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2 High Court Cases Could Upend Administrative Law Bedrock

By **Dan Wolff and Henry Leung** (September 8, 2023, 5:49 PM EDT)


Dan Wolff


Henry Leung

Administrative law is having a moment. Litigators who frequently find themselves in court against the United States, whether defending clients against enforcement actions or challenging agency action on the plaintiff side, should be paying attention.

While outside wonky D.C. legal circles the principles of administrative law may not provoke the same passions as social issues, such as abortion or gun rights, the U.S. Supreme Court's administrative law precedents are at least arguably, if not demonstrably, of greater importance to everyday life in the U.S.

As the Supreme Court observed in its 2010 decision in Free Enterprise Fund v. Public Company Accounting Oversight Board, the federal administrative state "touches almost every aspect of daily life."[1]

This coming term, the Supreme Court will decide two cases in particular that stand to upend one or more of its administrative law precedents. This matters because the decisions will likely change the nature, and shape, of agency-facing litigation in perpetuity.

In one of the cases, Loper Bright Enterprises v. Raimondo, the Supreme Court granted certiorari on whether it should clarify or overturn the 1984 Supreme Court case Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., which stands for the proposition that if a statutory provision is ambiguous, and Congress created an agency to administer that statute, that agency's interpretation of the ambiguous provision is entitled to deference so long as it is reasonable, regardless of whether it is the best interpretation.[2]

Although considered a bit of a sleeper when it was decided, Chevron became, over the ensuing decades, the court's most frequently cited decision in the area of administrative law because it established the framework for how the federal courts are to decide challenges to agency interpretations of statutes, regardless of the context in which those interpretations arise — rulemakings, enforcement actions, guidance, etc.

In the second case, U.S. Securities and Exchange Commission v. Jarkesy, the court will review a 2022 U.S. Court of Appeals for the Fifth Circuit decision holding that the statutory scheme authorizing the use of administrative law judges, in aid of enforcement actions brought by the SEC is unconstitutional. Three questions are presented.

First, did Congress improperly delegate to the SEC authority to decide whether to bring a case in federal court or before an agency ALJ without providing the SEC an "intelligible principle" to guide that decision making?

Second, are ALJs improperly protected from removal from office by the president?

Third, does enforcement before SEC ALJs deny the target of the enforcement a right to a jury trial?

Loper stands to attract more attention given the canonical status of Chevron in the Supreme Court's jurisprudence. But in our estimation, far more is at stake in Jarkesy. While nominally about SEC ALJs, a broad holding on one or more of the constitutional questions presented could easily have consequences across the entirety of the administrative state and change core tenets of government-facing litigation.

Loper

Chevron instructs courts how to treat an agency's interpretation of a statute where the provision in question is unmistakably ambiguous.

Under its famous two-step analysis, the court first asks whether the provision is ambiguous. In doing so, Chevron instructs the court to use all the "traditional tools of statutory construction."[3]

If, and only if, after exhausting its interpretative analysis, the court concludes the provision is truly ambiguous, it is then under step two to defer to the agency's interpretation if, and only if, the agency's interpretation is reasonable.[4]

If the court finds that the agency failed to adequately grapple with the ambiguity, the typical course of action is for the court to remand the issue back to the agency to articulate a better explanation.[5]

The chief criticism of Chevron is that it divests the courts of their constitutional role under Article III to "say what the law is" in favor of self-interested policymakers.

Some see this as a separation-of-powers defect; others see it as a handout to agencies to play fast and loose in their interpretations of statutes — which are rife with ambiguities precisely because, arguably, Congress prefers punting the hard work of settling tough policy issues to the executive branch — to suit shifting policy preferences, especially when there is a change of administrations.

Yet, for all its hype and hullaballoo, Chevron is highly porous and not by its own terms the unlawful agency power grab its critics make it out to be.

For one thing, when an agency prevails in a case under Chevron step two, that does not mean the agency's interpretation is what the law means, only that in that instance its interpretation of the law is not unreasonable. The agency's interpretation does not have a stare decisis effect as would a court's.

Furthermore, while empirical study shows that step two advantages the agency where it applies,[6] courts can avoid that outcome by deciding cases at step one. Ambiguity, like anything, is open to interpretation. As Justice Elena Kagan famously said in her 2015 lecture at Harvard Law School, "We're all textualists now."

Indeed, Justice Kagan emphasized the flexibility of interpretative methodologies in a 2022 dissent in which she commented, reprovingly of her so-called textualist colleagues in the majority, that her 2015 "we're all textualists now" remark was wrong — her point being that textualism, like anything else, is no less highly subjective and outcome-oriented than any other methodology.

Thus, a robust, or outcome-oriented, application of Chevron step one — asking whether the meaning of the statute is discernible using all tools of statutory interpretation — has always been, and remains, available to a court inherently skeptical of agency power to resolve the case for itself.

After Chevron was decided, Justice Antonin Scalia observed, for example, that a "strict constructionist," like himself, finds "more often ... that the meaning of a statute is apparent from its text and from its relationship with other laws, [and] thereby finds less often that the triggering requirement for Chevron deference exists. It is thus relatively rare that Chevron will require [him] to accept an interpretation which, though reasonable, [he] would not personally adopt."[7]

Even at step two, nothing prevents the skeptical court from declaring the agency's interpretation unreasonable.

Beyond that, Chevron has long been, according to the Justice Neil Gorsuch dissent in last year's Buffington v. McDonough, "pitted with exceptions and caveats."[8]

For example, the decades-old but recently en vogue "major questions doctrine" stands for the proposition that the courts will not defer to agency interpretations where the resulting agency action is one that, objectively speaking, has broad economic or political impacts and Congress has not clearly authorized it.[9] The major questions doctrine arose as a situational exception to Chevron deference in big cases.

Then there are other canons of construction that get primacy in a particular circumstance, such as the rule of lenity where a criminal statutory provision is at issue,[10] or the constitutional avoidance canon.[11]

At least at the Supreme Court, outright ignoring Chevron where it is inconvenient has always been an option.[12]

Beyond the historical exceptions to Chevron's application, the sheer hostility its critics have showered on the doctrine has already substantially, if not mortally, wounded Chevron as a functional, or at least prevalent, doctrine.

As Justice Gorsuch pointed out in Buffington after canvassing recent lower court decisions, state court decisions and various academic critiques, "the aggressive reading of Chevron has more or less fallen into desuetude — the government rarely invokes it, and courts even more rarely rely upon it."[13]

To be sure, Chevron still gets some traction, hence the occasional lower court outcomes like Loper and McDonough. All the same, given Chevron's fall from grace writ large, the last rites and burial that Chevron is anticipated to receive in Loper will likely prove to be a bit of a yawner.

Jarkesy

Not so with Jarkesy, which tees up three constitutional questions. In particular, if the court rules on

either the nondelegation question or the removability question, it is not difficult to see how the outcome could reverberate throughout the executive branch.

Take nondelegation: While it may not be obvious to attorneys whose portfolios are focused more on environmental enforcement, or occupational safety and health compliance, or product safety, that a decision striking down the SEC's authority to decide for itself whether to prosecute before a federal court or ALJ matters, if the court does so by reconsidering and altering its approach to nondelegation questions, it will have an immediate impact on how courts confront numerous other enforcement schemes where Congress has given only bare guidance to the agencies.

Several justices are already clamoring to take such an approach.

For instance, in the 2019 decision Gundy v. U.S., Justice Samuel Alito noted, "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years [of uniformly rejecting non-delegation arguments], I would support that effort."[14]

Meanwhile, Justice Gorsuch, dissenting in the same case, said, "In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"[15]

The removability question is equally loaded. There is nothing unique about SEC ALJs — they are creatures of the Administrative Procedure Act, and the manner by which they can be removed from office is the same regardless of the agency they serve.

If the Supreme Court holds, as the Fifth Circuit did, that SEC ALJs are unconstitutionally protected from removal from office by the president, then that is equally true of all ALJs, regardless of the agency that employs them.

In either scenario, one immediate question would be how — or even whether — these constitutional defects can be fixed.

It is dubious at best to think SEC enforcement in its current form could be spared by the Supreme Court applying a severability analysis, and unlikely a majority of the court at this point would be willing to even try.[16]

The problems just snowball from there: The consequences would be felt immediately around the administrative state, gumming up any number of agency enforcement programs, and there is no reason to think Congress has the collective incentive or capacity to address it all slowly, let alone quickly.

One agency that stands to feel an out-of-the-gate impact of an SEC loss in Jarkesy is the Federal Trade Commission, whose own authority is being challenged on similar grounds in several lower court proceedings.

In one of those cases, FTC v. Amgen Inc., the FTC said in a recently filed brief that if the challenging parties' claims are well founded, they "would essentially abolish the FTC's administrative processes — if not the agency in its entirety — and thus halt the agency's efforts to enforce American competition law."[17]

The Supreme Court could, of course, rule in a minimalist way to limit its result to the SEC. For example, it could affirm the Fifth Circuit on the Seventh Amendment question and limit its reasoning to the specific nature of SEC investigations, i.e., fraud, that do not arise in other regulatory contexts. If it did that, the impact on other agency programs might be negligible.

But the appetite to rule on one or both of the nondelegation and removability questions seems to be strong.

Justice Gorsuch has led the charge since joining the court to revisit the court's nondelegation precedent,[18] and others seem ready to jump on board.[19] The desire to revisit the court's precedents on so-called independent agency authority has an even longer pedigree.[20]

Looking Forward

The bottom line is that the anticipated outcomes in Loper and Jarkesy portend a new, and substantially hobbled, administrative state. But of the two cases, it is Jarkesy that holds the greater potential to effect change that only Congress will be able to address. Litigators across the regulatory spectrum would be well served to pay attention.

Daniel W. Wolff is a partner and Henry W. Leung is an associate at Crowell & Moring LLP.

[1] Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.,561 U.S. 477, 499 (2010).

[2] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[3] Chevron, 467 U.S. at 843 n.9.

[4] Id. at 845.

[5] See, e.g., Sec'y of Labor v. KC Transport, No. 22-1071, 2023 WL 4874493 (D.C. Cir. Aug. 1, 2023).

[6] See Kent Barnett & Christopher J. Walker, Chevron in the Circuit Courts, 116 Mich. L. Rev. 1, 33-34 (2017) (in sample set of over 1,100 court cases, 93.8% of "interpretations that made it to step two . . . were upheld")

[7] Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 521 (1989).

[8] Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari).

[9] See FDA v. Brown & Williamson Tobacco Corp.,529 U. S. 120, 159-160 (2000).

[10] See, e.g., Whitman v. United States, 574 U.S. 1003 (2014) ("rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants").

[11] See, e.g., Jennings v. Rodriguez, 138 S. Ct. 830 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.")

[12] See Mexican Gulf Fishing Co. v. U.S. Dep't of Com., 60 F.4th 956, 963 n.3 (5th Cir. 2023) (observing that Chevron has "become something of the-precedent-who-must-not-be-named—left unmentioned by the Supreme Court in two recent decisions addressing the reasonableness of agency action"), citing Am. Hosp. Ass'n. v. Becerra, 142 S. Ct. 1896 (2022), and Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022).

[13] Buffington, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari).

[14] Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring).

[15] Id. at 2148 (Gorsuch, J., dissenting).

[16] See, e.g., Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part) ("[T]he power of judicial review does not allow courts to revise statutes . . . [b]ut, even viewing severability as an interpretive question, I remain skeptical of our doctrine.").

[17] FTC v. Amgen Inc., No. 1:23-cv-03053, Pl.'s Mot. to Strike Aff. Defenses, ECF No. 113 at 2 (N.D. Ill. July 20, 2023).

[18] See Gundy, 139 S. Ct. at 2148 (Gorsuch, J., dissenting).

[19] See id. (Gorsuch dissent joined by Justices Roberts and Thomas); id. at 2131 (Alito, J., concurring).

[20] See Seila Law, 140 S. Ct. at 2200–01 (narrowing and limiting prior authorities recognizing Congressional authority to protect agency heads through statutory removal restrictions); Free Enterprise Fund, 561 U.S. at 492 (emphasizing constitutional principles of Presidential removal powers).