Organizations Face Uncertainty After Landmark SCOTUS Agency Decisions

By: James R. Layton and Mollie G. Mohan

Conservative politicians and commentators have long sought to reign in the "administrative state"—the system of centralized administrative decision-making that began in the New Deal and has continued to expand over the decades. Courts have resisted that effort—recognizing, perhaps, that reducing the scope of administrative agency authority would lead to more disputes decided by judges, increased burdens on the courts, and a likelihood of inconsistent decisions among courts.

In three high-profile decisions issued at the end of the U.S. Supreme Court's October 2023 term, the Court significantly limited the role of the regulatory state and substantially enlarged the role of courts. The three decisions restrict the circumstances in which agencies and administrative law judges can resolve disputes, eliminate deference to agency interpretation of statutes, and expand the time in which agency rules can be challenged.

Below is a summary of the key decisions and what organizations need to know.

Challenges to Internal Agency Enforcement

The first of the landmark decisions, ***Securities and Exchange Commission v. Jarkesy***, 144 S. Ct. 2117 (2024), addresses internal agency enforcement. The Seventh Amendment to the U.S. Constitution promises jury trials in "suits at common law." The Securities Exchange Commission (SEC) has long had authority to impose civil penalties through its own procedures, without having to present the issue to a jury. In *Jarkesy*, the Court addressed the use of this procedure to issue sanctions in cases involving securities fraud. The Court emphasized the "presumption . . . in favor of Article III courts" and held that, because fraud claims existed in the common law, the Seventh Amendment applies, and Jarkesy was entitled to a jury trial in federal court rather than being sanctioned by the SEC through its own procedures. [1]

Jarkesy may not apply to all agency enforcement actions, as its logic applies only to claims that, like fraud, have parallels in common law. But suits have been filed challenging similar procedures utilized by the Federal Trade Commission and National Labor Relations Board. And it is likely that similar challenges will be filed against other agencies.[1] Companies faced with internal agency enforcement should consider whether there are viable grounds to challenge such enforcement under *Jarkesy*.

Federal regulatory agencies may not have the resources—or the statutory authority—to move their enforcement actions to the courts. Thus, there might be a decline in agency enforcement in some areas. Courts have limited resources and already often face bloated dockets. Any increase in enforcement actions filed in court may lead to delays in final decisions for those facing agency enforcement.

Judicial Deference to Agency Interpretation

The second of the three cases, ***Loper Bright Enterprises v. Raimundo***, 144 S. Ct. 2244 (2024),[2] addresses the deference given to an agency's interpretation of statutes. Such agency interpretations may be made in adjudicating particular matters or in rulemaking. In *Loper*, commercial fishermen challenged a rule promulgated by the National Marine Fisheries Service. The Court reached back to invalidate a decade-old regulation requiring private funding of fishery protections. To achieve this end, in a highly anticipated move, the Court addressed the merits of and ultimately abrogated *Chevron U. S. A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Forty years ago, the Supreme Court held in *Chevron* that agencies were entitled to deference when interpreting statutes within their realm of expertise. Courts have not always followed that rule but, in general, courts have used the *Chevron* doctrine to justify accepting agency interpretations when they were reasonable—even if the court would have read the statute differently—to avoid having to themselves engage in detailed legislative analysis and construction.

In *Loper*, the Supreme Court expressly overruled *Chevron*. The Court again emphasized the importance of the judiciary, holding that "the final interpretation of the laws" is "the proper and peculiar province of the courts."[3] The Court held that, pursuant to the duties prescribed by the Constitution and clear text of the Administrative Procedure Act (APA), courts are to apply their own interpretation of statutes, even when it contradicts long-standing agency interpretations, including interpretations embodied in agency regulations. The Court did clarify that, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."[4] As an example, the Court pointed to the Fair Labor Standards Act, which provides that certain terms are to be "defined and delimited by regulations of the [Department of Labor] Secretary."[5] But the Court made clear that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[6]

The impact of *Loper* cannot be overstated. Now, courts may give their own, different reading to statutes, despite the statutory interpretations given by agencies. Abandoning *Chevron* deference opens the door to individuals and companies "rolling the dice" and challenging agency interpretations that have been in place for many years, seeking more favorable interpretations. These challenges may result in success or conversely, a court could adopt an even less favorable interpretation than the agency's prior construction.

In addition to revisiting long-settled past interpretations of statutes, moving statutory construction questions away from national agencies to individual judges likely will lead to inconsistent adjudications, resulting in less certainty depending on the jurisdiction or even the particular judge assigned to a given case. Organizations should expect a period of turmoil, as the inevitable challenges work their way through the judicial system. Indeed, district and appellate courts have already begun to cite *Loper* with varying results.[7]

It is unclear what impact the *Loper* decision will have on agency rulemaking as, again, *Loper* did not entirely eliminate deference to agency rulemaking. But because the interpretation of a statute through rulemaking in certain contexts is no

longer entitled to deference, agencies might be more reluctant to allocate the resources required to go through the notice and comment process required to promulgate a rule. Agencies might instead assert their position when adjudicating individual enforcement actions—a method that is less transparent, comes after the fact, and opens the door to inconsistent statutory interpretations.

Judicial Challenges to Administrative Regulations

The upheaval of the administrative state was compounded by the Supreme Court's third case, handed down on the last day of the term, ***Corner Post v. Board of Governors***, 144 S. Ct. 2440 (2024). The case addresses when a party can challenge an agency rule. Most courts had applied a 6-year statute of limitations, *i.e.*, a rule could not be challenged more than 6 years after it was promulgated, except as a defense to an enforcement action. The Court allowed Corner Post to challenge a Federal Reserve Board rule addressing interchange fees (charges to merchants for debit card transactions) that had been in place for 10 years before Corner Post sued. The Court held that, under the APA, a claim accrues when the "plaintiff is injured by final agency action."[8] Thus, the 6-year limitations period begins to run not when the regulation is promulgated, but when it has an adverse impact on the plaintiff.

The effect of *Corner Post* is to make federal regulations continuously subject to challenge, so long as the person or organization challenging the rule was not previously impacted by the regulation. When considered alongside *Loper*, the Court's holding casts even more uncertainty on the continuity and reliability of federal regulations.

Key Takeaways

The Court's agency decisions are likely to cause a sea change in the federal regulatory scheme. We may see decreased rulemaking and internal enforcement from the nearly 500 federal agencies and subagencies. We may also see a significant increase in litigation—both in direct challenges to rulemaking and

agency enforcement, and in lawsuits seeking judicial, rather than agency interpretation of statutory language.

Adding a layer of complexity to the current landscape is the fact that this is an election year. How aggressively the federal government defends a particular regulation is often dependent on which party controls the executive branch. Thus, whether a regulation is likely to survive might be dependent on the November election.

Industries interact with agencies in different ways—some industries are heavily regulated or more reliant on federal regulations. Organizations should think through their relationship with federal agencies and carefully consider the compliance requirements of each. Corporate counsel will need to more closely monitor court decisions in applicable jurisdiction(s) as various agency regulations and actions are challenged. Counsel will be tasked with assessing risk profiles and recommending business decisions in a volatile and ever-changing legal landscape. In an era when we can expect different standards applying in different jurisdictions, companies should consider proactively broadening policies where possible to allow for flexibility in these uncertain times.

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[1] The Court stated that the Occupational Safety and Health Administration could continue with internal enforcement because, unlike securities fraud, OSHA did not borrow its cause of action from common law. *Id*. at 2137.

[2] The *Loper* case was consolidated with a second case, *Relentless, Inc. v. Department of Commerce*; we refer to them together as "*Loper*."

[3] *Id*. at 2257 (cleaned up).

[4] *Id*. at 2273.

[5] *Id*. at 2263 n. 5.

[6] *Id*.

[7] *See, e.g., Adee Honey Farms v. U.S*., No. 2022-2105, 2024 WL 3405386, at *5 (Fed. Cir. July 15, 2024) (citing to *Loper* and noting its interpretation of the Continued Dumping and Subsidy

Offset Act was made "after resorting to the traditional tools of statutory interpretation"); *Lyman v. QuinStreet, Inc*., No. 23-CV-05056, 2024 WL 3406992, at *4 (N.D. Cal. July 12, 2024) (quoting *Loper* and accepting the Federal Communication Commission's interpretation of the term "residential phone" in the Telephone Consumer Protection Act (TCPA) because Congress "expressly conferred discretionary authority on the agency to flesh out the TCPA"); *Aguilar v. Attorney General*, No. 18-3320, 2024 WL 3352938, at *3 n. 3 (3rd Cir. July 10, 2024) (conducting *de novo* review of the Immigration and Nationality Act and noting that, despite *Loper*, the Court "reach[ed] the same conclusion as the BIA [Board of Immigration Appeals] did"); *Institute for Fisheries Resources v. Continental Tire the Americas, LLC*, No. 3:23-CV-05748, 2024 WL 3381032, at *3 (N.D. Cal. July 10, 2024) (denying defendants' request for a stay pending the outcome of Environmental Protection Agency's (EPA's) rulemaking, citing to the fact that, in light of *Loper*, the EPA's rulemaking "will not, and cannot, adjudicate" the "controlling issue" in the case); *Kansas v. Garland*, No. 24-CV-01086, 2024 WK 3360553, at *6 (D. Kan. July 10, 2024) (denying preliminary injunction noting that, although the plaintiffs identified instances where the Bureau of Alcohol, Tobacco, Firearms & Explosives "may have effectively attempted to rewrite the statute," the Bipartisan Safer Communities Act "is probably broad enough to authorize something along the lines of what the Final Rule has done" under *Loper*).

[8] *Id*. at 2447.