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The Supreme Court rebalances the administrative state

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Recent Supreme Court decisions show a strong and continued rebalancing of power in the administrative state that has been years in the making. This update outlines what it means for the future.

Introduction

The 2023?2024 Supreme Court term continued a strong rebalancing of power among the courts, the administrative state and, if it pays attention, Congress. This rebalancing will impact how executive branch and independent agencies engage in rulemaking, issue guidance and engage in enforcement. Courts will exercise more independent judgment and look more critically at agency actions. Nonetheless, agencies continue to have significant power, authority and discretion. We do not believe that the rebalancing will result in an immediate seismic shift in the administrative state as predicted by some media commentators. When *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* was decided in 1984, it took years for its implications of strong deference to administrative agencies to be widely understood. Similarly, it will take years to understand the full import of the new status quo. We expect an uptick in litigation, rather than a "blitzkrieg" or "tsunami." We agree with those commentators who have observed that litigation challenging agency actions will not be brought solely by regulated entities, but also stakeholders that favor greater regulation. Future litigation will not necessarily favor one set of interests over another. This update briefs on the main themes in the new status quo and what it means for the future.

Nondelegation not taken up

A change that did not occur has been ignored by most commentators. One of the most sweeping proposed theories for limiting the power of the administrative state is the expansion of the nondelegation doctrine, which has been pushed by some legal scholars. The nondelegation doctrine recognizes that, under the Constitution, Congress cannot delegate its legislative powers to the executive branch or independent agencies, unless it supplies an "intelligible principle" to guide the exercise of such power. The nondelegation doctrine has not frequently been used by courts in recent history and the Supreme Court this term declined to take it up despite opportunities to do so.

The Supreme Court had the opportunity to address nondelegation in *SEC v. Jarkesy*, given that the Fifth Circuit held that "Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III court or to adjudicate the matter itself."[1] Nevertheless, because the Supreme Court held that the Seventh Amendment required a jury trial in an Article III court for issues related to common law fraud, it declined to reach the issue, leaving the Fifth Circuit's nondelegation holding intact.

As for *Loper Bright Enterprises v. Raimondo* and its companion case, *Relentless v. Department of Commerce*, even though the petitioners alluded to the nondelegation doctrine in their brief,[2] the Supreme Court did not reach the issue. The Supreme Court noted that Congress can permissibly delegate authority to agencies, while also noting that it must do so in a constitutional manner. The Court stated, "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency," the reviewing court "fulfills [its role under the APA] by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking'

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within those boundaries."[3] The Supreme Court clarified that in the absence of *Chevron*, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation."[4] It remains to be seen whether the Supreme Court will weigh in on – or continue to sidestep – the nondelegation doctrine in a future term, but the references in the *Loper Bright* opinion to "constitutional limits" of delegation and statements from concurring and dissenting opinions in other cases[5] suggest that the Court's interest may be turning to the constitutional scope of permissible delegation.

The new status quo

There are a number of themes that emerge from these recent Supreme Court decisions, which demonstrate the rebalancing of power:

- **Textualism and fixed original intent**. A majority of the Supreme Court continues to favor tight textual analysis, including careful examination of the structure of statutes, and is skeptical when agencies give new meaning to older statutes, instead viewing statutes as having a "single, best meaning" that is "fixed at the time of enactment."[6] For example, in *NFIB v. OSHA,* regarding the 2022 vaccine mandate, the Supreme Court majority considered the statutory text and absence of interpretive support from the legislative and agency history to conclude that OSHA's vaccine mandate exceeded its authority to set workplace safety measures. A similar line of reasoning was emphasized in *Biden v. Missouri* (2022 HHS vaccine mandate case) and *Fischer v. United States* (2024 federal obstruction statute case).
- **Major questions**. The major questions doctrine, endorsed in recent terms, is another way in which the Supreme Court majority is limiting the power of agencies. The major questions doctrine is a mixture of textualism, structure and original intent infused with a concern about the separation of powers. In its June 2022 opinion in *West Virginia v. EPA* , the Court cited a line of recent precedents in support of the Court's holding that "in certain extraordinary cases" where there is reason to doubt that Congress authorized a particular agency action, "both separation of powers principles and a practical understanding of legislative intent" require the agency to point to "clear congressional authorization" for its action.[7] Exactly one year after *West Virginia v. EPA*, the Court again invoked the major questions doctrine in *Biden v. Nebraska*, striking down the Biden Administration's plan to forgive approximately $430 billion of federal student loans. Notably, in *Loper Bright*, the majority opinion alluded to the major questions doctrine, by including a citation to *West Virginia v. EPA*, as part of a list of refinements the Court has made to *Chevron* deference. As noted in our basic primer on the major questions doctrine and memo on *Biden v. Nebraska*, it was unclear pre-*Loper Bright* whether the major questions doctrine supplanted or fell within one of *Chevron*'s steps. While the *Loper Bright* decision did not address the intersection of the major questions doctrine and the overruling of *Chevron*, we expect that courts will more closely scrutinize agency actions that have significant economic and political impact in the absence of clear statutory authorization.
- **Reasoned "respect" instead of strong deference**. The *Loper Bright* decision overruled *Chevron* on the ground that its core holding – mandatory deference to any reasonable agency interpretation of an ambiguous federal statute – conflicts with the foundational understanding of the judicial role, including as codified in the APA. While strong deference under *Chevron* is dead, the *Loper Bright* opinion made clear that reasoned respect (the word used by the Court instead of deference) under *Skidmore v. Swift* from 1944 remains good law and is viewed favorably. The respect under *Skidmore* in a given case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[8] Courts are now tasked with determining a statute's best meaning, but they may "seek aid from the interpretations of those responsible for implementing particular statutes" and "such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA."[9] The Court in *Loper Bright* also recognized that special considerations apply to agency regulations, where the statute expressly provides agencies the authority to define terms or fill gaps, or to regulate subject to the limits imposed by a term or phrase, such as "appropriate" or "reasonable," which leaves the agency with flexibility. It also remains to be seen whether and how *Loper Bright* might be applied to statutory interpretation and regulations in areas where the executive is often accorded greater deference, such as national security, particularly in light of its emphasis on separation of powers. A forthcoming Davis Polk Client Update will summarize how *Loper Bright* might impact tax regulations.

  The *Loper Bright* majority opinion criticized *Chevron* for granting deference to agency interpretations "that have been inconsistent over time" and undermining reliance interests by "becom[ing] a license authorizing an agency to change positions as much as it likes."[10] There were also concerns expressed about flip-flopping in oral argument. Importantly, the *Loper Bright* majority opinion also declined to overturn past decisions made on the basis of *Chevron* deference, stating that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in

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interpretive methodology."[11]

The *Loper Bright* majority opinion cited to *Kisor v. Wilkie,* which was the 2019 decision that preserved but narrowed *Auer v. Robbins,* but did not clarify how overruling *Chevron* would affect *Auer* deference. *Auer* deference refers to the deference given to an agency's interpretation of its own ambiguous regulations. It is not certain what *Loper Bright* bodes for *Auer* deference, including whether *Kisor* will have proven to be "more a stay of execution than a pardon."[12]

- **Stronger version of arbitrary or capricious?** Agency actions, including rulemaking, can be challenged as "arbitrary" or "capricious" under the APA if they are not reasonable or reasonably explained by the agency. This term, the Supreme Court stayed the EPA's Good Neighbor plan in *Ohio v. EPA*, holding that the litigants were likely to succeed on the merits that the EPA's final rule was not "reasonably explained" and "the agency failed to supply 'a satisfactory explanation for its action[s]'" because the EPA did not provide a reasoned response to particular concerns posed by the commenters. This decision may signal a greater willingness of the Court to scrutinize the administrative record and look more critically at agency responses when applying the arbitrary-and-capricious standard, with agencies being held to a higher bar for adequately addressing concerns of commenters in rulemaking.
- **More time for challenges**. In *Corner Post v. Board of Governors of the Federal Reserve System*, the Supreme Court clarified the time period for facial challenges of agency actions by holding that the default six-year statute of limitations for raising APA challenges to agency regulations "accrues" when a party is injured, not when an agency action becomes final. As a result of *Corner Post*, an APA challenge is not time-barred until six years after the plaintiff is first injured by the challenged agency action, no matter when the agency action was taken and no matter whether the challenge is characterized as facial or as-applied.
- **More jury trials**. In *Jarkesy*, the Supreme Court held that an SEC claim seeking civil penalties for alleged violations of an anti-fraud provision of the securities laws must be filed in federal court, instead of an administrative proceeding – because the Seventh Amendment entitled the defendants to a jury trial. Notwithstanding that this type of fraud was codified in the securities laws, the Court analogized the SEC's claims to common law fraud claims. It is virtually certain that courts will apply the *Jarkesy* ruling to other types of government claims akin to common law claims, including both other types of SEC claims and claims by other federal agencies. For example, CFIUS, CFPB, FDIC, Federal Communications Commission, and OFAC, among other agencies, currently use administrative adjudication, including in at least some cases to seek civil penalties. Not all agencies have the statutory authority to go to a federal court. It remains to be seen how the administrative process will play out in those agencies. In the meantime, to the extent those administrative proceedings are used to pursue claims that are akin to common law claims and do not fall within the "public rights" exception to the Seventh Amendment right to a jury trial, those actions now seem more vulnerable to a similar constitutional challenge, which may lead to a shift in the agencies' power dynamics when negotiating orders with respondents. For more information, see our client update regarding *Jarkesy.*

Implications and key takeaways

Taken as a whole, these lines of cases lead to several key takeaways. We caution, however, that we expect the implications to play out over a number of years and to affect different agencies in different ways.

- **Agencies still have significant power**. Agencies will continue to have significant power, authority and discretion but will be called upon to consider more carefully their statutory authority and constitutional limits. In particular, agencies with broad statutory delegations of authority, like the ability of prudential regulators to interpret "safety and soundness," will continue to wield significant power, subject to a standard of reasoned respect. Interpretive guidance and enforcement authority remain powerful tools for agencies.
- **Less pushing the envelope**. We expect to see more successful challenges to final rules when agencies push the envelope of statutory authority, particularly when agencies attempt to retrofit old statutes to apply in novel ways. For example, we believe these recent Supreme Court cases make challenges to the SEC's climate disclosure rule, the FTC's non-compete rule, the SEC's dealer rule and the EPA's rule on greenhouse gas emissions from the power sector more likely to succeed. That said, rulemaking, guidance and enforcement within the traditional statutory and regulatory framework will continue, and even without strong deference under *Chevron*, courts are likely to often side with agency interpretations under *Skidmore* reasoned respect.
- **It cuts both ways**. It is not pre-ordained that the rebalancing will favor one set of stakeholders over another. Some have characterized the decisions as pro-business because companies, especially larger ones, have the wherewithal to sue. But public advocacy groups also have the funding to sue and can be expected to do so. *Chevron* itself reversed a D.C. Circuit opinion authored by the late Justice Ruth Bader Ginsburg that granted the relief sought by the environmental group that brought the case. And the landmark Supreme Court decision granting the EPA the authority to regulate greenhouse gas emissions under the Clean Air Act ignored the late Justice Antonin Scalia's arguments in dissent favoring application of *Chevron* deference.[13]

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- **Less regulatory "whiplash" with a change in the White House**. *Chevron* and cases that followed it stood for the notion of multiple "permissible" interpretations of a single statutory text.[14] This notion helped create room for regulatory swings from one administration to the next that has characterized many areas of law over the past decade, including power plant emissions and wetlands protection in environmental law. After *Loper Bright*, we expect this tendency to be constrained given that courts will get to decide the single "correct" meaning of a statute. On the other hand, there could be less uniformity among the courts, at least for a period of time before decisions converge or the Supreme Court steps in, if lower courts reach different interpretations rather than deferring to one agency interpretation. In any case, the wide delegations of authority expressly provided to the EPA, the OCC, the Federal Reserve and the FDIC, as well as many other agencies under their statutes will continue to give agencies some room to employ its discretion to further the policy priorities of the governing administration.
- **Longer rulemaking**. The timeline to propose, adopt and implement new and amended rules is likely to be extended as agencies take more time to carefully examine statutory authority and address concerns of commenters, particularly where rulemaking requires interagency coordination. Challenges to rulemaking may also take longer to process through the court system without *Chevron* deference. These considerations, along with *Loper Bright*'s critique of *Chevron* encouraging agencies to change positions, may also contribute to less flip-flopping in rulemaking policy from administration to administration.
- **Call to Congress**. Statutes will always be imperfect and contain some degree of ambiguity, but these recent Supreme Court decisions exhort Congress to deal with hard issues and update statutes where needed to address changes, instead of punting to executive branch or independent agencies, and to be reasonably specific in authorizing agencies to act. More congressional direction – not inaction or silence – is needed to empower agencies to engage in ambitious policymaking. In an already divided Congress, this may further complicate the legislative process.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Mary Jane Dumankaya
+1 212 450 3654
maryjane.dumankaya@davispolk.com

Joseph A. Hall
+1 212 450 4565
joseph.hall@davispolk.com

Suiwen Liang
+1 212 450 3974
suiwen.liang@davispolk.com

Paul Marquardt
+1 202 962 7156
paul.marquardt@davispolk.com

Margaret E. Tahyar
+1 212 450 4379
margaret.tahyar@davispolk.com

David B. Toscano
+1 212 450 4515
david.toscano@davispolk.com

Mario J. Verdolini
+1 212 450 4969
mario.verdolini@davispolk.com

David A. Zilberberg
+1 212 450 4688
david.zilberberg@davispolk.com

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1 *Securities and Exchange Commission v. Jarkesy*, 603 U.S. ___, slip op. at 6 (2024).

2 Brief for Petitioners at 17, 26-27, *Loper Bright Enterprises v. Raimondo,* 603 U.S. ___ (2024) (No. 22-451).

3 *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, slip op. at 17-18 (2024).

4 *Id*. at 35.

5 *See, e.g.*, *Gundy v. United States*, 588 U.S. 128 (2019) (Gorsuch, J., dissenting); *Gundy*, 588 U.S. 128 (2019) (Alito, J. concurring).

6 *Loper Bright*, slip op. at 22.

7 *West Virginia v. EPA*, 597 U.S. 697, 700 (2022).

8 *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

9 *Loper Bright*, slip op. at 16.

10 *Id*. at 21 & 33.

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[11] *Id*. at 34.

[12] *Kisor v. Wilkie*, 588 U.S. 558, 592 (2019) (Gorsuch, J., concurring).

[13] *Massachusetts v. EPA*, 549 U.S. 497 (2007) (Scalia, J., dissenting).

[14] In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court concluded that *Chevron* deference applies to agency interpretations that are inconsistent with prior practice as long as they are adequately explained by the agency. 545 U.S. 967, 981 (2005).

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