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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 OSHA 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 OSHA 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 OSHA 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 OSHA space, we will surely get a look at the implications of *Loper Bright* if/when OSHA finalizes its newly proposed Indoor and Outdoor Heat Illness Prevention standard. Like we saw in the challenge to OSHA's Vaccinate-or-Test emergency rule during the pandemic, industry challengers will no doubt push back on OSHA's authority under the vague delegation of rulemaking authority in the OSH Act, which instructs OSHA to promulgate standards that are reasonably necessary to protect workers. With respect to the Vaccinate-or-Test rule, the Supreme Court was skeptical that the OSH Act's broad and generic grant of rulemaking authority was specific enough to permit OSHA to regulate a hazard like COVID-19 that was affecting the entire world everywhere they went; i.e., it was not a hazard that was uniquely to the workplace. One could easily project that reasoning to OSHA's effort to address a hazard like heat, which is just as pervasive in our non-work lives as COVID-19 was. In a *pre-Loper Bright* world, under *Chevron* jurisprudence, OSHA's interpretation of the OSH Act was entitled to deference, so OSHA's authority to issue a rule about something as ubiquitous as heat was on much more solid footing. Now, with courts applying the tools of statutory interpretation on their own, and making their own judgements about the best interpretation of the the OSH Act's grant to OSHA of rulemaking authority, makes OSHA's proposed Heat Illness rule particularly vulnerable.

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 OSHA Defense Report blog are likely asking whether *Corner Post* means that OSHA standards promulgated in years past can be challenged by companies formed today. While SCOTUS was silent on this point, our initial take is that the answer is no. 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." Notably, The OSH Act sets forth the following

administrative review process with clear deadlines for challenging OSHA's final actions, including OSHA citations and standards, which presumably supersedes the default rule in the APA:

> **(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard.**

29 U.S.C. § 655 (emphasis added). Likewise, the OSH Act lays out very specific procedures for contesting OSHA citations. 29 U.S.C. § 659 (Enforcement Procedures) and § 660 (Judicial Review). Ultimately, there appears to be a compelling argument that Congress intentionally drafted the OSH Act's shorter statute of repose to supersede the APA's default statute of limitations rules. That said, we anticipate a spate of challenges to longstanding rules to be launched, 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 OSHA 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 Court also concluded that the "public rights" exception to the Seventh Amendment did not apply because

the SEC's antifraud provisions were intended to target "the same basic conduct as common law fraud," which amounts to a "matter[] of private rather than public right." In reaching this conclusion, the Court discussed at length its prior decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U. S. 442 (1977), upholding Congress' power to give an executive agency, in that case the OSH Review Commission, authority over adjudicating violations of a new public rights statute. There, SCOTUS held that the public rights exception applied to the OSH Act, rejecting the employer's argument that OSHRC was an impermissible venue in which to adjudicate disputed OSHA citations.

The *Jarkesy* opinion distinguished *Atlas Roofing* by explaining "[b]ecause the public rights exception as construed in *Atlas Roofing* does not extend to these civil penalty suits for fraud, the [*Atlas Roofing*] case does not control." Nonetheless, SCOTUS conspicuously left open the question of whether *Atlas Roofing Co.* has been overturned, going so far as to quote subsequent SCOTUS opinions questioning the continued validity of *Atlas Roofing Co.*

Although the future of *Atlas Roofing* (and the OSH Review Commission), is unknown, there are several possible scenarios that may unfold in the near future:

1. The Court could decline future cases challenging OSHRC's authority to adjudicate OSHA citation matters, leaving *Atlas Roofing* and OSHRC's jurisdiction undisturbed.
2. The Court could affirm *Atlas Roofing* in a future case, which would essentially foreclose challenges to OSHA's ability to litigate citations before OSHRC.
3. Alternatively, the Court could overrule *Atlas Roofing* and OSHA's enforcement under the OSH Act would no longer implicate the public rights exception.

If SCOTUS takes up a challenge to the lawful existence of the OSH Review Commission and its ALJs and Commissioners, and declines to apply the public rights exception to OSHA citations, the Court would also need to determine whether OSHA enforcement actions are "suits at common law." While the Court in *Jarkesy* stated that the "[OSH] Act was self-consciously novel," it does leave open whether the *Jarkesy* penalty analysis (i.e., civil fines intended to punish and deter) would apply, making OSHA fines "legal in nature." If so, OSHA could be required to bring enforcement actions for civil penalties in federal court. If this right is not inferred by courts, this would cause the most disruption because the OSH Act authorizes OSHA to bring enforcement actions exclusively through the OSHRC framework, and could put Congress in a position where it is forced to amend the OSH Act to allow OSHA to pursue any enforcement actions.

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 to see challenges of that nature very soon.

Looking to the Not-So-Distant Future and Beyond

The combined effect of these three cases is that the regulated community can 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. Below is a discussion about another case that

the Supreme Court did not take up on review, but which could make its way back to the Court in the near future.

Allstates Refractory Contractors, LLC v. Su.

On July 2, 2024, SCOTUS announced that it would not take up a case brought by an Ohio-based contractor, Allstates Refractory Contractors, challenging OSHA's lawful authority to promulgate any permanent workplace safety standards at all. Arising out of a fairly mundane walking working surfaces citation, *Allstates Refractory Contractors, LLC v. Su*, presented the Court with an opportunity to decide whether the delegation of authority by Congress to OSHA, spelled out in the OSH Act, to promulgate "reasonably necessary or appropriate" workplace safety standards is too generic in violation of Article I of the US Constitution (also known as the non-delegation doctrine). In short, Allstates Refractory set out to end OSHA's ability to regulate workplace safety.

The US Court of Appeals rejected the employers challenge to OSHA's rulemaking authority, so the Court's decision to deny *certiorari* allows OSHA to continue with business as usual for the foreseeable future, but it did not put the issue to rest. Indeed, in a strongly worded dissent, Justice Thomas made clear his view that OSHA is operating outside the bounds of the Constitution under impermissibly delegated legislative power:

> **"The Occupational Safety and Health Act may be the broadest delegation of power to an administrative agency found in the United States Code. See C. Sunstein, Is OSHA Unconstitutional? 94 Va. L. Rev. 1407, 1448 (2008) ("No other federal regulatory statute confers so much discretion on federal administrators, at least in any area with such broad scope"). If this far-reaching grant of authority does not impermissibly confer legislative power on an agency, it is hard to imagine what would. It would be no less objectionable if Congress gave the Internal Revenue Service authority to impose any tax on a particular person that it deems "appropriate," and I doubt any jurist would sustain such a delegation. The question whether the Occupational Health and Safety Administration's broad authority is consistent with our constitutional structure is undeniably important. At least five Justices have already expressed an interest in reconsidering this Court's approach to Congress's delegations of legislative power. [citations omitted] Because this petition is an excellent vehicle to do exactly that, I would grant review."**

OSHA and interested stakeholders alike will thus have to wait and see whether Justices Thomas and Gorsuch, who also wanted to decide *Allstates Refractory*, will prevail upon their colleagues to take up another case challenging OSHA's ability to promulgate safety standards. In the meantime, we have plenty of food for thought regarding the implications for OSHA arising out of the other cases decided by SCOTUS this term.

More to Come!

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