used as a predicate offense to convict the defendants under § 545.<sup>94</sup> Ultimately, the district court sentenced the defendants to a twenty-seven-month term of incarceration, followed by a three-year term of supervised release.<sup>95</sup>

On appeal, the defendants again argued that their regulatory violation could not serve as a predicate offense for § 545, but this time the court accepted their claim. The Eleventh Circuit began its analysis of this question by first considering, and then rejecting, both the Ninth Circuit’s approach in *Alghazouli* and the Fourth Circuit’s approach in *Mitchell*.<sup>96</sup> First, the Eleventh Circuit found the Ninth Circuit’s comparative analysis of § 545 and § 554 flawed and unpersuasive because § 554 was actually “enacted decades after 18 U.S.C. § 545.”<sup>97</sup> Then, although the court agreed with the Fourth Circuit’s general conclusion that “law” is not limited to statutes and extends to some regulations, it rejected the Fourth Circuit’s application of the three-prong “force and effect of law” test.<sup>98</sup> Specifically, the Eleventh Circuit declined to apply the *Chrysler* test because it would extend the scope of the statute too far, allowing many, or perhaps even most, regulations to qualify as “law” under § 545.<sup>99</sup> The court also found it troubling that the test was “derived from a non-criminal” administrative law context.<sup>100</sup>

---

<sup>92</sup> See *id.* at 1178.

<sup>93</sup> *Id.* at 1178 & n.3.

<sup>94</sup> *Id.* at 1179 (citing 19 C.F.R. § 141.113(c)(3) (2012)).

<sup>95</sup> Brief for Appellant at 13, *Izurieta*, 710 F.3d 1176 (No. 11-13585-I).

<sup>96</sup> See *Izurieta*, 710 F.3d. at 1180–82.

<sup>97</sup> *Id.* at 1181.

<sup>98</sup> See *id.* at 1181–82.

<sup>99</sup> See *id.*

<sup>100</sup> *Id.*

Instead, the court concluded that the rule of lenity<sup>101</sup> should be applied to § 545 because “lenity remains an important concern in criminal cases, especially where a regulation giving rise to what would appear to be civil remedies is said to be converted into a criminal law.”<sup>102</sup> It arrived at this conclusion even though the rule of lenity applies only when there is “grievous ambiguity or uncertainty” in the statute.<sup>103</sup> Unlike the Fourth Circuit, the Eleventh Circuit found that the lack of express mention of regulatory violations in § 545 created ambiguity and that this ambiguity becomes grievous “where the text or history of the regulation creates a strong perception that a violation of the regulation will give rise to civil remedies only.”<sup>104</sup> Thus, the court held that whenever a regulation has created a “strong perception” that it gives rise only to civil remedies, § 545 cannot apply.<sup>105</sup> Applying this test to the facts of *Izurieta*, the court analyzed the text, history, and context of 19 C.F.R. § 141.113(c) and concluded that the regulation “primarily acts to establish the general contractual terms between Customs and the importer regarding temporary release and storage of the imported goods, along with agreed-upon liquidated damages for non-compliance.”<sup>106</sup> Thus, the regulation was “civil only” and could not qualify as a “law” under § 545, and so the court vacated the defendants’ convictions.<sup>107</sup>

B. Other Circuits Have Not Taken Conclusive Positions on the Meaning of “Contrary to Law” but Still Offer Useful Commentary

Although the Fourth, Ninth, and Eleventh Circuits are the only federal appellate courts in recent years to have definitively weighed in on the meaning of “contrary to law” in § 545, other circuits have briefly addressed the issue without arriving at firm positions. For example, in *United States v. Place*,<sup>108</sup> the First Circuit stated that some regulatory violations—including the violation in the case—qualify as predicate violations for § 545, but

---

<sup>101</sup> See *Izurieta*, 710 F.3d at 1182 (“When [statutory] ambiguity exists, ‘the ambit of criminal statutes should be resolved in favor of lenity.’” (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971))).

<sup>102</sup> *Id.* at 1181–82.

<sup>103</sup> *Id.* at 1182 (quoting *Chapman v. United States*, 500 U.S. 453, 456 (1991)).

<sup>104</sup> *Id.*

<sup>105</sup> See *id.*

<sup>106</sup> *Izurieta*, 710 F.3d at 1182–83.

<sup>107</sup> *Id.* at 1184.

<sup>108</sup> 693 F.3d 219 (1st Cir. 2012).

the court did not specify the precise subset of regulatory violations that qualify.<sup>109</sup> In *Place*, the defendant, who traded sperm whale teeth, had violated several regulations that were promulgated to enforce the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>110</sup> (CITES) treaty.<sup>111</sup> The defendant was convicted under the Lacey Act,<sup>112</sup> which specifically criminalizes unlawful wildlife trade like the defendant's conduct, and under § 545, with the CITES regulatory violations serving as the predicate offenses.<sup>113</sup>

The First Circuit began its “contrary to law” analysis by noting that it found “persuasive” the argument that “‘law’ is much more commonly understood to include regulations.”<sup>114</sup> It then rejected the argument that comparing § 545 to § 554 reveals that “law” does not include regulations.<sup>115</sup> Specifically, the court noted that this comparison was flawed because § 554 “was enacted well over a hundred years after the original version of” § 545.<sup>116</sup> Moreover, the court stated that despite reenacting § 545 “multiple times[,] Congress has never sought to exclude regulations despite almost a century of circuit-court precedent holding that the word ‘law’ in the statute includes regulations.”<sup>117</sup> And finally, the First Circuit declined to apply the rule of lenity to § 545, noting a lack of ambiguity as to whether “contrary to law” includes regulations.<sup>118</sup> All of this indicates implicit support for an expansive approach, close to the Fourth Circuit's in *Mitchell*. But again, despite these similarities, the First Circuit's only explicit conclusion was that § 545 covers some regulatory violations, including violations of the CITES regulations at play in *Place*. And given that the CITES regulations are arguably also specifically criminalized by the Lacey Act, they would qualify as “contrary to law” even under the Ninth Circuit's interpretation in *Alghazouli* and the Eleventh Circuit's approach in *Izurieta*.

---

<sup>109</sup> See *id.* at 228–29.

<sup>110</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Jul. 1, 1975, T.I.A.S. No. 8249.

<sup>111</sup> See *Place*, 693 F.3d at 222.

<sup>112</sup> 16 U.S.C. §§ 3371–3378.

<sup>113</sup> See *Place*, 693 F.3d at 222–23.

<sup>114</sup> *Id.* at 228.

<sup>115</sup> See *id.* at 229.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *Place*, 693 F.3d at 229.



The Second Circuit also touched upon the meaning of “contrary to law” in *United States v. Koczuk*.<sup>119</sup> However, that court presented significantly less analysis and fewer conclusions regarding § 545 than the First Circuit did in *Place*. The defendant in *Koczuk*, who had imported Russian sturgeon roe without proper permits, was convicted of violating § 545, with 50 C.F.R. § 23.12(a)(2)(i)—another CITES regulation—serving as the predicate offense.<sup>120</sup> As in *Place*, the Lacey Act arguably criminalized this CITES regulatory violation specifically, and the defendant was convicted under the Lacey Act in addition to § 545.<sup>121</sup> The court found no issue with the conviction under § 545, citing the Fourth Circuit’s decision in *Mitchell* in support of the proposition that violators of CITES regulations can be prosecuted under § 545.<sup>122</sup> By citing *Mitchell*, the Second Circuit also implicitly conveyed support for the Fourth Circuit’s approach to § 545. But because the regulatory violation here, which had been specifically criminalized in another statute, would likely have been considered “contrary to law” under the Ninth and Eleventh Circuits’ approaches as well, it remains unclear exactly where the Second Circuit would fall in the ongoing circuit split.

Finally, the Seventh Circuit briefly discussed the meaning of “contrary to law” in *United States v. Heon Seok Lee*.<sup>123</sup> The defendant, Lee, operated a company that produced industrial fans in South Korea.<sup>124</sup> But in an effort to tap into the funds earmarked by the U.S. government for American-made industrial supplies, Lee falsely labelled his fans as made in the United States.<sup>125</sup> This false labelling violated 19 U.S.C. § 1304(a), which served as the predicate offense for Lee’s conviction under § 545.<sup>126</sup> The Seventh Circuit noted that the second paragraph of § 545 “makes it a crime to fraudulently or knowingly import merchandise in any manner contrary to law.”<sup>127</sup> It then affirmed Lee’s conviction because he had “circumvented” the country-of-origin labelling requirements in § 1304(a) “in a fraudulent fashion,” thereby

---

<sup>119</sup> 252 F.3d 91 (2d Cir. 2001).

<sup>120</sup> *See id.* at 94.

<sup>121</sup> *See id.*

<sup>122</sup> *Id.* (citing *Mitchell*, 39 F.3d at 470–71).

<sup>123</sup> 937 F.3d 797 (7th Cir. 2019), *cert. denied sub nom.*, *Lee v. United States*, 140 S. Ct. 1125 (2020).

<sup>124</sup> *See id.* at 802.

<sup>125</sup> *See id.* at 802–03.

<sup>126</sup> *See id.* at 812.

<sup>127</sup> *Id.* at 813.

importing merchandise in a manner that was “contrary to law.”<sup>128</sup> However, because the predicate offense in *Lee* was statutory, the Seventh Circuit’s decision to affirm Lee’s conviction under § 545 provides no clues regarding whether the court understood “contrary to law” to include regulatory violations.<sup>129</sup>

## II. INTERPRETING § 545 USING PREVIOUS VERSIONS OF § 545 AND COMPARATIVE STATUTORY ANALYSIS

Now that Part I has laid out the legal background of the circuit split, this Part begins to resolve the disagreement by revisiting some of the lines of analysis that courts have already used in interpreting § 545. First, Part II.A looks at case law from the late nineteenth and early twentieth centuries to determine how courts interpreted “contrary to law” in the Tariff Act of 1866, the original version of § 545. This examination reveals that courts generally understood “contrary to law” to include only regulatory violations that were specifically criminalized by a statute. Congress arguably knew about this judicial interpretation when it reenacted the Tariff Act of 1866 in 1922 and again in 1930. And given that § 545 contains essentially the same language as the Tariff Acts of 1866, 1922, and 1930, Congress apparently did not feel the need to override this judicial interpretation. This suggests that courts should continue to understand “contrary to law” as including only regulatory violations that are specifically criminalized by statutes, aligning with the Ninth Circuit’s position in *Alghazouli*.

---

<sup>128</sup> *Lee*, 937 F.3d at 812–13.

<sup>129</sup> It is worth noting that the court rejected Lee’s argument that “the words ‘imports . . . merchandise contrary to law’ in § 545 mean that the merchandise itself is per se illegal to import, not merely that the merchandise was imported in a condition noncompliant with some federal law or regulation somewhere.” *Id.* at 812. Because the court rejected Lee’s argument, one could claim that the court implicitly supported the interpretation that “contrary to law” means “noncompliance with some federal law or regulation somewhere.” *Id.* Furthermore, “some federal law or regulation somewhere” could be understood broadly to mean that *all* statutory and *all* regulatory violations qualify as predicate offenses under § 545. But this interpretation of *Lee* is a stretch. Given that the statement in question was simply the court’s description of Lee’s argument on appeal, it is unlikely that the court intended any part of this statement to be construed as its definitive position on the meaning of “contrary to law.” It seems far more likely that the court was merely attempting to clarify Lee’s position. Moreover, given that the predicate offense for Lee’s § 545 conviction was a statutory—not a regulatory—violation, the Seventh Circuit would have little reason to discuss whether regulatory violations qualify as predicate offenses at all. Thus, the Seventh Circuit, unlike the First and Second Circuits, did not provide any helpful clues regarding the court’s leanings on whether and which regulatory violations are “contrary to law.”

Then, Part II.B looks at the way “contrary to law” has been interpreted in the context of other statutes, namely 19 U.S.C. § 1595a(c), 18 U.S.C. § 1425, and 18 U.S.C. § 554. This analysis suggests that courts have repeatedly interpreted “contrary to law” quite narrowly, excluding most, if not all, regulatory violations. Under the “whole code rule,” courts should interpret terms consistently across different statutes, so this analysis provides further support for the Ninth Circuit’s position that “contrary to law” should be understood narrowly in the § 545 context. Though all of these lines of analysis support the Ninth’s Circuit interpretation, due to various limitations, they do not decisively resolve the issue. But the analysis in Part III will address this lingering uncertainty, conclusively resolving the circuit split.

A. Federal Courts’ Interpretations of “Contrary to Law” in the Previous Versions of § 545 Align with the Ninth Circuit’s Current Interpretation

Given that the language in § 545 is essentially the exact same as in the statute’s preceding iterations, understanding how courts interpreted “contrary to law” in these previous versions provides a better sense of Congress’s intent in repeatedly reenacting the language that now makes up § 545. In short, looking to previous interpretations of “contrary to law” can shed light on the correct, current scope of § 545. The Fourth and Ninth Circuits both engaged in this line of analysis when interpreting § 545 but arrived at starkly different conclusions. The Fourth Circuit concluded in *Mitchell* that courts had previously interpreted “contrary to law” to include all regulatory violations that had the force and effect of law, while the Ninth Circuit concluded in *Alghazouli* that courts had interpreted “contrary to law” to encompass only regulatory violations that were criminalized by accompanying statutes. Given this divergence, independently examining courts’ previous interpretations of “contrary to law” can help to resolve the § 545 circuit split. In particular, the three cases discussed in this Section—*Estes v. United States*, *Goldman v. United States*,<sup>130</sup> and *Keck v. United States*<sup>131</sup>—all of which deal with convictions under the Tariff Act of 1866, help illuminate what Congress likely understood “contrary to law” to mean when it reenacted this language in the Tariff Acts of 1922 and 1930.

---

<sup>130</sup> 263 F. 340 (5th Cir. 1920).

<sup>131</sup> 172 U.S. 434 (1899).

The courts in *Mitchell* and *Alghazouli* both cited the Eighth Circuit's decision in *Estes* in support of their interpretations of "contrary to law" but characterized it quite differently. An analysis of *Estes* demonstrates that the Ninth Circuit's characterization was correct. In *Estes* the defendants assisted in importing cattle from Mexico that were not properly declared to, or inspected by, Customs.<sup>132</sup> These actions violated several regulations, and the defendants were convicted under the Tariff Act of 1866 for facilitating the importation of the cattle "contrary to law."<sup>133</sup>

In reviewing this conviction, the Eighth Circuit began by describing the Supreme Court's holding in *Eaton*. The court explained that the Supreme Court had vacated Eaton's conviction based on the logic that if Congress had intended for violations of Internal Revenue Service regulations to be criminally punished under the Oleomargarine Act, "it would have said so."<sup>134</sup> The Eighth Circuit then discussed the Court's subsequent decision in *Grimaud*.<sup>135</sup> It explained that the Court had upheld Grimaud's conviction because, unlike in *Eaton*, the relevant statute in *Grimaud* had specifically "provided that any violation of" rules and regulations stemming from the statute "should be punished as provided" in the statute.<sup>136</sup> Applying the holdings from these two Supreme Court decisions to the facts of *Estes*, the Eighth Circuit concluded that the regulations that the defendants had violated when importing cattle "were fully authorized by law, and their violation [was] made punishable by law."<sup>137</sup> Therefore, "it was proper" to bring charges under the Tariff Act's "contrary to law" provision.<sup>138</sup>

As previously discussed, the Fourth Circuit in *Mitchell* and the Ninth Circuit in *Alghazouli* also both enlisted the *Estes* decision for support but characterized it quite differently. The Fourth Circuit asserted that *Estes* held quite broadly that administrative regulations fall within the purview of "law,"<sup>139</sup> whereas the Ninth Circuit stated that *Estes* built on the Supreme Court's decisions in *Eaton* and *Grimaud* and held that regulatory violations are

---

<sup>132</sup> See *Estes*, 227 F. at 820–21.

<sup>133</sup> See *id.* at 821–22.

<sup>134</sup> *Id.* at 821.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Estes*, 227 F. at 821.

<sup>138</sup> *Id.* at 821–22.

<sup>139</sup> See *Mitchell*, 39 F.3d at 469.

“contrary to law” only if they are specifically criminalized by a statute.<sup>140</sup> Reexamining this disputed decision, particularly its treatment of *Eaton* and *Grimaud*, reveals that only the Ninth Circuit accurately characterized the *Estes* holding. This reexamination also affirms the Ninth Circuit’s assertion that *Estes* aligns with and supports the narrower interpretation of “contrary to law” put forth in *Alghazouli*: regulatory violations are contrary to law only when specifically criminalized by statute.

The Fifth Circuit in *Goldman* also interpreted “contrary to law” in the context of the Tariff Act of 1866. This case dealt with defendants who were convicted under the Tariff Act of 1866 because they had “knowingly received” a “coil of rope that had been” unlawfully “landed . . . from a foreign port, without first having obtained a permit from the collector of internal revenue.”<sup>141</sup> These actions also violated § 2872 of the Revised Statutes, and this violation served as the predicate offense for the Tariff Act conviction.<sup>142</sup> The defendants argued that the Tariff Act was intended to punish only individuals who sought to evade paying a duty on imported merchandise.<sup>143</sup> But the court rejected this argument and noted that the Act’s “contrary to law” language had a “wider scope,” covering violations of “regulations relating to the introduction of merchandise into the country” and not just applying to duty laws.<sup>144</sup> However, when explaining the precise subset of regulations that the Tariff Act covered, the court then stated that “contrary to law” meant the “violation of any regulation . . . established by law” (other than the Tariff Act itself) “and made punishable when disobeyed.”<sup>145</sup> After making this statement, the court cited the Eighth Circuit’s *Estes* decision for support.<sup>146</sup> This all suggests that the Fifth Circuit’s approach to “contrary to law” under the Tariff Act of 1866 mirrored the Eighth Circuit’s approach, limiting the regulatory violations that could qualify as predicate offenses for the Tariff Act to those that were expressly criminalized by another statute. Once again, this tracks the Ninth Circuit’s reasoning and conclusions in *Alghazouli*.

Finally, the Supreme Court’s decision in *Keck* aligns with the conclusions in *Goldman*, *Estes*, and, by extension, the Ninth

---

<sup>140</sup> See *Alghazouli*, 517 F.3d at 1185–86.

<sup>141</sup> *Goldman*, 263 F. at 341.

<sup>142</sup> See *id.* at 341–42.

<sup>143</sup> *Id.* at 342.

<sup>144</sup> *Id.* at 343.

<sup>145</sup> *Id.*

<sup>146</sup> See *Goldman*, 263 F. at 343 (citing *Estes*, 227 F. 818).

Circuit's approach in *Alghazouli*. The defendant in *Keck* was charged with violating the Tariff Act of 1866 because he had allegedly imported diamonds into Philadelphia unlawfully.<sup>147</sup> Although this case primarily dealt with the characteristics of a legally permissible indictment, the *Keck* Court briefly remarked on the meaning of "contrary to law" in the Tariff Act. The Court stated that the "words, 'contrary to law,' contained in the statute, clearly relate to legal provisions not found in [the Tariff Act] itself."<sup>148</sup> But more specifically, the Court stated that "importing merchandise is not per se contrary to law, and could only become so when done in violation of specific *statutory* requirements."<sup>149</sup> Although the Court did not conclusively define the correct scope of the "contrary to law" provision, its statement that violations of "specific *statutory* requirements" are what qualify as "contrary to law" suggests that the Court understood the Tariff Act narrowly, perhaps exclusively encompassing statutory violations.

Taken together, *Estes*, *Goldman*, and *Keck* suggest that courts understood the proper scope of the Tariff Act of 1866 to be quite narrow, including, at most, only regulatory violations that were made criminally punishable by separate statutes. As the Ninth Circuit reasoned in *Alghazouli*, this judicial understanding of the Act provided the background against which Congress reenacted the Tariff Act of 1866 in 1922 and again in 1930, preserving the language of the original Act in the subsequent reenactments. Notably, Congress saw no need to add clarifying language to the statutory provision in either of these reenactments. Thus, assuming that Congress had awareness of this judicial interpretation of "contrary to law," it implicitly ratified this understanding of the statute. This assumption of congressional intent in turn sheds light on the proper understanding of § 545 because Congress again preserved the relevant statutory language from the previous Tariff Acts when enacting § 545. This line of analysis supports the conclusion that modern courts should understand "contrary to law" in § 545 in the same way that the courts in *Estes*, *Goldman*, and *Keck* did over a century ago—an understanding that neatly aligns with the Ninth Circuit's approach in *Alghazouli*.

---

<sup>147</sup> See *Keck*, 172 U.S. at 436.

<sup>148</sup> *Id.* at 437.

<sup>149</sup> *Id.* (emphasis added).

B. Applying the Whole Code Rule Provides Further Support for the Ninth Circuit’s Understanding of § 545

Textual analysis of § 545 provides further clarity to the statute’s meaning. As previously discussed, *Mitchell* and *Alghazouli* put forth different dictionary definitions for the word “law.” The Fourth Circuit in *Mitchell* noted that “law” is “commonly defined to include administrative regulations,”<sup>150</sup> while the Ninth Circuit stated in *Alghazouli* that “law” can be defined as including only statutes.<sup>151</sup> This divergence makes it clear that “law” does not have one undisputed dictionary definition, so other methods of textual analysis are needed to discern the meaning of “contrary to law” in § 545. Specifically, it is illuminating to examine how the phrase “contrary to law” has been interpreted in statutes other than § 545 and to apply the whole code rule.

The whole code rule is a canon of statutory interpretation that encourages courts to construe ambiguous statutory terms “to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.”<sup>152</sup> Employing this canon often entails determining the meaning of the ambiguous term across various statutory contexts and then applying that meaning to the case at hand. The Supreme Court has used this methodology in numerous cases to determine the meaning of ambiguous statutory terms.<sup>153</sup> The underlying reasoning for the whole code rule is twofold. First, the rule arguably tracks congressional intent because “Congress has a consistent way of expressing certain policy choices, such that differences in the wording of two similar statutes reflect differences in congressional intent.”<sup>154</sup> Additionally, the whole code rule reflects a judge’s obligation to “make sense of the law as a whole,” making the entire legal landscape a coherent whole by providing consistency in the meaning of words across statutes.<sup>155</sup>

An analysis of 19 U.S.C. § 1595a(c) is a good starting point for application of the whole code rule because that statute also contains the phrase “contrary to law.” The statute, which, like

---

<sup>150</sup> *Mitchell*, 39 F.3d at 468.

<sup>151</sup> See *Alghazouli*, 517 F.3d at 1183–84.

<sup>152</sup> *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991).

<sup>153</sup> See, e.g., *Carcieri v. Salazar*, 555 U.S. 379, 389 (2009); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2080 (2018) (Breyer, J., dissenting).

<sup>154</sup> Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 85 (2021).

<sup>155</sup> *Id.* at 86–87.

§ 545, deals with unlawful importation, states that “[m]erchandise which is introduced or attempted to be introduced into the United States contrary to law” can be seized, forfeited, or detained if certain other conditions are met.<sup>156</sup> In *United States v. Davis*<sup>157</sup> the Second Circuit interpreted “contrary to law” in the context of § 1595a(c). In *Davis* the government had initiated a civil forfeiture claim under § 1595a(c) against the defendant to recover an allegedly stolen work of art.<sup>158</sup> The government argued that the art had been imported to the United States contrary to law.<sup>159</sup> Specifically, the art had previously been stolen from a museum in France, violating a different statute, the National Stolen Property Act<sup>160</sup> (NSPA), which served as the predicate offense for § 1595a(c).<sup>161</sup> In response, the defendant argued that “‘contrary to law’ refers only to violations of the customs laws, not to violations of the NSPA.”<sup>162</sup> The Second Circuit rejected this argument and put forth a broader interpretation of “contrary to law” than the defendant desired.<sup>163</sup> The court pointed out that § 1595a(c) references other federal statutes, such as those dealing with copyright and trademark.<sup>164</sup> It then went on to state that the fact that § 1595a

incorporates by reference federal laws that do not directly pertain to customs enforcement counsels against a reading of “contrary to law” that might preclude its application to those very statutes. Accordingly, there is a strong argument that the phrase “contrary to law” in Section 1595a(c) means exactly what it says: the government may seize and forfeit merchandise that is introduced into the United States illegally, unlawfully, or in a manner conflicting with established law, regardless of whether the law violated relates to customs enforcement.<sup>165</sup>

A careful look at the court’s language in this portion of *Davis* reveals that the Second Circuit used the words “law” and

---

<sup>156</sup> 19 U.S.C. § 1595a(c).

<sup>157</sup> 648 F.3d 84 (2d Cir. 2011).

<sup>158</sup> See *Davis*, 648 F.3d at 87.

<sup>159</sup> See *id.*

<sup>160</sup> 18 U.S.C. §§ 2311–2315.

<sup>161</sup> See *Davis*, 648 F.3d at 87–89.

<sup>162</sup> *Id.* at 89.

<sup>163</sup> See *id.* at 89–90.

<sup>164</sup> See *id.* at 90.

<sup>165</sup> *Id.*



“statutes” interchangeably, first referring to copyright and trademark statutes as “law” and then stating in the next sentence that “contrary to law” means “conflicting with established law, regardless of whether the law violated relates to customs enforcement.”<sup>166</sup> It is, of course, possible that this interchangeable usage was merely coincidental or had no deeper significance. But it is also possible that the interchangeable usage suggests that in rejecting the defendant’s suggestion that “contrary to law” is limited to violations of importation statutes, the court intended to extend the scope of “contrary to law” to include only other statutory, not regulatory, violations. Assuming consistency across statutes, this possibility counsels in favor of a narrow interpretation of “contrary to law” in § 545.

A second statute that features “contrary to law” is 18 U.S.C. § 1425, which deals with the unlawful procurement of citizenship or naturalization.<sup>167</sup> This statute applies significant criminal penalties to “[w]hoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship.”<sup>168</sup> Exploring the meaning of “contrary to law” in this different statutory context, the Ninth Circuit in *United States v. Puerto*<sup>169</sup> appears to have arrived at a far narrower interpretation of the phrase than either its § 545 interpretation in *Alghazouli* or the Second Circuit’s § 1595a(c) interpretation in *Davis*.<sup>170</sup> In *Puerto*, the defendant Antonio Puerto was convicted of violating § 1425 by making false statements during his naturalization application process.<sup>171</sup> In explaining the details of the conviction, the court noted that § 1425(a) “does not define the phrase ‘contrary to law,’” and then explained that “[p]resumably the ‘law’ referred to is the law governing naturalization, 8 U.S.C., ch. 12, subchapter III.”<sup>172</sup> Thus, the court seemingly limited “contrary law” to violations of only a small subset of federal statutes, excluding both regulatory violations and statutory violations unrelated to naturalization.

This case and the Second Circuit’s decision in *Davis* suggest that courts, when interpreting “contrary to law” in statutory contexts other than § 545, have understood the phrase narrowly,

---

<sup>166</sup> *Davis*, 648 F.3d at 90.

<sup>167</sup> See 18 U.S.C. § 1425.

<sup>168</sup> 18 U.S.C. § 1425(a).

<sup>169</sup> 982 F.2d 1297 (9th Cir. 1992).

<sup>170</sup> See *id.* at 1301–02.

<sup>171</sup> See *id.* at 1299–1300.

<sup>172</sup> *Id.* at 1300–01.

excluding most, if not all, regulatory violations. Assuming there either is or should be consistency in the meaning of a particular phrase across different statutes, *Davis* and *Puerta* both indicate that courts should also narrowly construe “contrary to law” in § 545. This lends additional support for the Ninth Circuit’s interpretation of § 545 and further discredits the Fourth and Eleventh Circuits’ approaches because their interpretations would give “contrary to law” a dramatically broader meaning in § 545 than in other statutory contexts.

Finally, as alluded to in Part I.A.2, the Ninth Circuit in *Alghazouli* employed a version of the whole code rule when it compared § 545 to 18 U.S.C. § 554, both of which are provisions in the USA PATRIOT Improvement and Reauthorization Act of 2005.<sup>173</sup> The court noted that the two provisions use almost identical language, aside from one meaningful variation: § 545 uses the phrase “contrary to law,” while § 554 uses the phrase “contrary to any *law or regulation*.”<sup>174</sup> The court reasoned that the addition of “or regulation” in § 554 must mean that “contrary to law,” does not by itself include regulatory violations.<sup>175</sup> The court then concluded that because § 545 and § 554 are both part of the same act and use almost identical language, “contrary to law” should have a consistent meaning across both provisions.<sup>176</sup> Thus, few, if any, regulatory violations should qualify as predicate offenses under § 545.<sup>177</sup>

Both the First and Eleventh Circuits have explicitly rejected this comparative analysis argument because § 545 was not enacted at the same time as § 554.<sup>178</sup> Specifically, the courts noted that although both § 545 and § 554 were within the PATRIOT Reauthorization Act, this Act merely reauthorized § 545, whereas § 554 was an entirely new provision.<sup>179</sup> Because § 545’s “contrary

---

<sup>173</sup> See *Alghazouli*, 517 F.3d at 1187. Given that § 545 and § 554 are both part of the PATRIOT Act, applying a presumption of consistency in meaning across the two provisions could be more precisely labelled as an application of the whole act rule rather than of the whole code rule. But given that, as I argue below, § 545 was enacted in its initial form before § 554, the provisions can be understood as originating from two different statutes, so the whole code rule is what counsels in favor of interpreting “contrary to law” consistently. Therefore, for the sake of simplicity, I continue to use the term “whole code rule” in this Section.

<sup>174</sup> *Id.* at 1186 n.3, 1187 (emphasis in original).

<sup>175</sup> See *id.* at 1187.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 1187.

<sup>178</sup> See *Place*, 693 F.3d at 228–29; *Izurieta*, 710 F.3d at 1181.

<sup>179</sup> See *Place*, 693 F.3d at 229; *Izurieta*, 710 F.3d at 1181.

to law” language has been present since the Tariff Act of 1866, those courts concluded that using § 554 to shed light on the meaning of this phrase in § 545 is flawed.<sup>180</sup>

Though many years passed between the original enactment of the language in § 545 and the later enactment of § 554, comparative analysis between the two statutes is still illuminating. The whole code rule suggests that courts should understand “contrary to law” consistently across statutory provisions, even if those provisions were enacted at different times. Also, the argument for consistent meaning is particularly strong here. Sections 545 and 554 use almost identical language and deal with the exact same subject matter (restrictions on trade). And even though § 545 was not first enacted in the PATRIOT Reauthorization Act, it was expressly reauthorized in this Act alongside the enactment of § 554. All of this suggests that Congress was, at the very least, aware of § 545’s language when devising § 554 and perhaps even took the language for § 554 directly from § 545. Thus, Congress’s choice to add “or regulation” to § 554 implies that it did not understand “contrary to law” to encompass all, or even most, regulatory violations—otherwise, the subsequent addition of “or regulation” in § 554 would have been entirely superfluous. Alternatively, if Congress already understood “contrary to law” to include regulatory violations but just added “or regulation” to create extra clarity in § 554, then it arguably would have made the same clarifying addition to § 545 when reauthorizing the provision. The conclusions that emerge from comparing § 545 and § 554 align with the conclusions from analyzing § 1595a(c) and § 1425, providing additional evidence that “contrary to law” retains a consistently narrow meaning, no matter the statutory context.

Looking at how previous courts interpreted the Tariff Act of 1866 and how “contrary to law” has been understood in other statutory contexts hints at the correct interpretation of § 545. But unfortunately, these suggestions are not enough to confidently conclude that the Ninth Circuit’s interpretation of “contrary to law” in *Alghazouli* is correct. Each of the lines of analysis pursued in Part II has its limitations. Decisions like *Keck*, *Goldman*, and *Estes* are helpful in understanding how courts had interpreted a previous version of § 545. But these cases are over a century old, and their applicability to understanding § 545 rests on the

---

<sup>180</sup> See *Place*, 693 F.3d at 229; *Izurietta*, 710 F.3d at 1181.

assumption that Congress was aware of the common judicial interpretation of “contrary to law” and intended to retain that interpretation through its successive reenactments of the Tariff Act of 1866. Additionally, while more recent cases like *Davis* and *Puerta* offer subtle indications of whether “contrary to law” includes regulatory violations in other statutory contexts, these cases ultimately do not address this question in plain, direct, and indisputable language. And it is possible that applying the whole code rule fundamentally misinterprets congressional intent for § 545 and that “contrary to law” should actually take on different meanings in different statutory contexts.<sup>181</sup> Thus, while Part II tilts the scales in favor of the Ninth Circuit’s approach to § 545, it falls short of conclusively proving the position.

### III. SEPARATION OF POWERS CONCERNS

In light of the shortcomings of the analyses in Part II, Part III takes a different and novel approach to resolve the § 545 circuit split: using binding Supreme Court separation of powers case law and doctrine to definitively prove that the Ninth Circuit’s interpretation of “contrary to law” in § 545 was correct. Part III.A begins by providing a brief background on scholarship and Supreme Court case law regarding the separation of powers and, more specifically, the constitutionality of “administrative crimes.” Part III.B then applies these Supreme Court decisions and the overarching principles governing administrative crimes to the § 545 context to determine which interpretations of “contrary to law” are constitutionally permissible. Because § 545 does not itself authorize agencies to promulgate regulations, this statute poses more serious separation of powers concerns than the typical administrative crimes that the Court has deemed unproblematic. Ultimately, due to these unique concerns, this Part concludes that only the Ninth Circuit’s approach—which requires regulatory violations to be specifically criminalized by a statute to be § 545 predicate offenses—is consistent with the Supreme Court’s current approach to the separation of powers. This conclusion is bolstered by the fact that the Court seems likely to resurrect and strengthen the nondelegation doctrine in the near future, which would force Congress to delegate power to agencies with more precision and tighter constraints.

---

<sup>181</sup> See, e.g., Krishnakumar, *supra* note 154, at 133–34.

### A. Background on the Separation of Powers and Administrative Crimes

Under the nondelegation doctrine, the legislature is prohibited from delegating its legislative powers to the executive branch or any other entity because the Constitution fully vests all legislative power in Congress.<sup>182</sup> Though the Supreme Court has repeatedly acknowledged and reaffirmed the importance of the nondelegation doctrine, the Court virtually never finds that statutes violate the doctrine.<sup>183</sup> In fact, the first and last times the Court invalidated a statute on nondelegation grounds were in 1935, leading some to say that the nondelegation doctrine only had “one good year.”<sup>184</sup> Although courts have had little appetite to reverse legislative actions under the nondelegation doctrine over the past century, scholars have remained interested in the doctrine.<sup>185</sup> And one area in which some scholars have argued that nondelegation concerns are particularly acute is the realm of “administrative crimes.”<sup>186</sup>

An “administrative crime” exists when a “legislature creates an offense in which an element incorporates by reference a body of rules or regulations promulgated by an administrative agency.”<sup>187</sup> At the federal level this typically occurs when Congress enacts a statute that gives a broad grant of authority to an agency to promulgate regulations that deal with a specified problem, and the statute provides that anyone who violates the regulations promulgated pursuant to the statute faces a specific criminal penalty.<sup>188</sup> For example, the Securities and Exchange Commission (SEC)

is empowered to create record retention rules relating to corporate audits, and the statute giving the agency this power states that “[w]hoever knowingly and willfully violates . . . any rule or regulation promulgated by the Securities and Exchange Commission under [this grant of authority], shall

---

<sup>182</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989); see also U.S. CONST. art. I, § 1.

<sup>183</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

<sup>184</sup> *Id.*

<sup>185</sup> See, e.g., *id.*

<sup>186</sup> See generally, e.g., Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855 (2020).

<sup>187</sup> *Id.* at 860.

<sup>188</sup> See *id.* at 860–61.

be fined under this title, imprisoned not more than 10 years, or both.”<sup>189</sup>

In instances like this, Congress supplies the general framework, and the agencies define and detail the contours of the crimes.

1. Scholarship on the nondelegation concerns posed by administrative crimes.

Some scholars have criticized this process of delegation, arguing that it “is for the legislative branch . . . to determine . . . the kind of conduct which shall constitute a crime”<sup>190</sup> and that strict separation of powers is particularly important in the criminal law context. For example, Professor Rachel Barkow argued in her article *Separation of Powers and the Criminal Law* that “as a matter of traditional constitutional interpretation, a strict separation of powers in criminal law matters has a stronger textual and historical pedigree than in other contexts.”<sup>191</sup> Specifically, she noted that “[u]nder the scheme established by the Constitution . . . Congress must criminalize the conduct, the executive must decide to prosecute, and the judiciary (judges and juries) must agree to convict. This scheme provides ample evidence that the potential growth and abuse of federal criminal power was anticipated by the Framers.”<sup>192</sup> And aside from these textual considerations, Professor Barkow also pointed out that there are functional reasons for a strict separation of powers when dealing with the criminal law. Namely, she reasoned that criminal law is the realm in which “the state assumes the power to remove liberty and even life.”<sup>193</sup> Also, “[c]riminal defendants . . . [do not] have much sway in the political process . . . [a]nd individuals already convicted of a crime are perhaps the weakest of all groups in the political arena,” which means that these groups lack the ability to meaningfully lobby and influence the administrative state.<sup>194</sup> Similarly, Professor Brenner Fissell has argued that it is important for democratic accountability for the legislature to be solely responsible for defining what conduct triggers criminal sanctions because

---

<sup>189</sup> *Id.* at 860 (quoting 18 U.S.C. § 1520(b)).

<sup>190</sup> *See id.* at 856 (quoting CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 10 (15th ed. 2019)).

<sup>191</sup> Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 994 (2006).

<sup>192</sup> *Id.* at 1017.

<sup>193</sup> *Id.* at 995.

<sup>194</sup> *Id.* at 1029.

such sanctions have the “especially harsh effect of liberty deprivation.”<sup>195</sup>

Additionally, in *Nondelegation and Criminal Law*, Professors Andrew Hessick and Carissa Byrne Hessick supplied several other reasons for why the “delegation of criminal rulemaking power is more problematic than noncriminal delegations.”<sup>196</sup> Specifically, they noted that agency delegations “concentrate power in a single branch of government.”<sup>197</sup> And this concentration poses a severe threat to individual liberty because “when the same institution both writes and enforces the law, it is much easier for the government to punish individuals.”<sup>198</sup> By eliminating the need for alignment between Congress and the executive branch, which often have diverging priorities, delegations remove a structural barrier to punishment and liberty deprivation.<sup>199</sup> Additionally, these scholars echoed Professor Fissell’s concern that agency delegations “undermine government accountability to the public” because agencies are relatively insulated from the pressures of popular sentiment.<sup>200</sup> And they noted that this issue is particularly troubling in the criminal law context because “criminal laws pose a significant opportunity for government abuse” by providing the state with a “powerful tool to codify prejudices or impose unwarranted burdens on certain segments of the public.”<sup>201</sup> Finally, the scholars contended that delegation results in “less notice to the public of their legal obligations” because the lack of bicameralism and presentment requirements allows agencies to rapidly change the criminal law.<sup>202</sup> These scholars’ arguments imply that courts should be more willing to strike down statutes that delegate expansive power to agencies to create and define crimes or at least that courts should construe statutory delegations to agencies more narrowly in the realm of criminal law.

On the other hand, some scholars strongly favor congressional delegation to agencies to devise administrative crimes. For example, Professor Dan Kahan discussed a number of what he

---

<sup>195</sup> Fissell, *supra* note 186, at 865.

<sup>196</sup> F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 344 (2021).

<sup>197</sup> *Id.* at 306.

<sup>198</sup> *Id.* at 308.

<sup>199</sup> *See id.*

<sup>200</sup> *Id.* at 311.

<sup>201</sup> Hessick & Hessick, *supra* note 196, at 313.

<sup>202</sup> *Id.* at 316–17.

perceived to be the merits of administrative crimes.<sup>203</sup> Specifically, he noted that it is virtually impossible for Congress to define the entire criminal code on its own because of political constraints, resource and capacity limitations, and Congress's inability to update the code with regularity.<sup>204</sup> More pointedly, Professor Kahan stated that congressional gridlock would leave important criminal law stuck in political machinery, reducing the output of criminal legislation, which would create problematic loopholes and gaps in the law.<sup>205</sup> Given the inevitability of congressional delegation in this realm, Professor Kahan asserted that the choice is between delegation to either executive branch agencies or to the judiciary, which would then need to promulgate criminal law through the federal common law.<sup>206</sup> In light of this choice, delegation to agencies to define crimes is preferable because the executive branch "has more experience with criminal law enforcement," remains more consistent in its rulemaking, and remains "accountable to the people" through political checks.<sup>207</sup>

More broadly, scholars who support congressional delegation to agencies commonly argue that delegation is wise because agencies have more subject matter expertise than Congress.<sup>208</sup> This argument notes that because career civil servants in agencies deal with a specific content area every single day, whereas members of Congress and their staffs are generalists that deal with a wide variety of issues, agencies are better suited to solving complicated social problems.<sup>209</sup> Aligning with Professor Kahan's reasoning, another common argument for agency delegation is that delegation promotes flexibility and efficiency in policymaking. Agencies, which are far less encumbered by the need for consensus building and less divided in their attention to the problem at hand, are arguably more capable of quickly reacting to changing social circumstances and can better adjust and tailor rules and regulations to reflect these changes.<sup>210</sup> And given the sheer size of agencies

---

<sup>203</sup> See Fissell, *supra* note 186, at 876–78 (citing Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470–88 (1996)).

<sup>204</sup> See Kahan, *supra* note 203, at 473–85.

<sup>205</sup> See *id.* at 474–75.

<sup>206</sup> See *id.* at 471–79.

<sup>207</sup> *Id.* at 470–71.

<sup>208</sup> See Hessick & Hessick, *supra* note 196, at 322 (citing Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2024 (2015)).

<sup>209</sup> See *id.*

<sup>210</sup> See Jeffrey A. Wertkin, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO. L.J. 1055, 1074–75 (2002).



relative to Congress and the enormous number of issues that Congress has on its plate, some argue that delegation is the only way that the federal government can make the thousands of policy decisions that are needed to keep the nation running.<sup>211</sup> These scholars insist that administrative crimes—and agency delegation in general—are not only necessary and permissible but also desirable for effective governance. This suggests that courts should continue to refrain from invalidating statutes on nondelegation grounds, even in the realm of criminal law.

2. Supreme Court case law on the constitutionality of administrative crimes.

But setting aside academic debates, the practical reality is that delegation to agencies is an extremely common method by which federal criminal laws are put forth. And although it is “difficult to assess how numerous these administrative crimes are,” some scholars have estimated that there are roughly three hundred thousand such crimes currently on the books.<sup>212</sup> Moreover, administrative crimes have been consistently sanctioned by the Supreme Court. *Grimaud* was perhaps the first instance of the Court deciding that administrative crimes are permissible. As previously mentioned, the defendant in *Grimaud* was convicted for violating a regulation that the Secretary of Agriculture had promulgated under regulatory authority that Congress had delegated in the Forest Reserve Act.<sup>213</sup> The Act also made violating the Secretary’s regulations criminally punishable.<sup>214</sup> The Court concluded that this type of congressional delegation to agencies was entirely permissible because “it was impracticable for Congress to provide general regulations” that account for and consider the various minor details of what conduct harms forests.<sup>215</sup> Thus, “in authorizing the Secretary of Agriculture to” create rules that account for these minor details, “Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power,” thereby avoiding constitutional concerns.<sup>216</sup> The Court also stated that from “the beginning of the

---

<sup>211</sup> See Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 404 (1987).

<sup>212</sup> Fissell, *supra* note 186, at 862.

<sup>213</sup> See *Grimaud*, 220 U.S. at 507–09.

<sup>214</sup> See *id.*

<sup>215</sup> *Id.* at 516.

<sup>216</sup> *Id.*

government” it has been acceptable for Congress to give agencies or executive officers the “power to fill up the details’ [of statutes] by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress.”<sup>217</sup> So the Court in *Grimaud* clearly found no fault with the types of agency rules that nowadays would be considered administrative crimes.

The holding in *Grimaud* has remained relatively undisturbed over the past century, with the Court continually reaffirming the validity of administrative crimes. For example, in *Loving v. United States*,<sup>218</sup> the defendant, an Army private, was found guilty of murder under the Uniform Code of Military Justice.<sup>219</sup> While sentencing the defendant, the court-martial considered aggravating factors that had been promulgated by the President pursuant to congressional delegation of authority and applied three such factors to the defendant’s conduct.<sup>220</sup> The Supreme Court rejected the defendant’s argument that the President’s promulgation of these factors violated the Constitution, holding that there “is no absolute rule [ ] against Congress’ delegation of authority to define criminal punishments.”<sup>221</sup> The Court then specified that it had “upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations ‘confine themselves within the field covered by the statute.’”<sup>222</sup> In this way, while the Court reaffirmed its position that agencies are generally allowed to define what constitutes criminal conduct, it also provided specific guidelines that Congress and agencies must follow to ensure that an administrative crime is promulgated constitutionally.

Despite the Supreme Court’s consistency in dealing with the separation of powers, the Court has also indicated that it is preparing to revive and invigorate the nondelegation doctrine in the near future, which could have significant impacts on how administrative crimes are treated going forward. In *Gundy v. United States*<sup>223</sup> the Court rejected a nondelegation challenge to the Sex

---

<sup>217</sup> *Id.* at 517.

<sup>218</sup> 517 U.S. 748 (1996).

<sup>219</sup> *See id.* at 751.

<sup>220</sup> *See id.* at 751–52.

<sup>221</sup> *Id.* at 768.

<sup>222</sup> *Id.* (quoting *Grimaud*, 220 U.S. at 518).

<sup>223</sup> 139 S. Ct. 2116 (2019).

Offender Registration and Notification Act<sup>224</sup> (SORNA), holding that the Act—which allowed the Attorney General to promulgate certain regulations for the initial registration of sex offenders—did not provide the Attorney General with an unconstitutional grant of legislative power.<sup>225</sup> In particular, the Court arguably employed a saving construction in *Gundy*—interpreting SORNA in a way that narrowed the statute’s grant of power to the Attorney General—to avoid striking the statute down on nondelegation grounds.<sup>226</sup> This approach and outcome were in line with the Court’s longstanding lenient approach to the nondelegation doctrine.

However, the dissenting opinion, authored by Justice Neil Gorsuch and joined by Chief Justice John Roberts and Justice Clarence Thomas, indicated that the Court will likely revisit and significantly strengthen the nondelegation doctrine soon.<sup>227</sup> The dissent offered “a full-throated defense of a reinvigorated nondelegation doctrine”<sup>228</sup> and proposed a test, consisting of three guiding principles, for determining when the doctrine should be used to invalidate a statute.<sup>229</sup> First, the dissent noted that “as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”<sup>230</sup> Second, “once Congress prescribes the rule governing private conduct,”<sup>231</sup> it can authorize “the executive branch to find the existence of certain facts before”<sup>232</sup> that rule is applied. And finally, the dissent’s test would allow Congress to authorize another branch to exercise power that is not legislative but rather relates only to the way that branch exercises its own power.<sup>233</sup> This would allow, for example, the executive branch to create internal, procedural rules that do not have substantive impacts on private parties.<sup>234</sup>

---

<sup>224</sup> Pub. L. No. 109-248, 120 Stat. 590 (2006) (codified in scattered sections of 34 U.S.C.).

<sup>225</sup> See *Gundy*, 139 S. Ct. at 2121.

<sup>226</sup> See *id.* at 2126–29.

<sup>227</sup> See *id.* at 2131 (Gorsuch, J., dissenting).

<sup>228</sup> Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 N.Y.U. J.L. & LIBERTY 280, 296 (2020).

<sup>229</sup> See *id.* at 296–97.

<sup>230</sup> *Gundy*, 139 S. Ct. at 2136.

<sup>231</sup> *Id.*

<sup>232</sup> Postell, *supra* note 228, at 297.

<sup>233</sup> See *Gundy*, 139 S. Ct. at 2137.

<sup>234</sup> See *id.*

Even though only three Justices signed onto this dissenting opinion, at least five sitting Justices have indicated a willingness to take a similar position in a future nondelegation case. Justice Samuel Alito stated in his concurring opinion in *Gundy* that if a majority of the Court “were willing to reconsider the approach” that the Court has taken regarding the nondelegation doctrine, he “would support that effort.”<sup>235</sup> And Justice Brett Kavanaugh, who did not participate in *Gundy*, has suggested in his previous D.C. Circuit opinions that he would also be willing to reconsider and strengthen the nondelegation doctrine.<sup>236</sup> Thus, it appears that the question is not whether the nondelegation doctrine will be reinvigorated but when the right case will arise for a majority of the Court to effectuate this reinvigoration.

If the nondelegation doctrine were to take the form seen in the *Gundy* dissent, Congress would be significantly limited in its ability to delegate to agencies, and administrative crimes would become far more suspect. The first principle in the *Gundy* dissent’s test goes further than the requirements found in cases like *Loving* because it requires Congress to make all of the “policy decisions” by explicitly declaring which conduct constitutes a crime and defining the contours and punishment for that crime. In the administrative-crime context, this would presumably mean that agencies could be tasked only with ironing out minor administrative details, such as how to conduct enforcement or what circumstance-specific conditions might merit consideration when determining whether an individual has committed the crime that Congress defined. Therefore, under the likely future form of the nondelegation doctrine, Congress would have to create criminal laws with more specificity, and agencies would have less power and autonomy in promulgating criminal law than under the Court’s current approach.

B. Applying Separation of Powers Case Law and Doctrine to § 545 Reveals that the Ninth Circuit’s Approach Is Correct

Cases like *Grimaud* and *Loving* illustrate that administrative crimes generally do not raise serious constitutional concerns. However, § 545 differs from the statutes that were at play in those cases and others that commonly authorize agencies to create administrative crimes. Specifically, unlike the statutes that

---

<sup>235</sup> *Id.* at 2131.

<sup>236</sup> See Postell, *supra* note 228, at 298–300.

authorize the creation of a traditional or typical administrative crime, § 545 does not itself grant any authority to agencies to promulgate regulations. For instance, in the aforementioned SEC record-retention regulation example, Congress had passed a statute that authorized the SEC to promulgate regulations, carrying the force of criminal punishment, in accordance with the guiding principle and core policy choices that Congress laid out in the statute. In contrast, § 545 does not authorize any agency to promulgate regulations of any sort; rather the statute merely provides for a criminal punishment for anyone who engages in importation activities “contrary to law.” Thus, if “contrary to law” were understood to include regulatory violations, then a regulatory violation could be criminalized by § 545 without § 545 itself authorizing the creation of that regulation, unlike with the SEC authorization statute or the statute in *Grimaud*. This statutory structure poses significantly different nondelegation doctrine concerns than the standard administrative crimes that the Court has deemed permissible through the years.

In *Grimaud*, the Court allowed congressional delegation in large part because it had long been permissible for Congress to give executive officers or agencies the “power to fill up the details’ [of statutes] by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress.”<sup>237</sup> The fundamental logic underlying this statement appears to be that if an agency is filling in only the details of a statute, then Congress has already decided what general types of conduct should be criminalized. Indeed, the statute at issue in *Grimaud* gave the Secretary of Agriculture the power to “make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations” and to “make such rules and regulations . . . as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction.”<sup>238</sup> This provided constraining guidelines for the executive officer to follow in creating rules, and it applied the statute’s criminal penalties only to violations of this constrained and discrete set of rules.

When applied to § 545, the *Grimaud* logic crumbles if “contrary to law” is interpreted broadly. Under an approach like the

---

<sup>237</sup> *Grimaud*, 220 U.S. at 517.

<sup>238</sup> *Id.* at 509 (citing Rev. Stat. 5388, 3649).

Fourth Circuit's in *Mitchell*, the violation of a regulation that was promulgated through a purely civil statute that itself provides no criminal penalty could be criminalized through § 545. This outcome would run afoul of *Grimaud* because the careful constraints on agency action that typically accompany the criminalization of regulatory violations in statutes like the Forest Reserve Act are entirely absent in § 545. In perhaps the worst-case scenario, an agency could even create seemingly benign regulations under authority granted by a purely civil statute with the specific intent of using these regulations as predicate offenses for § 545. By allowing such possibilities, a broad approach to "contrary to law," like in *Mitchell*, would allow agencies to opportunistically use existing statutory grants of rulemaking authority to effectively override Congress's intent in those statutes and to define criminal law without meaningful congressional constraints.

Additionally, a broad interpretation of "contrary to law" would fail the test put forth in *Loving*. Once again, *Loving* held that agencies are allowed to define what conduct is criminal through regulations if (1) "Congress makes the violation of regulations a criminal offense," (2) Congress "fixes the punishment," and (3) the regulations "confine themselves within the field covered by the statute."<sup>239</sup> If all regulations with the "force and effect of law" were "law" under § 545, the statute would arguably fail the *Loving* test. In the case of purely civil regulations—regulations that do not specify criminal punishments or that stem from authorizing statutes that do not contemplate criminal sanctions—Congress did not make the violation of those particular regulations a criminal offense and did not specifically "fix" a criminal punishment for violating the regulations. Finally, and perhaps most importantly, it is unclear what constitutes the "field" of § 545. Unlike other statutes authorizing administrative crimes, § 545 does not authorize the creation of any regulations at all, so it does not provide an intelligible principle or any discernible boundaries that define the statute's field. Therefore, expansive understandings of "law" in § 545 would violate the Supreme Court's separation of powers doctrine by failing to meet the *Loving* conditions for allowing agencies to define criminal conduct.

Although existing Supreme Court precedents, such as *Grimaud* and *Loving*, already require "contrary to law" in § 545

---

<sup>239</sup> *Loving*, 517 U.S. at 768 (quoting *Grimaud*, 220 U.S. at 518).

to be understood narrowly, this conclusion would become even stronger if the Court were to adopt the strict nondelegation doctrine outlined in Justice Gorsuch’s *Gundy* dissent. The three-prong test presented there would likely make it unconstitutional for Congress to allow agencies to define crimes in any way because this would be an administrative “policy choice” rather than just “filling in details.” A broad reading of § 545 would allow agencies to turn civil regulatory violations into criminal offenses. Under the first prong of the *Gundy* dissent’s test, this would qualify as a policy decision that must be made by Congress and not an agency. Thus, while a broad interpretation of “contrary to law” would already violate the nondelegation doctrine as it is currently understood, such an understanding would even more obviously violate the stronger version of the doctrine foreshadowed by the dissent in *Gundy*. Because the logic of the *Gundy* dissent—or at least some version of this logic—seems destined to become the law of the land in the near future, this is an especially important consideration for interpreting § 545.

In addition to running afoul of both the Supreme Court’s current and its likely future separation of powers doctrines, a broad interpretation of “contrary to law” would squarely implicate many of the aforementioned concerns that scholars have raised in critiquing administrative crimes. By allowing agencies to use civil rulemaking authority to create criminal offenses without Congress’s direct approval, such an interpretation of § 545 would stray far from the constitutional scheme that Professor Barkow described, in which “Congress must criminalize the conduct.”<sup>240</sup> Moreover, giving agencies this ability allows them to almost entirely write *and* enforce certain criminal law provisions, concentrating power and removing the structural barrier to punishing individuals that Professors Hessick and Hessick identified as important to preventing overcriminalization. And given that agencies are necessarily more insulated from direct democratic checks than Congress, allowing them to effectively create criminal offenses without meaningful congressional constraints poses a serious potential threat of government abuse and excessive individual liberty deprivation, aligning with Professor Fissell’s concerns. These threats are particularly acute because, as Professor Barkow reasoned, criminal defendants and convicted individuals have little political sway or lobbying abilities. Therefore, even if

---

<sup>240</sup> Barkow, *supra* note 191, at 1017.

these scholars' concerns are less serious or have been dismissed by courts in the traditional administrative crime context, they are highly relevant in the § 545 context and warn against adopting an expansive understanding of "contrary to law."

But the Ninth Circuit's narrower interpretation of § 545 in *Alghazouli* is in line with the Court's nondelegation doctrine precedent and assuages scholars' separation of powers concerns. By adopting the Ninth Circuit's interpretation, under which only regulatory violations that Congress has specifically criminalized through statutes can serve as § 545 predicate offenses, courts would be allowing greater criminal sanctions to be applied only to the types of administrative crimes that the Supreme Court has repeatedly deemed permissible in cases like *Grimaud* and *Loving*. And given that under the Ninth Circuit's approach, Congress makes all of the relevant policy decisions in creating criminal law and agencies are left to merely fill in details, this interpretation satisfies even the stronger form of the nondelegation doctrine that is seen in the *Gundy* dissent and that the Court seems likely to adopt soon. Thus, the Ninth Circuit's interpretation of "contrary to law" not only comports with courts' understandings of § 545's predecessor statutes and with the way "contrary to law" is understood in other statutory contexts but also aligns with the Supreme Court's current, and potentially future, separation of powers doctrine.

Moreover, the Ninth Circuit's approach avoids many of the separation of powers concerns that scholars have identified. For example, by limiting the scope of § 545 to conduct that Congress has already criminalized, the *Alghazouli* approach avoids conflicting with the scheme for criminal lawmaking and enforcement that Professor Barkow asserted is proper. Because it keeps the decision to criminalize actions solely in the hands of the legislature, preserving democratic accountability, this approach also mitigates Professor Fissell's concerns regarding government abuse and excessive deprivation of individual liberty. And this narrow interpretation of "contrary to law" limits the concentration of power in one branch by preserving the structural barrier between the power to criminalize certain activities and the power to enforce criminal laws.

Finally, although following the Ninth Circuit's approach would limit the applicability of § 545, it would not render the statute useless to prosecutors. Many other importation-related statutes provide for only minor criminal penalties, whereas § 545's



maximum prison sentence is twenty years. Because even a narrow interpretation of § 545 would still allow this twenty-year maximum sentence to apply to statutory violations and regulatory violations specifically criminalized by other statutes, § 545 would remain valuable to prosecutors as a way to elevate punishments when appropriate. However, adopting the Ninth Circuit’s approach would entirely eliminate the concerning possibility of an individual facing up to twenty years in prison under § 545 despite committing only a minor regulatory violation that would otherwise be punishable with only a small civil penalty. No doubt prosecutors, exercising their discretion, would be highly unlikely to seek twenty-year prison sentences for such minor offenders. But cases like *United States v. Lawson*—in which the application of § 545 elevated the defendants’ punishments for violating a civil regulation from paying fines to spending months in prison and having felony convictions on their criminal records—show that the applicability of § 545 still has life-altering impacts. By limiting the statute’s scope to defendants who have committed statutory violations or regulatory violations that are explicitly criminalized by a separate statute, a narrow interpretation of § 545 ensures that the statute is employed judiciously—only when Congress clearly deemed it appropriate.

#### CONCLUSION

Title 18, U.S.C. § 545 has been a subject of dispute in recent years, with numerous courts weighing in on how the statute’s phrase “contrary to law” should be understood. While each of the courts in this circuit split presents compelling reasoning in support of its interpretation of the statute, the Ninth Circuit’s interpretation in *Alghazouli* is ultimately the most faithful to historical interpretations of “contrary to law,” the meaning of the phrase in other statutory contexts, and Supreme Court precedent on the proper role of the executive and legislative branches with respect to criminal law. Widespread adoption of the *Alghazouli* interpretation, which understands “contrary to law” as allowing only those statutory and regulatory violations that are specifically criminalized in statutes to serve as predicate offenses that trigger § 545’s severe criminal penalties, would have significant consequences going forward. In particular, because § 545 is often used by prosecutors to bring more severe penalties against defendants, many defendants who have committed only small, civil regulatory infractions would no longer face the possibility of receiving severe

criminal punishments through a § 545 conviction. For some defendants this difference between receiving a civil penalty and a felony-level criminal punishment can undoubtedly be life changing, so narrowing the applicability of § 545 and excluding the many regulatory offenses that fall outside of the statute's purview under the Ninth Circuit's approach in *Alghazouli* would have tangible and far-reaching impacts on many lives.