Administrative Law:

The New Landscape for Regulated Businesses

CASES REVIEWED

SEC v. Jarkesy

Loper Bright Enterprises v. Raimondo

Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.

CFPB v. Cmty. Fin. Servs. Ass'n of Am.

By Mark A. Perry, Joshua Wesneski and Jacob Altik
Weil, Gotshal & Manges
Appeals & Strategic Counseling

The Supreme Court's 2023-2024 term was a big one for administrative law. Four major cases examined the relationship between Executive Branch agencies and the other branches of our tripartite federal system. The Court ruled for the agency in one case (CFPB v. Cmty. Fin. Servs. Ass'n of Am.) and against the agencies in three others (SEC v. Jarkesy, Loper Bright Enterprises v. Raimondo, and Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.).

The through line is the separation of powers – the Court's ongoing efforts to ensure that each branch exercises the functions, and only the functions, conferred on it by the Constitution. These are structural cases that will clarify and refine the role of administrative agencies, and affect the liberty of individuals, corporations, and other entities, for decades to come.

Supreme Court Ushers in Big Changes to Administrative Law

The Supreme Court's 2023-2024 term was a big one for administrative law. Four major cases examined the relationship between Executive Branch agencies and the other branches of our tripartite federal system. The Court ruled for the agency in one case (*CFPB v. Cmty. Fin. Servs. Ass'n of Am.*) and against the agencies in three others (*SEC v. Jarkesy*, *Loper Bright Enterprises v. Raimondo*, and *Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*). The through line is the separation of powers—the Court's ongoing efforts to ensure that each branch exercises the functions, and only the functions, conferred on it by the Constitution. These are structural cases that will clarify and refine the role of administrative agencies, and affect the liberty of individuals, corporations, and other entities, for decades to come.

***SEC v. Jarkesy*, No. 22–859 (June 27, 2024)**

Opinions: Roberts, C.J., for the majority (joined by Alito, Gorsuch, Kavanaugh, and Barrett, JJ.). Gorsuch, J., concurring (joined by Thomas, J.). Sotomayor, J., dissenting (joined by Kagan and Jackson, JJ.).

Holding: The SEC cannot prosecute claims seeking civil penalties in its administrative courts.

Background and Holding

In *Jarkesy*, the Court held that the Securities and Exchange Commission ("SEC") cannot pursue civil penalties for securities fraud claims in the SEC's own in-house courts, because the defendant has a constitutional right to a jury trial for such claims. Under the federal securities laws, the SEC has the option to bring an enforcement action against a defendant either by filing a lawsuit in federal court or by initiating an administrative enforcement proceeding in-house and in front of the SEC's own Administrative Law Judge ("ALJ"). In the Dodd-Frank Act, Congress gave the SEC the power to seek civil penalties in administrative proceedings. *Jarkesy* arose from an in-house administrative proceeding imposing civil penalties on the respondent, who then challenged the constitutionality of the proceeding on a number of grounds, including the Seventh Amendment.

Writing for a 6-3 majority, Chief Justice Roberts reasoned that the Seventh Amendment's jury trial right was implicated by the statutory securities fraud claims because of the close relationship between those claims and common law fraud. The Court held that these claims do not fall within the "public rights" exception that allows Congress to delegate adjudication of certain claims to a non-Article III administrative tribunal, because the claims were akin to common law fraud claims that historically must be tried by a jury. Chief Justice Roberts emphasized that the determination of whether a claim involves private rights or public rights turns on the

"substance of the suit," and "not where it is brought, who brings it, or how it is labeled."

> **"A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator."**

The Court in *Jarkesy* did not address two other grounds relied on by the Fifth Circuit to hold the SEC's administrative proceeding unlawful: (1) the delegation of legislative power to the SEC to decide where to bring securities fraud actions; and (2) the statutory restrictions on presidential removal of SEC ALJs.

Analysis and Implications

Jarkesy limits the SEC's enforcement power in key ways and could have significant consequences for other administrative agencies. The SEC has already been moving away from filing contested actions in-house in recent years, but as Justice Sotomayor noted in dissent, "more than 200 statutes authoriz[e] dozens of agencies to impose civil penalties for violations of statutory obligations." *Jarkesy* will likely force agencies to bring suits for civil penalties in federal court, where defendants have greater procedural protections and a jury trial right. *Jarksey* may also reduce the government's likelihood of success in a given case: As Justice Gorsuch noted in his concurrence, the "SEC won about 90% of its contested in-house proceedings compared to 69% of its cases in court."

Jarkesy's biggest impact may be on agencies that, as the dissent notes, can *only* bring civil penalties in agency proceedings (and not in federal court), including the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and others. Those agencies may have no avenue going forward for seeking civil penalties, unless Congress amends the statute to authorize suits in federal court.

Public Rights Doctrine

Although *Jarkesy* is focused on cases involving civil penalties and the Seventh Amendment jury trial right, its broader discussion of the public rights doctrine may implicate other proceedings as well. The distinction between private and public rights affects not just whether a party is entitled to a jury trial, but also whether a case can be heard by an administrative tribunal at all. The Court explained that a suit concerns private rights, and therefore must be heard by an Article III court, if it "is in the nature of an action at common law." But the Court did not otherwise try to "definitively explain" the confusing category of public rights, which covers things like relations with Indian tribes, administration of public lands, payments to veterans, pensions, and patent rights. Instead, the Court simply stated that, for common law actions, there is a presumption in favor of exclusive Article III jurisdiction.

***Loper Bright Enterprises v. Raimondo*, No. 22–451 (June 28, 2024)**

Opinions: Roberts, C.J., for the majority (joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, JJ.). Thomas, J. and Gorsuch, J., concurring. Kagan, J., dissenting (joined by Sotomayor and Jackson, JJ.).

Holding: *Chevron v. NRDC* is overturned; under the APA, courts must exercise their independent judgment on all legal questions, rather than defer to reasonable agency interpretations of ambiguous provisions.

Background and Holding

In *Loper*, the Court overturned its decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and held that agency interpretations of a statute are not entitled to any deference in judicial proceedings. Under the Court's longstanding opinion in *Chevron*, courts were required to defer to an agency's construction of a statute the agency administers if the statute was ambiguous and the agency's interpretation was reasonable. In a 6-3 decision written by Chief Justice Roberts, the Court held this framework is inconsistent with the Administrative Procedure Act's ("APA") requirement that "court[s] shall decide all relevant questions of law." 5 U.S.C. § 706.

> **"In the business of statutory interpretation, if it is not the best, it is not permissible."**

The Court concluded that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA," and it rejected the notion that statutory ambiguities can be presumed to be implicit delegations by Congress to agencies. The Court further concluded that stare decisis did not counsel against (and in fact supported) overturning *Chevron*, as *Chevron* had "proved to be fundamentally misguided" and "[e]xperience has also shown that *Chevron* is unworkable."

Analysis and Implications

Loper will impact a variety of areas of administrative law. For example, agencies will be forced to toe the statutory line more closely in rulemaking, and elsewhere. *Loper* will also affect litigation. Looking backwards, the Court attempted to narrow its holding by saying that cases finding "specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology." But it is unclear whether statutory stare decisis should even apply in the lower courts—Justice Barrett, for one, has written that it should not. And stare decisis may not apply to challenges to old rules on new grounds. While the Supreme Court has signaled it will not use *Loper* to reevaluate old rules, many lower courts may.

Loper is already having a tangible impact in the lower courts. For example, in *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, the Northern District of Texas preliminarily enjoined the FTC's new non-compete rule, citing *Loper* and declining to defer to the FTC's interpretation of its own statutory authority. And in three other cases—*Tennessee v. Becerra*, No. 1:24-cv-00161, *Texas v. Becerra*, No. 6:24-cv-00211, and *Florida v. HHS*, No. 8:24-cv-01080—the courts cited *Loper* in issuing preliminary injunctions against an HHS anti-discrimination rule. The impact of *Loper*, however, should also not be overstated. The Supreme Court has been steadily retreating from *Chevron* over the past several years. For example, the Court declined to apply *Chevron* in *Johnson v. Guzman Chavez* (2021), *Salinas v. United States RRB* (2021), and *Epic Systems Corp. v. Lewis* (2018), to name a few. And, in *Kisor v. Wilkie*, which involved deference to agencies' interpretations of their own regulations, the Court stated that a court must exhaust *all* the tools of statutory interpretation before finding ambiguity and cited *Chevron*. Accordingly, agencies have relied less and less on the doctrine to defend their exercise of authority. Moreover, the effect of *Loper* may be primarily deterrent; that is, agencies may simply refrain from advancing novel or textually dubious interpretations of statutes to support rulemaking. It thus remains to be seen whether and to what extent *Loper* actually affects the success rate of challenges to agency statutory authority.

Skidmore **Deference**

An important question going forward will be the nature of *Skidmore* deference, which allows courts to defer to the interpretive guidance of an agency depending on its "power to persuade." It is unclear, for example, whether *Skidmore* is any different than the ordinary weight afforded to a persuasive argument from a litigant. The Court in *Loper* offered one possible distinction, saying that "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." Whether this has to do with the agency's persuasiveness—or perhaps represents a kind of liquidation of meaning through contemporary use—*Skidmore* will be one potential obstacle to challenging old rules that have been interpreted consistently by the agency. Rules that have swapped interpretations with changing administrations, however, are less likely to enjoy any level of deference.

Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.**, No. 22–1008 (July 1, 2024)**

<u>Opinions</u>: Barrett, J., for the majority (joined by Roberts, C.J., and Thomas, Alito, Gorsuch, and Kavanaugh, JJ.). Kavanaugh, J., concurring. Jackson, J., dissenting (joined by Sotomayor and Kagan, JJ.).

<u>Holding:</u> A claim "accrues," for the APA's six-year statute of limitations, when the plaintiff suffers the injury required to press her claim in court.

Background and Holding

In *Corner Post*, the Supreme Court held 6-3 that the six-year statute of limitations for challenges to agency rules under the APA does not begin to run until the date the plaintiff is first injured by the rule, even if that does not occur until long after the rule's promulgation. *Corner Post* arose from a 2011 Federal Reserve rule capping the fees that a merchant can charge the consumer's debit card issuer per transaction. The challenger was a truck stop convenience store that accepts debit-card payments and was subject to the rule, but was not incorporated until 2017—more than six years after the rule was promulgated. Following a majority of circuits holding that the statute of limitations under the APA begins to run for all plaintiffs on the date a rule is promulgated, the Eighth Circuit affirmed dismissal of the challenge as untimely.

> **"Section 2401(a) embodies the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action."**

Justice Barrett, writing for the majority and reversing, interpreted 28 U.S.C. § 2401 to mean that a claim "accrues" only after the plaintiff suffers the injury required to press her claim in court. This default meaning applies unless Congress has expressly indicated otherwise in the text of the statute, the government's policy arguments notwithstanding.

Analysis and Implications

In conjunction with *Loper*, the decision in *Corner Post* could expand the number of agency rules that are litigated, because rules may be challenged long after they are promulgated. Regulated entities that are formed (or become subject to a rule) years after a rule's promulgation can now launch fresh challenges. And *Corner Post* raises the prospect of strategic litigation brought by newly-incorporated entities funded or supported by other regulated entities whose claims would be time barred.

The majority and dissent disagreed about the practical significance of this. In some ways, *Corner Post* is not a large change; before *Corner Post*, a regulated entity could still challenge the lawfulness of a rule when an enforcement action was brought by an agency against it. Thus, old rules were always open to legal challenge. Moreover, parties seeking to challenge longstanding rules will still have to fight through old precedent, which may be binding or, at the very least, persuasive. But practically speaking, challenging agency action through enforcement has always been risky, and *Corner Post* therefore gives regulated entities a way to preemptively attack a rule rather than having to decide whether to comply with or violate the regulation. Additionally, some rules (including the rule at issue in *Corner Post*) by their nature may never be enforced against an interested party, and so *Corner Post* does in fact provide a new opportunity for those interested parties to bring a legal challenge. Accordingly, *Corner Post* opens the door for new challenges to old agency rules and

creates opportunities for businesses and industry groups to reevaluate their regulatory strategies—something the dissent predicts will be destabilizing.

***CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22–448 (May 16, 2024)**

<u>Opinions</u>: Thomas, J., for the majority (joined by Roberts, C.J., Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson, JJ.). Kagan, J., concurring (joined by Sotomayor, Kavanaugh, and Barrett, JJ.). Alito, J., dissenting (joined by Gorsuch, J.).

<u>Holding:</u> The CFPB's funding provision does not violate the Appropriations Clause.

Background and Holding

In *CFSAA*, the Court held in a 7-2 opinion authored by Justice Thomas that the CFPB's funding mechanism does not run afoul of the Appropriations Clause. The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. With the CFPB, Congress tested the limits of this clause by allowing the agency to draw from the Federal Reserve System the amount it deems "reasonably necessary to carry out" the CFPB's duties, subject only to an inflation-adjusted cap far above what the CFPB had ever requested. But the Court found that the Appropriations Clause requires only "a law that authorizes expenditures from a specified source of public money for designated purposes." And the statute that provides the CFPB's "funding meets these requirements." The Court supported its reasoning with Congress's early practice, which included a variety of funding schemes, if not an exact match for the CFPB's regime.

Analysis and Implications

CFSAA likely forecloses any meaningful challenges to agency action based on the Appropriations Clause. In fact, Justice Alito in dissent stated that the Court has turned the Clause into a "minor vestige." The Court's broad rule was sufficient to uphold the CFPB's flexible funding scheme, so it is difficult to imagine what funding scheme would fail the Court's test, so long as the scheme was implemented by Congress. But it is also hard to imagine that this case will have much of an impact on other doctrines in administrative law.

> **"Although there may be other constitutional checks on Congress' authority to create and fund an administrative agency, specifying the source and purpose is all the control the Appropriations Clause requires."**