How Justices Upended The Administrative Procedure Act

By **Alene Taber and Beth Hummer** (August 16, 2024)

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In three cases handed down over the final three days of its last term, the U.S. Supreme Court made fundamental changes to the federal Administrative Procedure Act that undermine Congress and the executive branch by shifting power to the judiciary.

The APA promotes transparency and guarantees public input in the agency rulemaking process, establishes the means for the public to challenge a federal agency decision implementing and applying congressional enactments — the so-called citizen suit — and sets forth the procedure for defendants to challenge enforcement decisions.

In Loper Bright Enterprises v. Raimondo, Corner Post Inc. v. Board of Governors of the Federal Reserve System, and U.S. Securities and Exchange Commission v. Jarkesy, the Supreme Court eliminated deference to agency interpretation of statutes, extended the time to challenge a federal agency decision, and established the right to a jury trial when civil penalties are sought, respectively.

Superficially, these decisions appear to be a win for business by limiting regulatory overburden. In fact, they sharply curtail public, including business, input. Since courts are not bound by the APA, their decisions will lack the full spectrum of input from all interested parties.

Only well-funded litigants will be able to influence the decision making. And, by shifting decision making from administrative agencies to the judiciary, the Loper Bright, Corner Post and Jakesy troika create great uncertainty and unpredictability — while simultaneously limiting opportunity for clarity regarding duties and obligations.

Federal Agency Interpretations of Ambiguous Statutes Receive No Deference

On June 28, Loper Bright Enterprises v. Raimondo ended the 40-year-old precedent set by the court's decision in Chevron U.S.A. Inc. v. National Resources Defense Council.[1] Under the standard colloquially called "Chevron deference," courts deferred to the implementing agency's reasonable judgment about the meaning of ambiguous or partially silent statutes.

A court did not substitute its own interpretation for the agency's. Federal courts deferred to federal agencies even where other reasonable interpretations existed. Courts only rejected agency interpretations inconsistent with statutory directives, or that interfered with intended congressional policy.

The courts decided that Congress intended for Chevron deference to bridge the gap when statutes were silent, or authority was delegated to agencies with subject-matter expertise to implement and enforce the law. For example, courts applied Chevron deference to uphold the U.S. Environmental Protection Agency's rule that excluded discharges from water transfers from National Pollutant Discharge Elimination System permitting requirements.

For 40 years, Congress has legislated knowing it could rely on courts to defer to expert

agency interpretations that are informed by public input as guaranteed by the APA. But in Loper Bright, the Supreme Court decided that the Constitution and the APA assign the responsibility to interpret laws to the courts alone.

The court announced that "agencies have no special competence in resolving statutory ambiguities. Courts do." Meanwhile, it ignored courts' limited ability to evaluate complex scientific and technical matters necessary to implement many laws.

The court rationalized that Congress really intended the courts to handle technical statutory questions — even though Congress never took steps in the last 40 years to curtail reliance on Chevron deference.

Without Chevron deference, federal judges will now rely on their independent judgment to decide the correct interpretation of a statute, even when Congress expressly delegates that authority to an agency. The Supreme Court thus shifted society from rules applicable to all in the same way to piecemeal application decided one judge at a time.

The court sought to soften this blow by announcing that prior Chevron deference cases remain good law and must be followed. But federal courts may not be willing to indefinitely sustain Chevron deference in new challenges to existing regulations already tested and upheld using the Chevron deference standard.

The Supreme Court's elimination of Chevron deference shifts the power to interpret ambiguous statutes to the judiciary, without a concomitant increase in qualified federal judges able to preside over these disputes.

Deadline to Challenge Federal Agency Decisions Extended Beyond Six Years

On July 1, in Corner Post Inc. v. Board of Governors of the Federal Reserve System, the Supreme Court decided that when a statute does not specify a deadline to sue, each plaintiff's six-year window under the APA to challenge a federal agency's decision starts when that particular plaintiff is actually injured by the decision.[2]

Corner Post works a monumental change, because the window to sue used to start for all on the date the agency's decision was published.

Attacking the legality of an agency decision implementing a statute is called a facial challenge. Facial challenges matter because they can prevent implementation of an entire regulatory framework.

An "as-applied" challenge attacks the agency's decision only as applied to a particular plaintiff. The as-applied challenge leaves the statutory scheme in place to govern all other parties. The Corner Post decision means that no regulatory framework will ever be settled, as new plaintiffs with new claims can continue to challenge agency actions forever.

The Supreme Court's reasoning was straightforward. A plaintiff cannot sue until it suffers injury because of the final agency's decision. When the final decision was made is irrelevant to whether a plaintiff was injured. Otherwise, plaintiffs injured more than six years after the agency's decision could never bring facial challenges.

But, as the dissent recognized, the new rule means no deadline to challenge long-existing regulations exists, which will be "profoundly destabilizing for both Government and businesses." It is precisely for this reason there had been a distinction between as-applied

and facial challenges.

The legal community shares no consensus as to the practicable implications of Corner Post. Some claim that because the lawfulness of many regulations are settled within six years of adoption, and these decisions would likely bind later challenges, not much will change. Others worry that agencies will be perpetually at risk of suits, creating uncertainty and chaos for businesses, environmental interests and the public.

One thing is certain: This new APA landscape gives plaintiffs the ability to overturn regulations long held valid under Chevron deference — and for the courts to reinterpret regulations in the absence of the APA process that guaranteed public input.

A few examples of regulations and decisions that could be reopened include:

- The EPA's designation of, or failure to designate, critical habitat under the Endangered Species Act;
- The U.S. Forest Service's issuance of special use permits for individual projects;
- Federal agency decisions under the National Environmental Policy Act regarding the need for, or adequacy of, environmental review;
- EPA toxicology reviews that reflect the agency's assessments of human health impacts;
- The EPA's approval of water quality standards under the Clean Water Act; and
- Individual U.S. Army Corps of Engineers decisions on permits under the Clean Water Act.

Defendants in Certain Enforcement Actions Entitled to a Jury Trial

On June 27, the Supreme Court took aim at administrative law judges and administrative proceedings in SEC v. Jarkesy.[3]

In the aftermath of subprime loans crashing the economy, Congress enacted the Dodd-Frank Act to reform Wall Street and protect consumers. The Dodd-Frank Act permitted the SEC to prosecute anti-fraud actions administratively or in federal court.

In Jarkesy, the court held that SEC enforcement of anti-fraud regulations seeking civil penalties constitutes a legal proceeding affecting the private rights of defendants, which entitles a defendant to a jury trial in federal court. The SEC's reliance on in-house administrative hearings conducted by administrative law judges, according to the court, violates defendants' Seventh Amendment rights to a jury trial, because a proceeding that can impose a penalty is legal, not equitable.

Jarkesy abrogates longstanding congressional authority to decide who adjudicates violations of statutes. Agency adjudication is distinct from a jury process; the switch to trial by jury will change not only who presides, but also which procedural, discovery and evidentiary rules apply, and who finds facts. Under longstanding rules governing appeals that dictate deference to factual findings in the trial courts, any errors in fact-finding can be extremely difficult to correct.

Congress has authorized numerous agencies to prosecute enforcement actions in administrative proceedings, including the EPA. These authorizations may now be unconstitutional.

In any EPA enforcement action to impose a penalty, a defendant may request to be prosecuted in federal court. But the EPA is unlikely to have the resources to adjudicate every violation that defendants choose to have decided by a jury. And courts are unlikely to be able to promptly adjudicate these violations when swamped by a tidal wave of new case filings. Buckle up!

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[1] Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc. (1984), 467 U.S. 837, overruled by Loper Bright Enterprises v. Raimondo (2024), 144 S.Ct. 2244.

[2] Corner Post Inc. v. Board of Governors of Federal Reserve System (2024), 144 S.Ct. 2440.

[3] Securities and Exchange Commission v. Jarkesy (2024), 144 S.Ct. 2117.