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Federal Administrative and Regulatory Litigation | Advisory

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Federal Regulatory and Administrative Law Issues Impacted by Recent Supreme Court Decisions

As the Supreme Court's new term begins, it will be considering several cases that could have a significant impact on cases involving the Administrative Procedure Act and other federal regulatory litigation. What follows is a summary of last term's APA-related decisions followed by a preview of two cases currently on the Court's docket for the new term that similarly may affect APA cases and other federal regulatory litigation. The decisions discussed below from last term address issues of statutory interpretation, deference to agency action and decision-making, timeliness of claims against the government, and the legitimacy of conduct by quasi-governmental corporations. The Court's rulings in these cases are relevant to a broad range of disputes with federal and state agencies. The same is likely to be true of the decisions slated for this term in the cases previewed at the end of this Advisory.

Statutory Interpretation

In three decisions involving statutory interpretation, the Court made clear that the plain meaning of terms can sometimes give way to contextual factors that require a different meaning, and also that there are limits to the deference that courts must give agency interpretations. Collectively these decisions provide ammunition for advocates seeking either to stretch, or limit, the reach of statutory provisions.

1. ***Yates v. United States*, 135 S. Ct. 1074 (2015) – The Context Trumps a Statute's Plain Meaning Case**.

In *Yates*, the Court considered whether a fishing boat's captain was validly convicted of throwing undersized fish overboard, under a provision of the Sarbanes-Oxley Act of 2002 which makes a felon of "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document or tangible object." The issue in *Yates* was whether the discarded fish was a "tangible object" within the meaning of that provision, now codified in 18 U.S.C. § 1519. In a 4-1-4 decision, Justice Ginsburg for the plurality and Justice Alito concurring separately concluded that the provision did not apply to fish and therefore reversed Yates' conviction.

The plurality acknowledged all but explicitly that the dictionary definition of both "tangible" and "object" covered fish, but concluded that the term "tangible object" in this statute is ambiguous for contextual reasons. While noting that a word's meaning ordinarily accords with its dictionary definition, the plurality stated that this is not always so, citing numerous prior decisions holding that the same words placed in different contexts mean different things. Having found the term "tangible object" ambiguous in context, the plurality then invoked "familiar interpretive guides," plus the rule that ambiguity in criminal statutes should be resolved in favor of lenity, to construe §1519 to cover only tangible objects used to record or store information.

The interpretative guides the plurality relied on to limit § 1519's reach, which all suggested that Congress intended the term "tangible object" in this provision to mean things that record or store information, included: 1) § 1519's caption, "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy;" 2) the title of the section of the Sarbanes-Oxley Act in which § 1519 was placed: "Criminal penalties for altering documents;" 3) the substance of adjacent provisions of title 18, which are "specialized provisions expressly aimed at corporate fraud and financial audits;" 4) the language of § 1519 itself, applicable to whoever "falsifies" or "makes a false entry in" any "record, document, or tangible object – which does not suggest coverage of fish or other objects not used to record or store information.

Justice Alito's concurrence, which called the question close, resolved it the same way on what he termed narrower grounds based on "the statute's list of nouns, its list of verbs, and its title."

2. *King v. Burwell*, 135 S. Ct. 2480 (2015) – the Affordable Care Act Case.

In *King v. Burwell*, the Supreme Court in a 6-3 decision authored by the Chief Justice upheld the IRS regulation that provided subsidies under the Affordable Care Act (ACA) to individuals in States with only federally established, as opposed to state established, American Health Benefit Exchanges (Exchanges). Those who challenged the Regulation had argued that the ACA only authorized federal subsidies to those enrollees who purchase insurance through an Exchange "established by a State," as opposed to one established by the federal government.

The ACA authorized States to establish and operate Exchanges under § 1311 and also authorized the federal government under ACA § 1321 to establish and operate Exchanges in those States that had failed to set up their own Exchanges. However, the language authorizing federal subsidies stated that those subsidies, in the form of premium assistance, would be available only to those who were enrolled through "an Exchange established by the State under section 1311." IRC § 36B(b). The IRS regulation provided subsidies to both.

In upholding the Rule, the Court first held that the phrase "established by a State," in the context of the ACA was ambiguous. The Court, though, declined to accord the IRS *Chevron* deference because it did not believe that Congress intended to delegate such a significant decision to an agency and further, the IRS has no expertise in health care.

The Court then held that the "plain meaning" of the phrase "established by a State" had to take a back seat to congressional intent and it was obvious that Congress would not have enacted a law to provide health coverage for all if in fact a significant number of citizens would be ineligible by virtue of where they lived to receive subsidies.

Scalia wrote a scathing dissent in which he renamed the ACA "Scotuscare."

3. *Michigan v. EPA*, 135 S. Ct. 2699 (2015) – the Regulatory Costs Must Be Considered Case

The Clean Air Act provides that EPA may initiate a rulemaking to develop emissions standards for fossil-fuel powered electric generating plants only if EPA determines it is "appropriate and necessary" to do so, after studying the effect of other provisions of the Act on the emission of pollutants from such plants. EPA determined that initiating the rulemaking was "appropriate and necessary," but in making that determination it did not consider the cost to the power plant owners of complying with the additional standards that would ultimately be promulgated. The EPA concluded instead that costs "should not be considered" in making the determination to launch the rulemaking (although it did later consider cost

during the rulemaking).

The Supreme Court, in a 5-4 decision authored by Justice Scalia, held that EPA was required to consider cost when it made the initial decision to regulate. The Court invoked the *Chevron* test, which requires a court to analyze an agency's interpretation of statutory language in two steps. First, if the statute's meaning is unambiguous the court must apply that meaning and vacate any contrary agency interpretation. Second, if the statute is amenable to more than one meaning, the court must defer to the agency's interpretation so long as it is reasonable.

Michigan v. EPA is notable because, in rejecting EPA's conclusion that cost was not relevant to the initial decision whether it was "appropriate and necessary" to regulate, the Court did not explicitly invoke *Chevron*'s two-step test, and seemingly applied elements of both steps. Noting the "capaciousness" of the phrase "appropriate and necessary," the Court found that the term "appropriate," in particular, is "the classic broad and all encompassing term that includes consideration of all relevant factors." Applying administrative law principles, the Court explained that agencies may not "entirely fail to consider" an important aspect of the problem when deciding if regulation is appropriate. But the Court also stated that there are "undoubtedly" settings in which the phrase "appropriate and necessary" does not encompass cost. Referring to the "deferential standard" of *Chevron*'s second step, the Court said that even under that standard, an agency must operate "within the bounds of reasonable interpretation."

Ultimately *Michigan v EPA* is best read as a *Chevron* step-two case where the Court found EPA's interpretation was unreasonable. But it also instructs more specifically that when determining whether to initiate what proves to be very costly regulation is "appropriate," that term requires an agency to consider cost. The dissent by Justice Kagan agreed that cost is "almost always relevant – and usually highly important" – in agency decision-making, but believed that EPA adequately considered cost in subsequent stages of the regulatory process in determining what particular emissions standards to impose on power plants.

Deference to Agency Action and Decision-Making

In three other cases, the Court clarified the degree of deference (if any) owed to different kinds of actions by federal agencies.

4. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) – the Agencies Can Generally Decide the Scope of their Own Jurisdiction Case.

In *City of Arlington, Texas*, the Supreme Court considered whether an agency's interpretation of a statutory ambiguity in the scope of its regulatory authority is entitled to deference or, put differently, whether *Chevron* deference is appropriately accorded to an agency's interpretation of its own jurisdiction. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), the Court adopted a two-part test to determine when courts must defer to an agency's interpretation. The Court held that:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The majority in *Arlington* rejected the distinction between jurisdictional (big, important) and nonjurisdictional (humdrum, run-of-the-mill) interpretations as the litmus test for according *Chevron* deference. Justice Scalia, writing for the majority, explained that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage," and "judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'non-jurisdictional.'" Rather, "[n]o matter how it is framed, the question a court faces when

confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*" If an agency action is outside of the bounds of its authority, deference is inappropriate because it would give the agency more authority than Congress intended. "Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." In this case, the majority concluded that *Chevron* deference applied because "Congress has unambiguously vested the FCC with *general* authority to administer the Communications Act through rulemaking and adjudication, and the agency action at issue was promulgated in the exercise of that authority." Justice Breyer concurred in part and concurred in the judgment, but wrote a separate opinion.

Chief Justice Roberts wrote a dissenting opinion in which Justices Alito and Kennedy joined. He stated: "A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency."

5. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015) – the Administrative Estoppel Case

This case involved a multi-front battle between two companies over trademarks for their respective products. Both companies make metal fasteners–B&B's fasteners are used in the aerospace industry while Hargis' are used in ordinary construction. B&B's registered trademark is Sealtight. When Hargis sought to register its trademark–Sealtite–B&B instituted an administrative proceeding within the Patent and Trademark Office (PTO) arguing that the two names are confusingly similar and therefore, Hargis' should not be registered. The administrative hearing within the PTO before the Trademark Trial and Appeal Board (TTAB) is governed by the Federal Rules of Civil Procedure and Evidence, complete with the discovery. The salient difference between a federal court proceeding and a PTO proceeding over trademarks is that in the latter there is no live testimony, although deposition testimony can be proffered. The PTO sided with the registrant B&B and declined to register Hargis' mark; bad spelling aside, it was deemed to be confusingly similar to the B&B mark.

In addition to instituting an administrative proceeding before the PTO, B&B also filed suit against Hargis for trademark infringement. Before the district court was able to resolve the case, though, the TTAB announced its decision in favor of B&B. Thereafter, B&B argued that Hargis was estopped from contesting that its trademark is not confusingly similar to the B&B trademark. The district court disagreed holding that the TTAB ruling was not entitled to any preclusive effect because it was not an Article III tribunal. The Eighth Circuit affirmed, but for different reasons, including that Hargis bore the burden before the TTAB while B&B bore the burden in the district court. The Supreme Court reversed.

The Court, in a 7-2 decision by Justice Alioto, held that issue preclusion is not limited to situations where the same issue is before two courts, but rather applies with equal force when an administrative agency is acting in a judicial capacity to resolve a dispute. First, the court noted that although Hargis had not raised a Seventh Amendment issue, the right to a jury trial does not undermine normal notions of administrative issue preclusion. Second, the Court held that the Lanham Act itself does not prevent the application of issue preclusion. The fact that a TTAB decision is subject to de novo review in district court does not affect that conclusion.

The Court went on to address the critical issue, namely, whether likelihood of confusion for registration purposes is the same standard as likelihood of confusion for infringement purposes. The Court held that the two issues are really the same and that Hargis was estopped from arguing in district court that its proposed mark was not confusingly similar to B&B's issued trademark. Justices Thomas and Scalia dissented.

6. *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015) – the Agencies Can Reverse Interpretative Rules Case

This case involved a dispute over the Department of Labor's efforts to determine whether mortgage-loan officers are covered by the Fair Labor Standards Act (FLSA). In 1999 and 2001, the Department issued letters stating that mortgage-loan officers do not qualify for the overtime "administrative exemption" to the FLSA. In 2004, DOL promulgated new

regulations, through notice-and-comment rulemaking, that provided that employees in the financial services industry "generally meet the duties requirements for the administrative exception." When the Mortgage Bankers Association (MBA) requested an opinion interpreting those regulations, DOL in 2006 issued a new opinion that mortgage loan officers qualified for the exemption, but in 2010, DOL reversed course and stated that mortgage loan officers are not exempt from FLSA's overtime regulations. Relying on the D.C. Circuit's decision in *Paralyzed Veterans of Am. v. D.C. Arena*, LP, 117 F.3d 579 (D.C. Cir. 1997), MBA filed suit, claiming that the 2010 letter was procedurally invalid because notice-and-comment rulemaking was required to change DOL's interpretation of its regulations.

In a unanimous decision written by Justice Sotomayor, the Court held that the *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements. The APA expressly exempts interpretive rules from notice-and-comment requirements, and the Court reasoned that the exemption applied equally when agencies amend or repeal existing interpretive rules. Although MBA attempted to argue that the 2010 interpretation should be classified as a legislative rule, MBA had previously conceded the rule was interpretative, and it was too late in the litigation to change its litigation strategy.

The Court rejected MBA's arguments for upholding the *Paralyzed Veterans* doctrine on two grounds. First, the Court held that when an agency revises its interpretation of what a regulation means, it does not constitute an amendment of the regulation itself and thus does not mandate the use of notice-and-comment procedures. Second, the Court held that the APA already provides recourse to regulated entities from agency decisions that skirt notice-and-comment provisions by placing a variety of constraints on agency decision-making such as the arbitrary and capricious standard. The Court also noted that Congress sometimes includes safe harbors—as it did in the FLSA–that shelter regulated entities from liability when they comply with previous agency interpretations.

Justices Scalia, Thomas, and Alito each concurred in the judgment.

What Makes an Entity's Conduct Governmental?

In a case with implications for various quasi-governmental entities, the Court held that Amtrak has sufficient ties to the federal government to be able to exercise governmental functions.

7. ***Dep't of Transportation v. Assoc. of American Railroads*, 135 S. Ct. 1225 (2015) – the Amtrak Is A Government Entity Case**

By statute the National Railroad Passenger Corporation (commonly known as Amtrak) is empowered, jointly with the Federal Railroad Administration, to issue "metrics and standards" pertaining to performance and scheduling of passenger railroad services. The question in this "*Amtrak"* case was whether in issuing those metrics and standards, Amtrak acts properly as a governmental entity or instead as a private corporation to which Congress unlawfully delegated governmental authority. The D.C. Circuit held that Amtrak was a private entity that had wrongly exercised "regulatory authority," relying on statutory provisions stating that Amtrak "is not a department, agency, or instrumentality of the United States Government" and that Amtrak "shall be operated and managed as a for-profit corporation."

The Supreme Court reversed unanimously. In an opinion for eight Justices (Justice Thomas concurred only in the judgment), Justice Kennedy explained that those congressional pronouncements are not dispositive for purposes of separation of powers analysis under the Constitution. Instead, the Court held that Amtrak is a governmental entity, at least "for purposes of determining the constitutional issues in the present case," because Amtrak "was created by the Government, is controlled by the Government, and operates for the Government's benefit."

Numerous factors supported that conclusion. For example, Amtrak's ownership and corporate structure reveals that the Secretary of Transportation holds all of its preferred stock and most of its common stock, and that its nine-member board of directors includes the Transportation Secretary and seven members appointed by the President and confirmed by the Senate. Those eight members select Amtrak's president. Congress sets a salary limit for the board members, and all the

appointed members are removable by the President without cause. Amtrak is required by statute to submit numerous reports annually to Congress and the President, is subject to the Freedom of Information Act and must maintain an inspector general pursuant to the Inspector General Act. Amtrak also is required by statute to pursue numerous, specific goals and is dependent on very substantial federal financial support (over $1 billion annually). Finally, the Court also cited the precedent of *Lebron v. National Railroad Passenger Corp.,* 513 U.S. 374 (1995), which held that Amtrak was a governmental actor for purposes of a First Amendment challenge to its conduct.

Can Statutes of Limitation on Claims Against the Government be Tolled?

In a case involving the Federal Tort Claims Act, the Court clarified that some statutes of limitations on claims against the federal government are "jurisdictional" and cannot be tolled, but others, which are not "jurisdictional," are subject to equitable tolling, estoppel, and similar doctrines.

8. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) – the FTCA Statutes of Limitations Case

At issue in *United States v. Kwai Fun Wong*, was whether the Federal Tort Claims Act's two time bars are subject to equitable tolling or whether they are jurisdictional and thus absolute. The FTCA establishes to time bars. First, a claimant must present his or her claim to the agency within two years of it accruing and second, a claimant must file suit within six months after the agency denies the claim. If either of these two bars is not met, the claims "shall be for- ever barred." In this consolidated case, one respondent filed the initial claim within the 2-year limitation period, but filed suit after the 6-month period had lapsed. In that case, the respondent had filed a motion to amend an existing suit against the government to add the FTCA claim; the magistrate judge recommended that the motion be granted, but the district judge did not adopt the magistrate's recommendation until after the 6-month period had run. The government moved to dismiss arguing that the 6-month period was jurisdictional. On reconsideration the trial court agreed; the Ninth Circuit sitting *en banc* reversed.

In the other case, plaintiff only learned about the federal government's involvement in approving a defective highway median that led to two deaths three years into her wrongful suit against the State of Arizona. After filing her tardy claim, she filed suit against the federal government within the six-window. The district court dismissed and the Ninth Circuit reversed.

The Court, in a 5-4 decision by Justice Kagan, agreed that the FTCA's two statutes of limitations are not jurisdictional and therefore subject to equitable tolling. The Court noted that it has repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has "clearly state[d]" as much. "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." The Court concluded that the FTCA does no such thing.

Preview of Two Cases on This Term's Docket That Will Likely Impact APA and Other Federal Regulatory Cases

Decisions in the following cases already accepted by the Supreme Court for review in its current term are also likely to hold lessons for APA-related cases and other federal regulatory litigation.

1. *Hawkins v. Community Bank of Raymore*, No. 14-520.

In *Hawkins* the Supreme Court is reviewing an Eight Circuit decision dismissing claims for marital status discrimination asserted by two wives who executed guarantees for a loan extended to a company controlled by their husbands. The Equal Credit Opportunity Act prohibits discrimination on the basis of marital status "against any applicant, with respect to any aspect of a credit transaction." In pursuing their claims for such discrimination, the wives in *Hawkins* relied on a Federal Reserve Board regulation, promulgated under the ECOA, that that "the term [applicant] includes guarantors." The Eight Circuit held, however, that the statutory term "applicant" unambiguously excludes guarantors. It reasoned that "[a] guarantor engages in different conduct, receives different benefits, and exposes herself to different legal consequences than does a credit applicant." Therefore, applying *Chevron* step one, the court refused to apply the

regulation defining applicant to include guarantors. In reaching this conclusion the Eight Circuit expressly disagreed with the Sixth Circuit's decision in *RLBB Acquisition, LLC v. Bridgemill Commons Dev. Grp.,* 754 F.3d 380 (6th Cir. 2014), which found the statutory term "applicant" was "easily broad enough to capture a guarantor." That court therefore proceeded to step two of the *Chevron* analysis, and found the Federal Reserve Board Regulation's inclusion of guarantors as applicants was based on a permissible construction of the statute. Several state courts have agreed with the Sixth Circuit's conclusion that wives whose only connection to a loan transaction are "applicants" entitled to sue for marital status discrimination under the ECOA.

In *Hawkins t*he Supreme Court likely will resolve the conflict among the lower courts as well as the question whether the statutory term "applicant" is ambiguous in the context of the ECOA, and if so, the further question whether the Federal Reserve Board's regulation including guarantors as applicants is a permissible construction of the statute. In addressing these questions the Court will provide further guidance *Chevron's* application. It also will be interesting to see in the *Hawkins* decision what use the Court makes, if any, of its statutory interpretation decisions last term in *Yates* and *King v. Burwell*.

2. *Spokeo v. Robins,*No. 13-1339.

The Supreme Court accepted *Spokeo* for review to address the following question set forth in the petition for certiorari: whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute. The case arose under the Fair Credit Reporting Act, which requires consumer reporting agencies to assure maximum possible accuracy for consumer reports. Mr. Robins sued Spokeo, a website that provides user with information about individuals, including occupation, economic health and wealth level, for willful violations of the FCRA based on allegedly false information Spokeo posted about him. As indicated by the question posed in the cert. petition, the Ninth Circuit held that violation of a statutory right is usually a sufficient injury in fact to confer standing." That court also dismissed separation of powers concerns, applying its precedent holding that the constitution does not prohibit Congress "from elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."

Spokeo potentially has substantial practical significance in the realm of consumer class action litigation, because like the FCRA, many other federal consumer protection statutes also authorize causes of action based on statutory violations with no requirement that any further injury be alleged. For practitioners who litigate federal administrative and regulatory cases, the Court's decision in *Spokeo* may further specify the requirements for Article III standing, which is often a threshold issue to surmount when challenging federal agency action on APA or other grounds.

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