A Brave New World: The Supreme Court Torpedoes the 'Administrative State'

July 12, 2024

The Supreme Court is at war with the "administrative state." In three major cases decided at the end of the Supreme Court's last term, the Court decided against the administrative state, reducing the powers of administrative agencies. "*Chevron* deference" to agency interpretations in areas of their expertise was eliminated. The "public rights" exception to a target's right to a jury trial in an action brought by an agency was redefined and limited. The statute of limitations to challenge agency rulemaking was extended to permit a new entity to challenge decades-old rules. Collectively, these decisions shift power away from the agencies (and in some cases Congress), transferring that power to the Courts. Decades-old precedents were swept aside to shift the balance of power in Washington. The implications of these decisions extend to all federal agencies.

What is the fuss about? As the concurrence in *Cochran v. SEC*[1] argued, democracy itself is at issue:

> Woodrow Wilson. . . argued that universal suffrage would make the three branches of government ignorant, indolent, and incapable of regulating modern affairs. Wilson's solution? He wanted administrative agencies to operate in a separate, anti-constitutional, and antidemocratic space — free from pesky things like law and an increasingly diverse electorate. One of Wilson's acolytes, James Landis, was the SEC's founding father. . . . Landis hoped that the SEC could set upon Americans without interference from courts—unless and until the SEC gave courts permission to review its work. That is obviously not how our government is supposed to work. And in the Landisonian view, that's precisely the point.[2]

A contrary view was presented by Justice Elena Kagan in her dissent in *Seila Law LLC v. Consumer Financial Protection Bureau*,[3] where she argues that a flexible approach to administrative law is necessary to create a working government:

> In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission — a measure of independence from political pressure.[4]

1 20 F.4th 194 (5th Cir. 2021).

2 *Id.* at 214.

3 591 U.S. 197 (2020).

4 *Id.* at 263-64.

This advisory examines the implications of the Supreme Court's decisions in *Loper Bright Enterprises v. Raimondo*,[5] *SEC v. Jarkesy*,[6] and *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.[7]

Loper Bright Enterprises v. Raimondo

Background. In the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[8] the Supreme Court created a doctrine known as *Chevron* deference, which generally required courts to defer to an administrative agency's interpretation of an ambiguous statute so long as the agency's interpretation was reasonable.

Congress cannot anticipate every situation that an agency faces, so it sometimes directs agencies to act in the public interest (or some other broad directive) or provides statutory commands which could be interpreted in several ways. As a result of these Congressional enactments, *Chevron* deference has been used as a defense for thousands of rulemakings by agencies covering numerous sectors, from environmental protection to financial regulation. As discussed below, the scope of *Chevron* deference has been changed throughout its history.

In 2022, the Supreme Court's decision in *West Virginia v. Environmental Protection Agency*[9] created a limit on *Chevron* deference in the form of the Major Questions Doctrine. The Major Questions Doctrine provides that courts will presume Congress does not delegate issues of major political or economic significance to administrative agencies without a clear statement to that effect.

***Loper Bright* Factual and Procedural Summary.** To address overfishing concerns by unregulated foreign vessels off the US coasts, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under a delegation of authority from the Secretary of Commerce, the National Marine Fisheries Service (NMFS) administers the MSA. The MSA established councils that develop fishery management plans, which the NMFS approves and promulgates as final rules. Of relevance, a plan may require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery."

At issue in this case, brought by petitioners Loper Bright Enterprises and others, was a rule promulgated by NMFS that could require a fishing vessel to contract with and pay for a government-certified third-party observer, which could cost up to $710 per day. The DC Circuit relied on *Chevron* deference to uphold the rule, and the Supreme Court granted *certiorari*.[10] Because of the Supreme Court's decision, the case was remanded to the lower court.

US Supreme Court Holding. "*Chevron* is overruled."[11] Forty years after the landmark decision in Chevron, the Supreme Court held that courts may not defer to an agency's statutory interpretation of a law simply because the statute is ambiguous. Such an approach violates the Administrative Procedure Act (APA). Instead, courts will "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[12]

In *Loper Bright*, the Supreme Court overturned the *Chevron* doctrine, which generally required courts to defer to an agency's reasonable interpretation of an ambiguous statute. Chief Justice John Roberts explained that *Chevron* deference cannot be squared with the APA and "prevents [judges] from judging."[13] Prior to *Chevron*, courts would independently examine each statute to determine the meaning of the statute. This practice, according to Chief

5 603 U.S. ___ (2024), No. 22-451 (June 28, 2024).

6 603 U.S. ___ (2024), No. 22-859 (June 27, 2024).

7 603 U.S. ___ (2024), No. 22-1008 (July 1, 2024).

8 467 U.S. 837 (1984).

9 597 U.S. 697 (2022).

10 A similar case was brought by petitioners Relentless Inc. and others, which also operated fishing vessels. The Supreme Court granted certiorari in both cases and consolidated them.

11 *See Loper Bright*, *supra* note 5, at slip op. 35.

12 *Id.* at 23.

13 *Id.* at 26.

Justice Roberts, followed APA § 706, which requires that "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." The Court specifically noted that courts, not agencies, have special competence in resolving statutory ambiguities.

The Court also acknowledged concerns that judges may be forced to interpret ambiguities on highly technical matters. Chief Justice Roberts addressed this concern by explaining that "[c]ourts, after all, do not decide such questions blindly. The parties and *amici* in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives" and added that "although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'"[14] This is particularly important because Chief Justice Roberts cited *Skidmore v. Swift & Co.*,[15] which established the concept of *Skidmore* deference. *Skidmore* deference allows a court to consider an agency's interpretation of an ambiguous statute when it falls within the agency's purview, based on the strength of the arguments presented by the agency.

The Court also explained why *stare decisis* did not require *Chevron* to stand. The Court first noted that *Chevron's* reasoning was fundamentally misguided, resulting in the foundations of *Chevron* and its application continually being revised. Second, the Court explained that *Chevron* is unworkable, because what constituted "ambiguity" evaded a meaningful definition. Finally, the Court explained that no meaningful reliance on the *Chevron* doctrine is present because the doctrine was constantly being updated by various courts, although the Court did not "call into question prior cases that relied on the Chevron framework" and explained that the "holdings of those cases that specific agency actions are lawful. . . are still subject to statutory *stare decisis* . . ."[16]

Implications. This decision will have wide reaching implications for administrative law practice — no longer will agencies be able to rely on Chevron deference when their actions are challenged in court. As many observers have noted, the *Loper Bright* decision is almost sure to bring about challenges to the actions of other federal agencies, including those regulating the environment, health care and consumer safety.

Rulemaking Challenges

Under *Loper Bright*, agencies are much more likely to have their rules that interpret ambiguous statutes challenged in court.

- As one potential example, the Office of the Comptroller of the Currency (OCC) may interpret what constitutes the "business of banking" under 12 C.F.R § 7.1000. Under *Loper Bright*, a court is not required to follow the OCC's interpretation of what constitutes the "business of banking" simply because it is reasonable.
- Another potential example involves the Securities and Exchange Commission's (SEC or Commission) expansion of the definition of "dealer" in a February 2024 rulemaking,[17] which is currently facing multiple court challenges. Under *Loper Bright*, the reviewing court will not defer to the SEC's interpretation of the statute simply because the statute is ambiguous; the court must instead conduct its own statutory analysis.
- Generally, any agency that oversees financial services (such as the Commodity Futures Trading Commission (CFTC)) and interprets an ambiguous statute when issuing rules will face higher scrutiny from courts, as any reviewing court is no longer required to defer to the agency's interpretations of a statute.

[14] *Id.* at 24-25.

[15] 323 U.S. 134 (1944).

[16] *See Loper Bright*, *supra* note 5, at slip op. 34.

[17] Securities Exchange Act Release No. 34-99477 (Feb. 6, 2024), https://www.sec.gov/files/rules/final/2024/34-99477.pdf.

Clients

- Clients and legal counsel may more readily consider legal challenges to new rulemakings by regulators, as all new rules are no longer subject to *Chevron* deference. Any agency's interpretation of a statute will be subject to a judge's analysis of the relevant ambiguous statute.
- In addition, clients and legal counsel may strategically decide which court to file a lawsuit in, since the judge is now required to conduct the relevant statutory analysis as required under the APA.
- Notwithstanding *Loper Bright*, agency rulemakings are still subject to *Skidmore* deference, meaning courts can consider an agency's interpretation of a statute so long as the statute is within the agency's purview.

SEC v. Jarkesy

Background. When authorizing an enforcement action, the SEC has two paths — it can bring a civil action in federal district court; or its "home court," in an administrative proceeding before an Administrative Law Judge (ALJ) (Administrative Proceedings). Much has been written over the years as to why the SEC may prefer Administrative Proceedings: (i) a more favorable record of "wins"; (ii) more relaxed Commission Rules of Practice when compared with the Federal Rules of Evidence and Procedure (e.g., under the Commission's Rules of Practice, hearsay is generally permitted, depositions are limited, discovery is generally not permitted, and ALJ Initial Decisions are required within aggressive timelines); and (iii) an appellate process that requires the respondent, when challenging an adverse ruling by an ALJ, to first take its appeal to the Commission (who made the decision to approve bringing the enforcement action in the first instance).

Before the 2008–09 financial crisis, the SEC's ability to bring a case seeking civil penalties (for alleged securities law violations) using Administrative Proceedings was limited, in many cases, to fact patterns where the respondent(s) were directly within the SEC's regulatory purview (e.g., an SEC-registered entity or associated person) — otherwise, the SEC had to bring the case in federal court. In 2010, after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress meaningfully expanded the SEC's enforcement powers by authorizing the SEC to impose such penalties through Administrative Proceedings with respect to any person charged with violating the securities laws (regardless of whether such persons fell within the SEC's direct regulatory supervision). As a result, beginning in 2010, the SEC could bring virtually any case seeking significant monetary penalties in Administrative Proceedings.

***Jarkesy* Factual and Procedural Summary.** Not long after the passage of the Dodd-Frank Act, in 2013, the SEC brought a cease-and-desist case before one if its ALJs in an Administrative Proceeding, against, among others, George Jarkesy, the manager of Patriot28 LLC—an investment adviser. The SEC alleged that Jarkesy and Patriot28 violated the anti-fraud provisions of various securities laws. According to the SEC, Jarkesy and Patriot28 misled investors by misrepresenting the investment strategies employed, lying about the identity of the funds' auditor and prime broker, and inflating the funds' claimed value to collect larger management fees. The ALJ ordered Jarkesy and Patriot28 to pay a penalty of $300,000, disgorge $685,000 in illicit profits, and barred Jarkesy.

Jarkesy and Patriot28 appealed the decision (which was reviewed first by the Commission) to the US Fifth Circuit Court of Appeals and a divided panel of the court vacated the final order, holding, among other findings, that the SEC's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial. The US Supreme Court granted *certiorari* and as framed by the majority of the Court, posed a straightforward question: Whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against them for securities fraud?

US Supreme Court Holding. On June 27, 2024, in a 6-3 decision, the Supreme Court upheld the Fifth Circuit's ruling, finding that the Seventh Amendment guarantees the right to a jury trial for statutory claims that are legal in nature. Whether a claim is "legal in nature" — the Court noted that it must consider whether the cause of action resembles common law causes of action and whether the remedy sought was of the type traditionally obtained in

a court of law. The Court found a close relationship between federal securities fraud (as alleged here by the SEC) and common law fraud and further held that SEC civil penalties are "a type of remedy at common law that could only be enforced in courts of law."[18] Accordingly, the Court held that the Seventh Amendment applies such that the SEC's claims should have been tried before a jury.

Notably, the Court rejected the SEC's argument that the public rights exception applied. The public rights exception provides that an Article III court is not necessary where the claim being adjudicated concerns matters of public rights (seeking collection of revenues owed to the United States or for penalties for violating statutes in areas where Congress has plenary authority). The Court held that suits at common law (or cases such as this that are brought under a statutory analog) have a presumption of being subject to Article III review (and jury trials) and that what ultimately matters is the substance of the action and not how it is labeled or by who brings the action (including, as here, the US government).

Notably, the Court did not address other constitutional issues decided by the Fifth Circuit in the affirmative, including that: (i) Congress violated the non-delegation doctrine (in authorizing the SEC, without adequate guidance, to choose where to litigate this action); and (ii) the appointment of SEC ALJs violated the appointments clause.

Implications. Below we highlight several possible implications following the *Jarkesy* decision:

SEC and Enforcement Priorities

- The SEC's use of Administrative Proceedings has been under siege for several years (since 2016), facing scrutiny from all sides, including, for example, the fairness and constitutionality of its use. Because of this, the SEC has already significantly curbed its use of the administrative forum and it therefore seems unlikely to see immediate and drastic shifts in how the SEC and the Enforcement Division currently bring cases.
- By statute, certain theories of liability, including a failure to supervise, improper professional conduct, and cause liability — can only be litigated in an Administrative Proceeding. Unless Congress amends the law, the theories of liability can never be asserted in litigated cases.
- The SEC will likely continue bringing enforcement actions charging fraud and seeking financial penalties in federal district court. Because doing so is more time consuming and resource intensive than previously using Administrative Proceedings, the SEC may scrutinize more closely the enforcement actions it deems worthy of litigating and/or adjusting its approach/posture regarding settlements.

ALJs and Administrative Proceedings

- The Court did not address how its Seventh Amendment analysis may apply, if at all, to limit other types of sanctions sought by the SEC in Administrative Proceedings. Significant ambiguity also remains regarding the scope of the public rights exception.
- As noted above, constitutional challenges regarding the use of ALJs and Administrative Proceedings remain prevalent (and have not been resolved by the *Jarkesy* decision).[19] The use of Administrative Proceedings and its long-term viability will continue to present potential difficulties for the SEC. In some cases, the SEC can avoid the matter by electing to take cases to federal court; in other cases, where the sanctions sought are available only via an Administrative Proceeding (e.g., Rule 102(e) Improper Professional Conduct cases), the SEC may continue to face a variety of constitutional challenges.

[18] *See Jarkesy, supra* note 6, at slip op. 9.

[19] Last term, in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023) (and its companion case *SEC v. Cochran*), the Supreme Court held that a respondent in an SEC administrative proceeding may collaterally attack the constitutionality of the proceeding in federal district court rather than appeal an administrative decision to the Commission before petitioning a federal appellate court for review. This decision bolsters further the likelihood of challenges to the SEC's use of Administrative Proceedings.

Clients

- Post *Jarkesy*, clients and legal counsel may be emboldened to fight cases brought in federal court, rather than enter into a "forced" settlement or otherwise defend itself in an Administrative Proceeding viewed by many as generally unfavorable to respondents.
- Notwithstanding *Jarkesy*, the Commission may still impose voluntarily agreed-upon civil money penalties through an administrative proceeding and settlement because the right to a jury trial can be waived by the target; but the *Jarkesy* decision provides some leverage to respondents and defense bar to force the matter into federal court (including a trial by jury).
- Clients who are facing potential enforcement actions may consider resisting settlements or forgoing settlements in light of potentially more favorable outcomes and alternative arguments in federal court.

Beyond the SEC

- Post Jarkesy, civil penalty statutory regimes will likely be challenged, including those related to dozens of federal agencies identified in Justice Sonia Sotomayor's dissent — referring to the decision as a "massive sea change" and identifying a variety of agencies that could be affected by the *Jarkesy* decision (e.g., the CFTC). Most critically and potentially impacted, some federal agencies do not currently have an option to seek monetary penalties in a venue other than in an Administrative Proceeding.

Corner Post, Inc. v. Board of Governors of the Federal Reserve System

Background. The APA established a framework for federal agencies to issue regulations and for affected parties to challenge these rules in court. To provide finality to agency actions, Congress enacted 28 U.S.C. § 2401(a), setting a six-year statute of limitations for civil actions against the United States. *Corner Post* arose from a challenge to a 2011 Federal Reserve regulation on debit card fees, brought a decade after its implementation. This raised questions about when the statute of limitations should begin, especially for entities that did not exist when the regulation was issued.

***Corner Post* Factual and Procedural Summary.** In 2010, Congress mandated that the Federal Reserve Board issue rules regulating debit card interchange fees. The Board complied in 2011 by issuing Regulation II, which capped interchange fees at 21 cents per transaction plus 0.05 percent of the transaction value. Several trade groups immediately challenged Regulation II, but the DC Circuit ultimately upheld it in 2014. Corner Post, a truck stop and convenience store, opened for business in 2018, several years after Regulation II had been implemented and judicially reviewed.

In 2021, two trade associations filed a lawsuit challenging Regulation II under the APA. The government moved to dismiss the case based on the 6-year statute of limitations in 28 U.S.C. § 2401(a). In response, the trade groups amended their complaint to add Corner Post as a plaintiff. The amended complaint was nearly identical to the original, except for the addition of Corner Post. The district court dismissed the suit as time-barred under Section 2401(a), and the Eighth Circuit affirmed, holding that for facial challenges to agency regulations, the 6-year limitations period begins running when the regulation is published. The Supreme Court then granted *certiorari* to resolve a circuit split on when the Section 2401(a) limitations period begins for APA challenges to agency regulations.

US Supreme Court Holding. In *Corner Post*, the Supreme Court effectively eliminated the statute of limitations to challenge agency rulemaking. The Court held that for claims brought under the APA, the six-year statute of limitations established by 28 U.S.C. § 2401(a) begins to run when the plaintiff is first injured by the rule, not when the agency rule is published. This interpretation hinges on the Court's reading of the phrase "right of action first accrues" in Section 2401(a), which the Court held means the point at which a plaintiff has a complete and present cause of action. For APA claims, the Court reasoned, this requires both final agency action ***and*** an injury to the plaintiff.

The Court acknowledged but dismissed concerns about the potential for perpetual litigation, stating that such policy considerations cannot override the clear text of the statute. While acknowledging the government's arguments about the need for regulatory finality and the potential burden of perpetual litigation, the majority held that such "pleas of administrative inconvenience" cannot justify departing from the statute's clear text.[20] The Court opined that the impact may not be as severe as feared, noting that "regulated parties may always assail a regulation as exceeding [an] agency's statutory authority in enforcement proceedings against them," and that established precedent may limit the burden of addressing new suits.[21]

The dissent disagreed: "The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline."[22]

Implications. This decision marks a significant shift in administrative law practice, potentially opening the door to challenges of long-established regulations. As one potential example, under the Supreme Court's ruling in *Corner Post*, the SEC's longstanding Rule 10b-5 could, in theory, face new legal challenges despite its decades-long existence. Rule 10b-5, which prohibits fraud and deception in connection with the purchase or sale of securities, has been a cornerstone of securities regulation since its adoption in 1942. However, the *Corner Post* decision potentially allows a newly formed entity entering the securities industry to challenge Rule 10b-5 within six years of being subject to its provisions. For instance, a startup brokerage firm or a newly established investment advisory company could potentially bring an APA claim arguing that Rule 10b-5 exceeds the SEC's statutory authority or was promulgated without adherence to administrative procedures. While such a challenge would likely face significant hurdles given the rule's long-standing acceptance and judicial interpretations, the *Corner Post* ruling theoretically opens the door for such litigation, introducing an element of uncertainty into even the most well-established securities regulations.

[20] *Corner Post*, *supra* note 7, at slip. op. 5.

[21] *Id.* at 20.

[22] *Id.* at slip. op. 2 (dissenting opinion).

CONTACTS

For more information, please contact your Katten attorney or any of the following Financial Markets and Funds attorneys.

Carl E. Kennedy
+1.212.940.8544
carl.kennedy@katten.com

Daniel J. Davis
+1.202.625.3644
daniel.davis@katten.com

Richard D. Marshall
+1.212.940.8765
richard.marshall@katten.com

Adam Bolter
+1.312.902.5204
adam.bolter@katten.com

Alexander C. Kim
+1.212.940.6535
alexander.kim@katten.com

Robert Bourret
+1.312.902.5568
robert.bourret@katten.com

Katten katten.com

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

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7/12/23