Farewell to the two-step: Supreme Court overrules Chevron

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In a big week for administrative law watchers, the Supreme Court issued a pair of 6-3 decisions paring back the powers of administrative agencies. In *Loper Bright Enterprises v. Raimondo*, the Court overruled *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* and in *Jarkesy v. S.E.C.* it held that the Seventh Amendment prohibits agencies from seeking civil penalties for suits resembling actions at common law before administrative tribunals. Taken together, these cases demonstrate the Court's focus on separation of powers. Below, we consider their potential impact on the Federal Trade Commission.

Loper Bright Enterprises v. Raimondo

Loper Bright overrules *Chevron*, eliminating the deference given to agencies' interpretations of ambiguous statutes. Since 1984, courts have employed a two-step framework when reviewing an agency's statutory interpretations. First, courts determined "whether Congress has directly spoken to the precise question at issue."[1] If it had not and there was any ambiguity, courts moved on to the second step, deferring to the agency's interpretation if it was a "permissible construction of the statute."[2] Under *Chevron*, courts were obliged to cede their independent judgment to an agency's reasonable interpretation.

In *Loper Bright*, the Supreme Court held that this deference "defies the command of the [Administrative Procedure Act] that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'"[3] Agencies, according to the Court, "have no special competence at resolving statutory ambiguities. Courts do."[4] Going forward, courts must do what they do best and "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[5]

For forty years*, Chevron* has given agencies an advantage in disputes over the statutes they administer. It has required courts to defer to agency interpretations, even when the agency's interpretation has evolved (sometimes dramatically) over time. In his concurring opinion, Justice Gorsuch points to the FCC's changing rules regarding the classification of broadband internet across four administrations as an example of the "regulatory whiplash that *Chevron* invites."[6]

The death of Chevron deference will be felt across administrative agencies, including at the Federal Trade Commission ("FTC" or "Commission"). Most immediately, the decision may impact the Commission in legal challenges it faces to two rules: the Non-Competes Clause Rule and the Combating Auto Retail Scams (CARS) Rule. Previously, if there was a dispute about the meaning of the statute at issue, the FTC could simply point to *Chevron* and expect to prevail. For example, in *National Automobile Dealers Association v. Federal Trade Commission*, the court applied *Chevron* to determine that the FTC's interpretation of "uses" under the Fair and Accurate Credit Transactions

Act of 2003 was reasonable and entitled to deference.[7] [Full disclosure: the author worked on this case on behalf of the FTC.] Going forward, a reviewing court will now use its own judgment to resolve any ambiguity.

Beyond rulemaking, *Loper Bright* could also potentially impact any FTC efforts to expand its authority under Section 5 of the FTC Act. Section 5 is famously broad (and, some might even say, ambiguous). Entities and individuals that find themselves in a dispute with the agency over statutory questions, such as what constitutes an unfair method of competition, may now press their case before a "neutral party 'to interpret and apply' the law without fear or favor … ."[8]

Jarkesy v. S.E.C.

In *Jarkesy v. S.E.C.*, the Court ruled that the Seventh Amendment right to a jury trial requires that the SEC seek civil penalties for securities fraud in district court. The Court found that, where an agency's claims are legal in nature, they must be tried before a district court. In determining whether claims are legal (and not, for example, equitable or admiralty), courts must consider both the remedy and cause of action. When a monetary remedy is meant to punish rather than "restore the status quo," it is legal rather than equitable, and implicates the Seventh Amendment.[9] In addition, the Court found that the "public rights" exception (Congress's ability to assign certain matters to an agency without a jury) did not apply, because fraud is in the nature of an action at common law. Suits akin to those brought in common law "presumptively concern private rights, and adjudication by an Article III court is mandatory."[10]

While this decision will affect administrative agencies beyond the SEC, its immediate impact on the FTC is likely to be limited. The Commission is already required to go to district court to obtain civil penalties. It is an open question whether there might be other remedies sought by the FTC in administrative litigation that are likewise legal in nature and implicate private rights, which may no longer be obtained in-house. For example, the FTC has sometimes issued cease and desist orders in deception cases which ban Respondents from doing business in a particular industry.[11] If this remedy is viewed as punitive and implicates a core private right, it could only be imposed by an Article III court. Other novel remedies the Commission has obtained in settlements, such as so-called algorithmic disgorgement, may also be off-limits in an agency cease and desist order.

Because the Seventh Amendment jury trial requirement resolved the case, the Court did not reach two other questions that could have affected the FTC. First, the Court did not determine whether the ability of an administrative agency to determine whether to bring an action administratively or in federal court violates the non-delegation doctrine. Second, the Court did not consider whether an ALJ's two layers of for-cause removal protections violates separation of powers. These and other issues, such as whether the FTC's role as both prosecutor and judge in administrative proceedings constitutes a due process violation, will continue to be the subject of litigation. If these questions ultimately find their way back to the Court, at least two Justices have signaled that Article III and the Due Process Clause of the Fifth Amendment also limit agencies' ability to handle certain matters administratively. In a concurrence, Justice Gorsuch, joined by Justice Thomas, writes that, because the SEC would deprive Jarkesy of property, "due process demands 'nothing less than the process and proceedings of the common law… .'"[12] This means use of an Article III court and "not the use of ad hoc adjudication procedures before the same agency responsible for prosecuting the law, subject only to hands-off judicial review."[13]

The fight against the so-called administrative state seems destined to continue for a bit longer. We will keep you posted.

Notes

[1] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

[2] *Id.* at 843.

[3] *Loper Bright Enterprises v. Raimondo*, 603 U.S. __(2024) (slip op., at 21).

[4] *Id.* (slip op., at 23).

[5] *Id.*

[6] Gorsuch, J., concurring at 24.

[7] *Nat'l Auto. Dealers Ass'n, v. FTC*, 864 F. Supp. 2d 65 (D.D.C. May 22, 2012).

[8] *Id.* at 6.

[9] SEC v. Jarkesy, 603 U.S. ___(2024) (slip op., at 9).

[10] *Id.* at 14.

[11] *See, e.g.*, In the Matter of Traffic Jam Events, Docket No. 93-95 (Oct. 25, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/x200041-202-3127-traffic-jam-events-llc-matter (cease and desist order bans Traffic Jam and David J. Jeansonne II from participating in any business relating to the advertising, marketing, promotion, distribution, or sale or leasing of motor vehicles).

[12] Gorsuch, J., concurring at 12. *See also*, *Axon Enterprise, Inc. v. FTC,* 598 U.S. 175, 204 (2023) (Thomas, J., concurring).

[13] *Id.*