

AUGUST 9, 2024 | REGULATORY & GOVERNMENT OVERSIGHT

Destabilized But Not Yet Deconstructed: Analysis of This Momentous SCOTUS Term for the Administrative State

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The 2023-2024 Term of the United States Supreme Court will undoubtedly have far-reaching implications in a number of areas, but perhaps most significantly—at least for regular readers of the Employer Defense Report blog—with respect to the ability of federal agencies to promulgate and enforce regulations. In a trio of recent decisions addressing federally mandated monitors in fishing vessels (*Loper Bright v. Raimondo*), civil fines imposed by the Securities and Exchange Commission (*SEC v. Jarkesy*) and payment network processing fees incurred by a truck stop (*Corner Post, Inc. v. Board of Governors of the Federal Reserve System*), the High Court sent shockwaves that will likely reverberate through all federal agencies and the regulated community alike for years to come.

The familiar framework in which these agencies have long operated, dating back to the mid-1980s when *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* was decided, appears to have been upended, or at least is now resting on shaky ground. And while these three decisions do not, by themselves, dismantle the administrative state, they have the potential to significantly reorder the familiar foundations upon which the Department of Labor (“DOL”) and dozens of other administrative agencies have operated.

Perhaps most importantly, these decisions appear to open the door wide for future challenges to vast swaths of the Code of Federal Regulations that currently govern how businesses and other regulated entities operate today and the venue where regulatory disputes are resolved. This article examines the implications of these cases and offers some educated speculation about the sea change that may occur at DOL and elsewhere over the next few years.

***Loper Bright Enterprises v. Raimondo* (June 28, 2024)**

[Loper Bright Enterprises v. Raimondo](#) overrules the long-standing doctrine of *Chevron* deference established in the 1984 Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* The Court's decision in *Chevron* commenced a 40-year run of federal courts having to defer to an executive agency's interpretation of ambiguous terms in its statute, so long as the agency's interpretation was merely reasonable; not necessarily the best interpretation. That legal construct resulted in an agency-biased playing field in

individual enforcement actions, but more importantly, exponential growth of regulations grounded in vague statutory language interpreted by agencies to provide themselves broad authority to establish detailed restrictions and obligations in virtually all aspects of business operations. The *Chevron* decision mandated that federal courts must defer to these agency's determinations regarding their authority to regulate as long as those interpretation were "reasonable." The *Chevron* case has been cited more than 18,000 times, making it the most frequently cited case in administrative law ever.

Some believe *Loper Bright* simply lifts the figurative agency thumb off the scale and resets the balance between the executive and judicial branches. Courts, not agencies, *Loper* holds, must interpret the laws enacted by Congress. Agencies, according to SCOTUS, have no particular expertise in this area of statutory interpretation – to the contrary, statutory interpretation falls within the unique province of the judicial branch.

Accordingly, agency standards issued from this point forward will be scrutinized more carefully. In the employment law space, courts have applied *Chevron* deference to a variety of matters, ranging from the EEOC's interpretation of whether labor unions are covered by the ADA to whether California meal and rest break rules are preempted by federal law under the Motor Carrier Safety Act of 1984. We can expect to see all kinds of challenges in the near future, from the FTC's ban on non-compete agreements to DOL's independent contractor rule.

Likewise, the regulated community will get a fairer shake in agency enforcement. No deference will be afforded by federal court judges; litigants' perspectives – both the challenging petitioners and the defending agencies – will be weighed equally, and the "best" interpretation of the statute, as determined by the reviewing court, will presumably win the day.

As Justice Roberts wrote in the Loper Bright opinion: "In the business of statutory interpretation, if it is not the best, it is not permissible."

Corner Post, Inc. v. Brd. of Governors of the Federal Reserve (July 1, 2024)

In a decision that may have a more profound impact in certain corners of the administrative state than *Loper Bright*, SCOTUS held in [Corner Post, Inc. v. Board of Governors of the Federal Reserve System](#), 603 U.S. ____ (July 1, 2024), that the six-year statute of limitations for suits against the United States under the Administrative Procedure Act (APA) does not begin to run until a party is injured by an agency's regulation, and runs anew each time a new part is injured by the regulations, rather than one time when the agency's action first becomes final. 

Generally, a plaintiff's claim that they suffered harm from a final agency action is subject to judicial review under Section 706(2) of the APA, which enables a reviewing court to set aside a final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This new ruling means that plaintiffs who have not been affected by a federal agency's regulation will still have a six-year window to bring an APA challenge once they are harmed by the regulation.

This case involved a truck stop merchant, Corner Post, that brought an action against the Federal Reserve Board, challenging a regulation adopted by the Board pursuant to the Wall Street Reform and Consumer Protection Act.

Corner Post alleged that the regulation, which set a maximum interchange fee that merchants must pay to the bank that issued the debit card used by the customer, enabled the payment networks that processed the transactions to charge higher fees than the Act permitted. Having opened for business more than six years *after* the Federal Reserve promulgated the regulation at issue, Corner Post could not have brought its challenge if the limitations period ran from the date the regulation went into effect.

Writing for the majority, Justice Barrett announced:

“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.”

Justice Barrett explained that the statute of limitations will begin to run only after the plaintiff has a “complete and present” cause of action, finding that a plaintiff cannot bring a lawsuit to challenge agency action unless and until s/he suffers an injury.

The implications of *Corner Post* are significant. Now, recently formed entities, including businesses opened decades after a regulation went into effect, will in many cases have the same opportunity to challenge certain regulations as those entities that existed when the regulation first went into effect. Although this ruling has the potential to open the litigation floodgates as longstanding agency rules face a slew of new challenges, as noted in the dissent, it remains to be seen exactly how much of an impact this decision will have on the regulatory landscape.

One thing that the majority and dissent agreed on, however, is that “the ball is in Congress’ court.” If enough members of Congress eventually agree that greater finality is needed and/or that the volume of regulatory challenges is too great, they could pass legislation clarifying when the claims of entities impacted by federal regulations accrue and expire. Wasting no time, Democratic Representatives Jerrold Nadler and Lou Correa introduced the [Corner Post Reversal Act on July 11, 2024](#), seeking to amend the APA to require parties challenging agency actions to assert their claims within 6 years after the relevant agency action was finalized.

Readers of the Employer Defense Report blog are likely asking whether *Corner Post* means that DOL regulations already promulgated in years past can be challenged by companies formed today. While SCOTUS was silent on this point, the answer really depends on the statutory authority for the regulation. To understand why, note that the procedures for challenging agency actions under the APA are default rules that apply *unless another law supersedes them*. As SCOTUS explained in *Thunder Basin Coal Co. v. Secretary Reich*, 510 U.S. at 207, “[w]hether a statute is intended to preclude initial review is determined from the statute’s language, structure, and purpose, its legislative history and whether the claims can be afforded meaningful review.”

Ultimately, the answer to this question may come down to the specific statutory language. In statutes where the deadlines for challenging administrative action are clear, especially statutes of repose, *Corner Post* may have no impact. On the other hand, where the statutory language is ambiguous as to when a challenge must be initiated, *Corner Post* may be applicable. That said, we anticipate a spate of challenges to longstanding rules, meaning this interpretation will be tested in the months to come.

SEC v. Jarkesy (June 27, 2024)

Of this trio of cases, the one that has the greatest potential to disrupt DOL and other federal agencies is [SEC v. Jarkesy](#), in which SCOTUS held that when the Securities Exchange Commission (SEC) imposes civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial, meaning that the SEC must bring such enforcement actions in federal court rather than before an administrative law judge (ALJ). Under the antifraud provisions at issue, the SEC has historically had the option to pursue enforcement actions in federal court before a jury or through its own administrative proceedings before an ALJ. SCOTUS considered whether the adjudication of these disputes in an administrative proceeding violated the Seventh Amendment's guarantee that in "[s]uits at common law...the right of trial by jury shall be preserved."

In determining whether the antifraud provisions were "suits at common law," SCOTUS declared that common law actions "embrace all suits which are not in equity or admiralty." This includes statutory claims that are "legal in nature." Whether a claim is legal in nature, thus entitling the accused of a right to a jury trial in an Article III court, turns on:

1. whether the cause of action resembles a common law cause of action; and
2. whether the remedy is the sort that was traditionally obtained in a court of law.

Comparing the two factors, SCOTUS stated that the remedy was the more important component of this analysis.

Noting that SEC does not use civil penalties to compensate victims or restore the status quo, but rather to punish and deter, SCOTUS characterized the monetary relief as "the prototypical common law remedy." The Court thus found that "in this case, the remedy is all but dispositive" and "effectively decides that this suit implicates the Seventh Amendment right and that a defendant would be entitled to a jury on these claims." Nonetheless, SCOTUS went on to evaluate and determine that the SEC's antifraud provisions also replicate historical common law fraud claims, further supporting its conclusion that the matters belonged in an Article III court and not before an ALJ.

The implications of this ruling are already making their way to lower courts. In July, the Ninth Circuit asked lawyers for the NLRB and a national retail chain to brief the impact of the *Jarkesy* holding on the NLRB's ability to impose remedies in administrative proceedings. Should there be a split among the Courts of Appeal on whether *Jarkesy* applies to agencies other than the SEC, SCOTUS could be called upon to resolve that split. That would present the opportunity for SCOTUS to expand *Jarkesy* or limit its holding to SEC proceedings.

Importantly, SCOTUS declined to address the Fifth Circuit's holding that SEC Board Members and ALJs are unconstitutionally insulated from removal, leaving that holding to be good law in the Fifth Circuit.

We are already seeing the potential implications of SCOTUS not addressing this issue. On July 23, 2024, the District Court for the Western District of Texas granted a space exploration company's motion for preliminary injunction against the NLRB (National Labor Relations Board), enjoining the NLRB from proceeding administratively against the company. Relying on both the Fifth Circuit's *Jarkesy* holding, the company argued that NLRB Members and ALJs are improperly insulated from removal. In granting the preliminary injunction, the District Court ruled that the company is likely to succeed on the merits of the removal argument. On July 29, 2024, the District Court for the Southern District of Texas granted an energy company's motion for preliminary injunction against the NLRB on identical grounds. There, the company also argued a Seventh Amendment violation, but the court did not reach that issue in granting the preliminary injunction.

While every executive agency should be anxious about losing the deference they had been afforded the last forty years, losing a forum to adjudicate enforcement would be a much greater blow. We expect additional challenges of that nature soon.

Looking to the Not-So-Distant Future and Beyond

The combined effect of these three cases is that the regulated community can potentially challenge agency actions years after the agency acted, with no special deference afforded to the agency's interpretation that supported the agency action, and perhaps in a different venue than the often more agency-friendly administrative dispute forum. But these cases also could just reflect the tip of the spear, with a torrent of additional SCOTUS and other federal court opinion chipping away at the administrative state.

More to Come!

The recent SCOTUS term has fundamentally reshaped administrative law, with substantial policy implications for every agency, including DOL. Tune in over the coming months as we continue to discover how these cases impact DOL rulemaking, enforcement, and adjudication. Let us know if you have questions about the implications for any specific interactions your organization has with DOL in the meantime.