Yale Journal on Regulation

Notice & Comment

A blog from the Yale Journal on Regulation and ABA Section of Administrative Law & Regulatory Practice.

Four Administrative Law Cases This Term Signal Enhanced Opportunities to Challenge Federal Agency Actions

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During the past Term, the Supreme Court issued a series of landmark decisions upending longstanding interpretations of administrative law. These decisions have important implications not only in the context of those particular cases, but also in the larger framework of how judicial review of agency action is developing.

The Four Decisions

In one case, *SEC v. Jarkesy*, the Supreme Court, in a 6-3 decision, held that the SEC's use of administrative tribunals to adjudicate securities fraud claims seeking civil penalties violated the defendant's Seventh Amendment right to a jury trial. Writing for the Court, Chief Justice Roberts first established that the action implicates the Seventh Amendment because the relevant SEC antifraud provisions "replicate common law fraud". In doing so, the Court emphasized that the remedy at issue is the most important consideration when determining whether a claim, due to its common law nature, implicates the Seventh Amendment. According to the Court, the civil penalties sought in *Jarkesy* were "legal in nature", particularly as they were designed to punish or deter the defendant, rather than solely to "restore the status quo". Finally, in confirming the common law nature of the SEC's claim, the Court dismissed the Government's public rights argument, holding that Congress cannot subvert the Seventh Amendment by statutorily mandating that traditional legal claims be heard in administrative tribunals.

While *Jarkesy*'s holding specifically compels the SEC to litigate securities fraud claims seeking civil penalties in federal court, the Court's reasoning raises the question of whether other, or even all, SEC-initiated punitive enforcement actions must be adjudicated in an Article III court. Moreover, beyond SEC enforcement actions, *Jarkesy* will likely invite legal challenges to the use of administrative tribunals for enforcement actions that either assert similar, parallel common law claims or seek punitive penalties.

In a second opinion that was handed down shortly after *Jarkesy*, the Court issued its decision in *Loper Bright Enterprises v. Raimondo*, overturning the *Chevron* doctrine and holding that judges must exercise independent judgment when interpreting statutes. Writing for the Court in a 6-3 decision, Chief Justice Roberts first reasoned that *Chevron* deference was inconsistent with the federal judiciary's constitutional duty to say what the law is. The Court went on to hold that *Chevron* was irreconcilable with the Administrative Procedure Act ("APA"), which states that courts "shall decide all relevant questions of law". Finally, the Court addressed the foundational presumption of *Chevron*—i.e., that a statutory ambiguity carries an implied delegation of authority. In rejecting the presumption of an implied delegation, the Court noted that courts routinely confront statutory ambiguities without deferring to external parties and that, relatedly, the presumption is fundamentally misguided because agencies possess "no special competence in resolving statutory ambiguities".

The *Loper Bright* decision did not come as a surprise to legal commentators, as the Court has steadily limited the applicability of *Chevron*[1], and has not relied on the *Chevron* doctrine since 2016. Assuming that the lower degree of deference that exists for agency regulations pursuant to *Skidmore v. Swift & Co*., 323 U.S. 134 (1944) still applies, as *Loper Bright* seems to suggest, the regime that applied before *Chevron* was decided in 1984 would seem to be in effect. While the Court explicitly refused to call into question previous cases that upheld agency action under *Chevron*, *Loper Bright*'s mandate is likely to lead to increased challenges to regulatory actions.

In a third decision—another 6-3 ruling—the Supreme Court held in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* that the APA's statute of limitations for facial challenges does not accrue until the plaintiff is injured by final agency action. *Corner Post* concerned a challenge to Regulation II, which in 2011 established the maximum fee that payment networks can levy on merchants. Seven years later, Corner Post, a merchant that opened for business in 2018, challenged Regulation II, arguing that the maximum charge was too high. The lower courts dismissed the claim on the grounds that it was barred under the APA's statute of limitations, which requires that claims against the United States be brought "within six years after the right of action first accrues". Justice Barrett, writing for the Court, reversed the dismissal, reasoning that "[a]n APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured".

Corner Post may open new avenues for litigants and increase the likelihood of success for legal challenges to regulatory actions. The Court's permissive reading of the statute of limitations could invite trade associations or other interested parties to recruit new market entrants, or perhaps existing ones claiming long-delayed harmful impacts, to challenge existing regulatory regimes, irrespective of the outcome of previous legal challenges (or the absence of any such challenges). How such litigants will ultimately fare may be uncertain, but it is clear that *Corner Post* expands the time horizon and increases the legal jeopardy faced by regulators across various industries.

These three decisions—*Corner Post*, *Loper Bright* and *Jarkesy*—came on the heels of an earlier decision from the Term, *Axon Enterprise, Inc. v. FTC*, in which the Court held that respondents in federal administrative proceedings can assert constitutional challenges to such administrative processes in federal court prior to exhausting all avenues within the administrative tribunal. Axon, the subject of an FTC enforcement action adjudicated within an administrative tribunal, filed a separate constitutional challenge to the tenure protections of the FTC's Administrative Law Judges. The FTC Act instructs parties objecting to administrative proceedings to first make their claims within the Commission itself and then appeal, if needed, to a federal court of appeals; however, *Axon* circumvented this statutory review scheme and asserted its constitutional claim directly in federal district court. The Court, in a unanimous opinion by Justice Kagan, first confirmed that the FTC Act's statutory review scheme "does not necessarily extend to every claim concerning agency action". Next, the Court applied the three *Thunder Basin*[2] factors, which, as previously held by the Court, guide the inquiry into whether a litigant's claim is subject to a statutory review scheme. The *Thunder Basin* factors are considered in answering the fundamental question of whether a claim is "of the type Congress intended to be reviewed within [the] statutory structure". The Court in *Thunder Basin* had implied that all three factors must be satisfied in order to trigger the presumption that Congress did not intend to limit the district court's jurisdiction. The Court in *Axon* determined that all three *Thunder Basin* factors were satisfied as the claim was wholly collateral to the FTC Act's review provisions, sat beyond the FTC's expertise and was such that judicial review after the Commission ruled would be insufficient because the proceeding itself, rather than the adverse agency action, constituted the harm.

The immediate implication of *Axon* is that administrative tribunal litigants may increasingly assert constitutional challenges in federal court prior to exhausting all administrative options before the agency itself.

Observations

Taken together, these four recent Supreme Court decisions signal new opportunities for regulated parties to assert rights under the Constitution, the APA and organic agency statutes against perceived overreaches by federal agencies. That is certainly true in contexts similar to the particular cases, but also in a wider context as well.

As with some other decisions in recent years, the Supreme Court has indicated its willingness to engage in robust scrutiny of the validity of federal regulatory actions—perhaps the most careful scrutiny since the 1930s, when agency actions during the New Deal eventually led to legislative proposals and requirements that eventually became the Administrative Procedure Act of 1946.[3]

At the same time, the Supreme Court has also demonstrated in recent years, and again this Term, that litigants with less persuasive positions will lose, as illustrated by the Court's decision in *CFPB v. Community Financial Services Ass'n*, where the Court rejected an Appropriations Clause challenge to the funding mechanism and actions of the CFPB. So regulated parties aggrieved by agency action need analysis and arguments strongly grounded in the Constitution, statutory text and precedents of the Court.

The existing pipeline of challenges to federal agency actions is extensive, in part because of the sizable flow of regulatory pronouncements in recent years by multi-member agencies such as the SEC, FTC and FCC, and by Executive Departments such as EPA, DOL, Treasury and HHS. Going forward, it would be unsurprising to see litigants challenge questionable interpretations of the APA from long ago. Equally so, regulated parties may invoke constitutional concerns, as suggested by the Court's admonition in the 1970s against imposing more process than the APA requires, "[a]bsent constitutional constraints or extremely compelling circumstances". *Vt. Yankee Nuclear Power Corp. v. NRDC*.

The four administrative law decisions from this Term demonstrate a strengthened judicial focus on the limits imposed upon federal agencies by the Constitution, the APA and other federal statutes.

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1 *See, e.g.*, *United States v. Mead Corp.* (limiting *Chevron* deference to instances where agencies can generally make rules carrying the force of law); *West Virginia v. EPA* (applying the "Major Questions Doctrine" such that agency interpretations that carry great economic and political significance are not subject to *Chevron* deference).

2 *Thunder Basin Coal Co. v. Reich* (articulating the following three considerations in determining whether a claim is subject to the statutory review scheme at issue: 1) could precluding district court jurisdiction foreclose all meaningful judicial review; 2) is the claim wholly collateral to the statute's review provisions; and 3) is the claim outside the agency's expertise?).

3 *E.g.*, George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 Nw. U. L. Rev.1557 (1996); James E. Brazier, *An AntiNew Dealer Legacy: The Administrative Procedure Act*, 8 J. Pol'y History 206 (1996).