

## High Court Flexes Muscle To Limit Administrative State

By **Katie Buehler**

*Law360 (July 5, 2024, 6:33 PM EDT)* -- The U.S. Supreme Court's dismantling of a 40-year-old judicial deference doctrine, coupled with rulings stripping federal agencies of certain enforcement powers and exposing them to additional litigation, has established the October 2023 term as likely the most consequential in administrative law history.

In the term's final dizzying days, the court's conservative supermajority issued four opinions that redistributed power among the three branches of government and reasserted the judiciary's supremacy over questions of law, attorneys told Law360. While lawyers and legal scholars are still trying to wrap their heads around the full extent of this shift in administrative law jurisprudence, they all say one thing's for certain: This term's one for the history books.

"It's been an extremely — and I'll venture to say the most — important term ever when it comes to administrative law," Bracewell LLP partner Jeff Holmstead said.

The high court secured the conservative, anti-agency legal movement's crowning achievement by overruling the so-called Chevron doctrine, a legal precedent established in the court's 1984 decision in *Chevron v. Natural Resources Defense Council* that instructed judges to defer to a federal agency's reasonable interpretation of an ambiguous statute.

But the right-leaning justices also handed down decisions that limited administrative agencies' ability to pursue enforcement actions in-house, called into question what constitutes an arbitrary and capricious agency action, and expanded the window for challenging agency regulations in courts.

"With any one of these cases, you could expect quite a significant impact," said Peter Karanjia, DLA Piper's administrative law appellate practice chair. "But putting them together, and looking at them with the backdrop of other cases, the administrative law doctrine has really significantly moved. And we're only seeing the beginning of it."

Several factors contributed to what became a paradigm-shifting term.

First, with the addition of Justice Amy Coney Barrett in 2020, the court's conservative bloc secured a 6-3 supermajority, which determined the vote breakdown in all but one of the term's four major administrative law cases. Second, its right-leaning members have long signaled their desire to rein in the so-called administrative state, but until now, they either didn't have the opportunity or the votes to enact large-scale changes.

Add on the fact four of the current justices are alumni of the D.C. Circuit — which handles the most administrative law disputes and likely produced justices more confident in tackling those cases — and the executive branch's increasing reliance on administrative agencies to further policy objectives, this session became the perfect administrative law storm, attorneys said.

"The stars just aligned," said Roy Englert, Kramer Levin Naftalis & Frankel LLP's Supreme Court and appellate litigation practice chair.

Attorneys pointed to the court's 2021 decision in *West Virginia v. Environmental Protection Agency*, which **restricted the agency's power** to regulate greenhouse gas emissions from power plants, as the first major signal sent showing the justices were open to questioning prevailing assumptions about the administrative state's authority.

However, as Justice Elena Kagan wrote in her dissent to the court's 6-3 decision in *Loper Bright Enterprises v. Raimondo* wiping out the Chevron doctrine, individual justices have been planting seeds of doubt about the current balance of power for years.

Chief Justice John Roberts wrote for the *Loper Bright* majority that the deference doctrine had been "fundamentally misguided" from the beginning and, after decades of "pruning," had become unworkable. The Supreme Court itself hadn't applied the doctrine since 2016, he said, so it only made sense to free lower courts from its restraints.

"This court has 'avoided deferring under Chevron since 2016' because it has been preparing to overrule Chevron since around that time," Justice Kagan wrote. "That kind of self-help on the way to reversing precedent has become almost routine at this court."

"Stop applying a decision where one should; 'throw some gratuitous criticisms into a couple of opinions'; issue a few separate writings 'questioning the decision's premises'; give the whole process a few years ... and voila! — you have a justification for overruling the decision," she continued.

The ruling in *Loper Bright* was essentially a foregone conclusion given the court's hostility toward the doctrine, attorneys said, but its impact will be compounded by three other opinions handed down in a span of just three business days.

In what many attorneys described as a "sleeper" case, the Supreme Court ruled 6-3 in *Corner Post Inc. v. Board of Governors of the Federal Reserve System* that the Administrative Procedure Act's six-year deadline to bring lawsuits challenging agency regulations doesn't begin until the challenger is harmed by the rule in question.

The decision opens up to new litigation regulations that were thought to be long-settled under a previous understanding that the statute prohibited lawsuits filed six years after the federal regulation was finalized.

"It's safe to say that overall, [*Loper Bright* and *Corner Post*] together will have some destabilizing effect," Crowell & Moring LLP partner Amanda Shafer Berman said. "But *Corner Post* is going to be much more destabilizing."

Wyatt Kendall, a Morris Manning & Martin LLP partner, agreed, saying the combination "opens up the

floodgates to a number of challenges of federal rules across the board," from environmental regulations to tax rules to technology directives and more. There are a number of interests groups on both sides of the political spectrum "champing at the bit" to challenge regulations that impede their policy objectives, Kendall said.

"Taken together, these cases are going to have a revolutionary impact," said Alston & Bird LLP partner Dan Jarcho.

The court's 6-3 decision in *U.S. Securities and Exchange Commission v. Jarkesy*, which held the agency's use of in-house courts to pursue certain securities fraud enforcement actions violated the Seventh Amendment's jury-trial right, will likely act as a launch pad for similar challenges to other agencies' use of in-house court systems, attorneys said.

And in *Ohio v. EPA*, the justices' 5-4 ruling, which halted the agency's implementation of a cross-state smog reduction plan while litigation challenging the move as arbitrary and capricious plays out, leaves open questions on whether the Supreme Court has expanded the definition of arbitrary and capricious, said Meg Tahyar, head of the financial institutions and fintech team at Davis Polk & Wardwell LLP.

"It's a strong statement to the executive branch and the administrative state: Don't try to retrofit statutes into places where Congress didn't think about going," she said.

The Supreme Court's liberal faction criticized the court's rulings as acts of judicial hubris that wrongly take power away from the executive and legislative branches and place judges "at the apex of the administrative process as to every conceivable subject," as Justice Kagan wrote in her Loper Bright dissent.

"Make no mistake: Today's decision is a power grab," Justice Sonia Sotomayor noted in her dissent to the court's *Jarkesy* decision.

But attorneys said those claims might not be completely fair.

"Deference is a fact of life," said Elena Chachko, an assistant professor at the University of California at Berkeley Law School.

In a vast majority of cases, judges will still defer to an agency's interpretation of a statute if they find it persuasive under the *Skidmore* doctrine, attorneys said. That doctrine was established in the Supreme Court's 1944 ruling in *Skidmore v. Swift & Co.* and instructs judges to consider a federal agency's interpretation when deciding what a statute or term means.

Some of the broader, more far-reaching regulations may be on the chopping block following this term, attorneys said, but they believe most long-settled regulations will remain on the books.

"This is not the end of the world by any means," Cooley LLP partner Robert McDowell said.

McDowell, a former commissioner for the Federal Communications Commission, said most federal agencies have been preparing for the downfall of *Chevron* deference ever since the Supreme Court announced it would review the *Loper Bright* case.

Some had developed alternative reasons to support newly enacted regulations, like the FCC's decision to

explain how its revived net neutrality regime is based on the best reading of the Communications Act. Others had already stopped relying on the doctrine to support their rules since several lower courts had followed in the Supreme Court's footsteps and stopped invoking the deference rule.

"You will see changes in reasoning in the short term until agencies find their footing," McDowell said. "It might take lawyers at agencies a little bit longer to write better orders, but it won't be a permanent collateral effect."

Judges will also be hesitant to reopen rules that entire industries have relied on for years, no matter how significantly a new entity claims to have been harmed by them, Clark Hill PLC member Jerry Worsham said.

"I don't think this is an assault on the administrative state," he said. "It just puts it back to the way it was taught when I was in law school, that you have three equal branches of government."

Davis Polk's Tahyar agreed.

"This isn't just red team, blue team," she said. "This is a rebalancing. This is trying to get things to work."

Of course, there are some legitimate concerns, especially when it comes to forum-shopping since APA plaintiffs can choose where to file their lawsuits. George Washington University law professor Paul Schiff Berman said there may be a shift from the D.C. Circuit to the Fifth Circuit — which oversees courts in Texas, Louisiana and Mississippi — as the main venue for challenges to regulatory actions.

"The major impact of [Loper Bright] is to give those judges who are inclined to be hostile to administrative regulation a freer hand to strike down any regulation that goes even a little bit beyond the four corners of the statute," he said.

But several of the statutes that give administrative agency's their regulatory powers have individual statute-of-limitations or forum limitations. The Clean Air Act, for example, requires challenges to EPA actions involving national standards to be filed in the D.C. Circuit.

And other factors, like the merits of a plaintiff's claims, could work against them, attorneys said.

"The fact that you can challenge something doesn't mean you necessarily have a strong legal claim," UC Berkeley Law's Chachko said.

Cooley's McDowell said there may be an uptick in lawsuits filed following this term, but he doesn't expect the trend to last. Challengers to administrative regulations were already a "litigious bunch" before these monumental decisions, he said.

"It's hard to have more" lawsuits, he said. "Will we have more relative to the past? Maybe initially over the next five years. But 15, 20 years from now, will we be seeing a sustained higher volume than the normal trend? I don't think so."

--Editing by Philip Shea and Dave Trumbore.

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