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What the 2023 Supreme Court Term Means for Federal Regulators—*Loper Bright*, *Corner Post*, *Jarkesy*, and Other Leading Cases

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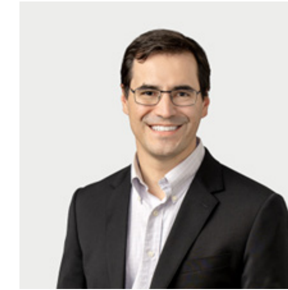

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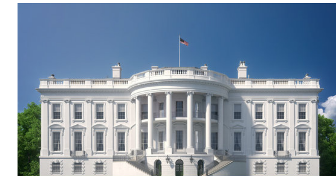
Introduction

- In recent years and especially this year, the Supreme Court has decided **significant administrative law cases** that transformed this area of law

- General trend toward the **narrowing of agency authority**

Agencies v. Judiciary

Agencies v. Legislature



Agencies v. President

- This Term's cases have **several important implications for litigants** considering challenges to rules or other agency action

- Developments should be understood against backdrop of **other recent cases**

Loper Bright Enterprises v. Raimondo

Decided June 28, 2024

The Prior Regime: *Chevron* Deference

- *Chevron v. Natural Resources Defense Council* (1984)
- Required courts to **defer to reasonable agency interpretations of federal statutes** when the statutes were silent or ambiguous as to the specific issue being litigated
- Over time, it evolved into a **complicated framework with multiple steps**

The Writing on the Wall

- When decided, *Chevron* was **not considered particularly significant** by Justice Stevens (author of the opinion), judges, commentators, and litigants

- As *Chevron*'s role in statutory interpretation grew, **criticism mounted and the Court seemed to start cutting back**
  - New doctrines limited when *Chevron* deference was required
  - Supreme Court has not applied *Chevron* since 2016
  - Federal judges varied widely in how likely they were to conclude that a statute was ambiguous and therefore subject to *Chevron* deference

- Agencies and DOJ have **lessened their reliance on *Chevron***, anticipating its narrowing or overruling

Question Presented in *Loper Bright*

- National Marine Fisheries Service required fishing vessels to carry and pay government monitors on board who supervised the fishing operations
- Fishing business challenged the rule
- The Court granted certiorari on whether to overrule *Chevron*

Holding of *Loper Bright*

- 6-3 decision with majority by Chief Justice Roberts; dissent by Justice Kagan
- "**The deference that *Chevron* requires** of courts reviewing agency action **cannot be squared with the APA**."
- The Court based its holding in large part on **Section 706 of the Administrative Procedure Act**, the statute that defines agency rulemaking procedures and judicial review
  - "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. § 706.

Limitations on the Holding

- In exercising their "independent judgment," "courts may … **seek aid from the interpretations of those responsible** for implementing particular statutes."

- "Interpretations issued **contemporaneously** with the statute at issue, **and which have remained consistent over time**, may be especially useful."

- "In a case involving an agency, of course, the statute's meaning may well be that **the agency is authorized to exercise a degree of discretion**." For example:
  - Congress enacts a statute that expressly delegates discretion;
  - Congress empowers an agency to prescribe rules to fill up the details of a statutory scheme; or
  - Congress uses "a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable'"

Loper Bright's Retroactive Applicability

- The Court attempted to **limit impact on previously decided cases** involving statutory interpretation.

- "We **do not call into question** prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful…are still **subject to statutory *stare decisis*** despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a special justification for overruling such a holding."

Implications of *Loper Bright*

- Contrary to press commentary, agencies are **still able to regulate**.

- Agencies will **receive less deference** on questions of statutory interpretation and **no longer be able to overturn judicial interpretations** of ambiguous statutes (*Brand X*).

- Reflects a **broader suspicion toward the administrative state**
  - This "mood" may be a factor for some judges going forward, even in cases where *Chevron* was not directly implicated.

- **Effects may be lessened by:**
  - Courts' hesitation to question agencies on highly technical questions;
  - Agencies' recent reduced reliance on *Chevron*;
  - *Loper Bright*'s language about limited retroactive applicability to statutory questions that have already been litigated; and
  - Agencies will still be able to seek deference to interpretations of their own regulations under the so-called *Kisor* deference.

Interaction with Major Questions Doctrine

- Major questions doctrine requires Congress to **expressly authorize agency actions with major economic or political impact**

- While doctrine has roots in older cases, the Court has **elaborated it in recent cases** including:
  - COVID-era restrictions
  - EPA regulations
  - Biden Administration student loan forgiveness programs

- Together with *Loper Bright*, it means that many significant agency regulations will **be vulnerable to legal challenges**

- Congress remains **structurally inefficient and closely divided**, making detailed legislation challenging

Corner Post Inc. v. Board of Governors

Decided July 1, 2024

Question Presented in *Corner Post*

- 28 U.S.C. 2401(a) requires a complaint to be filed “within six years after the right of action first accrues.”
- Federal Reserve adopted regulation in 2011; business opened in 2018; business sued in 2021.
- Is the suit timely?

Holding of *Corner Post*

- 6-3 decision with majority by Justice Barrett, dissent by Justice Jackson
- "A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is **when the plaintiff is injured by final agency action**."
- "Because Corner Post filed suit **within six years of its injury**, § 2401(a) did not bar its challenge."

Implications of *Corner Post*

- **New plaintiffs or trade associations** can challenge older rules
- Older rules that were never challenged could be **vulnerable to APA claims**
- Older rules that *were* challenged but upheld under *Chevron* **may be vulnerable to APA claims**, depending on how courts apply *Loper Bright*
- Older rules may face **new challenges under the major questions doctrine**
- Government may try to argue that holding applies only to **"substantive" claims, not "procedural" claims**

Ohio v. EPA

Decided June 27, 2024

Question Presented in *Ohio v. EPA*

- A group of States challenged the EPA's Clean Air Act federal implementation plan for reduction of air pollutants as arbitrary and capricious
- Plan was preliminary enjoined by certain courts, such that it could be applied to only 11 of 23 originally covered states
- Remaining States sought emergency relief, which was denied by the D.C. Circuit

Holding of *Ohio v. EPA*

- 5-4 decision with majority by Justice Gorsuch, dissent by Justice Barrett
- States **entitled to a stay** of plan pending appeal
- Likelihood of success was **most important factor**
  - States likely to succeed on arbitrary and capricious challenge
  - EPA failed to reasonably explain how its emissions goals would be achieved even though the plan would apply to only 11 of 23 states
  - Severability provision in regulation indicated mere *consideration* and not adequate *explanation*
- Court **rejected "hair-splitting" preservation argument** that States had not raised arguments during comment period with "reasonable specificity"

Implications of *Ohio v. EPA*

- **Arbitrary and capricious review** will continue to play a major role in judicial review of agency actions
  - Contrast with *FCC v. Prometheus Radio* (2019), which could have been read as moving towards a more deferential test

- Dispute over preservation highlights the **importance of building a strong comment record** at the agency

SEC v. Jarkesy

Decided June 27, 2024

Question Presented in *SEC v. Jarkesy*

- Whether statutory provisions that empower the SEC to seek civil penalties in administrative enforcement proceedings violate the Seventh Amendment

Holding of *Jarkesy*

- 6-3 decision with majority by Chief Justice Roberts, dissent by Justice Kagan

- "When the SEC seeks civil penalties against [a defendant] for securities fraud," the "**Seventh Amendment entitles him to a jury**"

- There is a **right to jury trial** because:
  - SEC seeks "legal" remedies because the civil penalties "are designed to punish and deter, not to compensate"
  - SEC's antifraud authority resembles common law fraud
  - "Public rights" exception does not apply because "the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court"

Limitations of *Jarkesy*

- **Two requirements:** (1) cause of action is analogous to a common law cause of action, and (2) remedy sought is legal in nature

- This might not sweep in agencies which pursue more **novel statutory causes of action**

- It also may not apply to agencies that pursue common law causes of action, but that **do not seek monetary penalties**

Implications of *Jarkesy*

- Unlike *Loper Bright*, *Corner Post*, and *Ohio v. EPA*, *Jarkesy* imposes a **substantive limit on agency power that cannot be overcome** through merits arguments or more robust reasoning during rulemaking
  - Coupled with *Axon Enterprise v. FTC* (2022), continues a trend of shifting litigation into Article III tribunals
- Future litigants will likely **challenge administrative enforcement of other federal statutes** by other agencies
- Agencies will have to be **more strategic** in their enforcement decision-making
- Defendants can still **consent to an administrative forum**

Other Recent Developments

Separation Of Powers Cases

- Court has held **unconstitutional restrictions on the President's authority** to remove certain agency officials
  - *Free Enterprise Fund v. PCAOB* (2009): Dual for-cause removal for PCAOB members
  - *Seila Law LLC v. CFPB* (2020): CFPB headed by a single director with for-cause removal protection
  - *Collins v. Yellen* (2021): FHFA headed by a single director with for-cause removal protections

- Following *Collins*, President Biden **removed the Commissioner of Social Security without cause** (pursuant to OLC opinion)

- But the Court recognizes **limits on separation of powers challenges**
  - *CFPB v. Community Financial Services* (7-2): Court upheld CFPB's self-funding mechanism against Article I challenge

Standing Cases

- While many recent decisions are favorable for regulated parties, others **enforced strict limits on the requirements for suit**
  - *FDA v. Alliance for Hippocratic Medicine* (9-0): Court rejects a challenge to FDA's rules on mifepristone for lack of standing; Justice Thomas writes on scope of injunctive relief for trade associations
  - *United States v. Texas* (8-1): Court rejects challenge to DHS immigration guidelines for lack of standing; concurrence by Justices Gorsuch, Thomas, and Barrett on availability of vacatur
  - *Murthy v. Missouri* (6-3): Court rejects challenge to alleged Executive Branch coordination with social media platforms for lack of standing
  - *Brackeen v. Haaland* (8-1): Court rejects challenge to Indian Child Welfare Act for lack of standing

Summary and Open Questions

Summary of Implications

- Court has **revamped administrative law**, narrowing the authority and deference that courts allow agencies
- Court has simultaneously **increased presidential control and oversight** over agencies
- Trends are exacerbated by agencies increasingly engaging in important policy questions; as a result, **many agency actions are now challenged in court**, often immediately
- **Potential litigants should consider:**
  - (1) constitutional arguments, including agency structure
  - (2) statutory arguments challenging scope of delegated power
  - (3) challenges to rulemaking process, including arbitrary-and-capricious challenges
- Challengers should **carefully follow procedural requirements** for suit, including issue preservation during agency proceedings

Open Questions

- Whether **ALJs or multi-member independent agencies** can be subject to for-cause removal
- Scope of **non-delegation and major questions doctrines**
- Availability of **nationwide injunctions and vacatur** of agency rules
- **Venue and plaintiffs' choice of forum**

Administrative Law Cases in 2024 Term

- *Garland v. VanDerStok*: Whether a regulation issued by Bureau of Alcohol, Tobacco, Firearms and Explosives is consistent with Gun Control Act of 1968
- *San Francisco v. EPA*: Requirements for permits issued by EPA under the Clean Water Act
- *Seven County Infrastructure Coalition v. Eagle County*: Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action
- *FDA v. Wages and White Lion Investments*: Whether FDA's denial of applications for authorization to market e-cigarettes was arbitrary and capricious

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Prior to re-joining the firm, Stuart served as White House Counsel for President Biden from 2022-2023. As Counsel to the President, he advised the President on the full range of constitutional, statutory, and regulatory legal issues, including on questions of presidential authority, domestic policy, and national security and foreign affairs. He managed responses to high-profile congressional and other investigations, and he assisted the President in nominating and confirming federal judges. Stuart also served as Deputy Counsel to the President from 2021-2022. Throughout his time in the White House, he was deeply embedded in the administrative law and regulatory process, working closely with Cabinet secretaries, agency general counsel, and the Department of Justice on policy development and defending litigation challenging Administration actions.

Stuart also was previously the Acting Associate Attorney General of the United States, the third-ranking position at the U.S. Department of Justice. In that position from 2014-2016, Stuart oversaw the civil and criminal work of five of DOJ's litigating divisions -- Antitrust, Civil, Civil Rights, Environment and Natural Resources, and Tax -- as well as components supporting state and local law enforcement, among others. As a member of DOJ's senior management team, he assisted the Attorney General and Deputy Attorney General in formulating and implementing DOJ policies. Stuart also served as the Senate-confirmed Assistant Attorney General of the Civil Division, DOJ's largest litigating division, where among other things he supervised the government's enforcement efforts under the False Claims Act and litigation defending Congressional statutes, Administration policies, and federal agency actions. In recognition of his service, Stuart received the Edmund J. Randolph award, considered the Department of Justice's highest award.

Stuart's full biography can be viewed here.

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