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Impact on Federal Regulatory and Administrative Law Issues of Recent Supreme Court Decisions

This Term the Supreme Court will consider several cases that could have a significant impact on administrative law and federal regulatory litigation. What follows is a preview of three of those cases, as well as a summary of last Term's administrative law-related decisions. The decisions discussed below from last Term address issues of when agency action is "final" and subject to judicial review, deference to agency action, standing and justiciability, statutory interpretation and the reach of federal authority under the Commerce Clause.

Preview of Administrative Law Cases on This Term's Docket

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

Gloucester Cty. School Bd. v. G.G., No. 16-273

Gloucester Cty. involves access by a transgender individual to a school restroom, but the underlying administrative law issue has potentially far-reaching effect. Title IX prohibits discrimination "on the basis of sex," while its implementing regulation permits "separate toilet, locker rooms, and shower facilities on the basis of sex," if the facilities are "comparable" for students of both sexes. In this case, a Department of Education official opined in an unpublished letter that Title IX's prohibition of sex discrimination "includes[s] gender identity," and that a funding recipient providing sex-separated facilities "must generally treat transgender students consistent with their gender identity." The Fourth Circuit afforded this letter "controlling" deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997), which requires deference to an agency's interpretation of its own regulations. On remand, the district court ordered the Gloucester County School Board to allow G.G. – who was born a girl but identifies as a boy – to use the boys' restroom.

The Court granted cert. on two questions: first, whether courts should extend deference to an unpublished agency letter that was adopted in the context of the very dispute in which deference is sought; and second, whether with or without deference to the agency, the Education Department's interpretation of Title IX and its implementing regulation should be given effect. The Court's response to these questions could alter *Auer's* requirement of deference to an agency's interpretation of its own regulations, which several Justices have criticized and urged to be reconsidered.

Lightfoot v. Cendant Mortgage Corp., No. 14-1055

In *Lightfoot* the Court will decide whether the "sue and be sued" clause in Fannie Mae's statutory charter automatically confers federal jurisdiction on any claim by or against the federal-chartered corporation. The issue is important because more than 40 federal agencies and instrumentalities have statutory "sue and be sued" authority, although there are variations in the wording of the provisions. The Court has addressed the jurisdictional significance of such provisions in a line of cases dating back to the early 19th century, when it held in one case that the charter of the first Bank of the United States did not confer federal jurisdiction, and shortly thereafter, that the charter of the second Bank of the United States did. The difference turned on the specific reference in the second Bank's charter to federal courts. Most recently, the Court reiterated that reference to federal courts can be determinative, holding that the statutory charter of the American Red Cross – which authorizes it "to sue and be sued in courts of law and equity, State or Federal" – confers federal court jurisdiction over suits by or against the Red Cross.

Fannie Mae's charter authorizes it "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." The Ninth Circuit held that the reference to federal court brought the clause within the rule reaffirmed in the Red Cross case, but a dissenting judge argued that the phrase "in any court of competent jurisdiction" – which did not appear in the Red Cross charter – makes the Fannie Mae provision different and requires that federal jurisdiction be established independently of the "sue and be sued" clause in Fannie Mae's charter. The Court will resolve the issue in *Lightfoot*.

Bank of America Corp. v. City of Miami, No. 15-1111

Bank of America involves who has standing to sue under the Fair Housing Act (FHA), and for what types of injury. The case is one of many filed by local governments nationwide against mortgage lenders alleging that as a result of discriminatory lending practices many loans in minority neighborhoods defaulted, leading to foreclosures which in turn reduced real estate tax revenues and also led to blight that increased the cost of police and other services.

The Eleventh Circuit, citing the FHA provision allowing any "aggrieved" party to sue, noted that courts have held other statutes with nearly identical language to require that the aggrieved persons be within the "zone of interests" protected by the statute. But the appeals court read a prior Supreme Court decision to hold that the FHA allows a suit by anyone that has Article III standing – including the City of Miami, which does not even allege it suffered any housing discrimination.

The Eleventh Circuit also held, with respect to proximate cause, that as long as the harm alleged in an FHA case was "foreseeable," it need not meet the "directness" requirement that other circuits have imposed in FHA cases. As a result, the appeals court allowed the City of Miami to proceed with its rather attenuated theory of causation.

The Supreme Court granted cert. to review both the standing and causation rulings of the Eleventh Circuit. Both rulings may have significance for cases involving claims under other federal statutes.

Review of Last Term's Administrative Law Decisions

Finality of, and Deference to, Agency Action

In two cases last Term, the Court increased opportunities for challenging agency action, by recognizing that the practical impact of agency action can make it final and subject to judicial review and by requiring a reasoned explanation for regulations that reverse an agency's longstanding statutory interpretation. In a third case, the Court applied a statute precluding judicial review of an agency action despite the ordinary presumption that judicial review is available, and also rejected challenges to a regulation the Court found plainly authorized by statute.

United States Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807 (2016)

The question in *Hawkes* was whether an approved "jurisdictional determination" (JD) issued by the U.S. Army Corps of Engineers constitutes "final agency action" for which there is no other adequate remedy, thus making it judicially reviewable under the Administrative Procedure Act, 5 U.S.C. § 704. The Clean Water Act (CWA) regulates discharges of pollutants into "waters of the United States," but whether a specific parcel contains such waters can be difficult to determine, particularly because bogs, swamps, wetlands and the like can fit within the statutory definition. To assist in making determinations regarding the scope of "waters of the United States" subject to CWA jurisdiction, the Corps created an administrative process for issuing JDs.

Applying the two-part test of *Bennett v. Spear*, 520 U.S. 154 (1997), the Court found the approved JD to be final agency action, because it marked the consummation of the agency's decision-making process and had legal consequences. The Corps did not dispute that JDs satisfy the first condition, as JDs are issued after extensive fact-finding, they are valid for five years and Corps regulations describe them as "final agency action." Regarding the second *Bennett* condition, the Court found that the "definitive nature" of approved JDs also gives rise to appreciable legal consequences. Under the "pragmatic approach" reflected in prior decisions, the Court noted that an approved JD finding that property does not contain jurisdictional waters -- a "negative" JD -- is binding on the Corps (and on EPA) for five years, creating a "safe harbor" from enforcement action. Correspondingly, an affirmative JD represents a denial of that safe harbor.

The Court also rejected the Corps' claim that JDs are not reviewable because Hawkes Co. had other adequate remedies: they could either discharge material without a permit, risking enforcement action during which they could argue no permit was necessary, or they could apply for a permit and seek judicial review if dissatisfied with the results. The Court found neither alternative adequate; the first because regulated parties need not await enforcement proceedings or risk serious penalties before obtaining judicial review, and the second because the onerous and expensive permitting process also does not lead to an eventual "adequate" remedy.

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016)

Encino Motorcars held that *Chevron* deference was not due to a 2011 Department of Labor (DOL) regulation that changed DOL's longstanding interpretation of a statutory provision and adopted an interpretation opposite to the position set out in the proposed rule. The 2011 regulation provided that "service advisors" at automobile dealerships are not exempt from the overtime pay requirements of the Fair Labor Standards Act under a statutory provision exempting "any salesman, partsman or mechanic primarily engaged in selling or servicing automobiles." In 1970, DOL had issued an interpretive rule finding service advisors were not exempt, but after several courts disagreed with that interpretation, in 1978 DOL issued an opinion letter stating service advisors could be exempt and that DOL would soon revise its regulations. DOL finally undertook new rulemaking in 2008, noting that courts had uniformly held that service advisors were exempt and proposing to revise its regulations to conform to existing practice and declare service advisors exempt. In 2011, however, DOL changed course again, and with little explanation, issued a final rule providing that service advisors are not exempt.

Under *Chevron's* "step-two," an agency's reasonable interpretation of an ambiguous statute is generally entitled to deference. But *Chevron* deference is not warranted where an agency fails to follow correct procedures in issuing the regulation. And one of the basic procedural requirements of administrative rulemaking, the Court emphasized in *Encino Motorcars*, is that an agency must give adequate reasons for its decisions. The Court found that DOL's 2011 regulation failed to meet that basic requirement: "the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of [DOL]'s change in position and the significant reliance interests involved." In fact, DOL "gave almost no reason at all." The Court remanded with directions that the court of appeals construe and apply the statutory exemption without giving controlling weight to the 2011 DOL regulations.

Cuozzo Speed Technologies, LLC v. Lee, 136 S. Ct. 2131 (2016)

Cuozzo involved a petition to institute a proceeding for review of a patent before the Patent Trial and Appeal Board (Board), known as an inter partes review proceeding. Two statutory provisions were at issue: 35 U.S.C. § 314(d), which provides that "[t]he determination by the Director [of the Patent Office] whether to institute an inter partes review . . . shall be final and non-appealable," and 35 U.S.C. § 316(a)(4), which grants the Patent Office authority to issue "regulations . . . establishing and governing inter partes review under this chapter."

The petition to institute the proceeding in *Cuozzo*, filed by a competitor, alleged only that claim 17 of the patent was invalid, but the Patent Office Director instituted an inter partes review of claims 10 and 14 as well as claim 17, finding them interrelated. Citing 35 U.S.C. § 313, which says that petitions must be pleaded "with particularity," *Cuozzo* claimed that the Patent Office had instituted a proceeding in violation of that requirement – because the proceeding involved patent claims not cited in the petition -- and therefore the bar set forth in § 314(d) on judicial review of decisions to institute inter partes proceedings should not apply. The Court rejected that argument, as well as several policy-based arguments for allowing judicial reviewing, explaining that it was required to enforce "what 314(d) says," namely that Patent Office decisions to institute inter partes proceedings "shall be final and non-appealable."

Cuozzo also challenged a Patent Office regulation requiring the agency, when conducting inter partes review, to give a patent claim "its broadest reasonable construction in light of the specification of the patent in which it appears." See 37 CFR § 42.100(b). Applying *Chevron*, the Court concluded there was a statutory "gap" regarding the standard to apply in construing patent claims in inter partes proceedings, and that the standard set forth in the regulation was reasonable and well within the Patent Office's statutory authority to issue rules "governing inter partes review." See 35 U.S.C. § 316(a)(4).

Standing, Mootness and Justiciability

In four decisions last Term, the Court addressed important justiciability issues: standing, mootness and a limited statutory bar on claims against the federal government.

Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)

Spokeo involved a claim by Thomas Robins that he was the victim of inaccurate information gathered and disseminated on the internet by Spokeo, Inc., a "people search engine." The information that was disseminated disclosed that Robins was married, had children, was in his 50s, had a job and was relatively affluent. Robins alleged that none of this was true. He filed a class-action complaint, claiming that Spokeo had willfully failed to comply with the Fair Credit Reporting Act (FCRA), which requires consumer reporting agencies to assure maximum possible accuracy for consumer reports.

The district court dismissed the complaint for lack of standing. The Ninth Circuit reversed, finding that Spokeo's violation of Robins' statutory rights and his personal interest in the handling of his credit information were sufficient to allege injury-in-fact for purposes of Article III standing. According to the Ninth Circuit, the violation

of a statutory right was sufficient injury in fact to confer standing where, as here, Robins had alleged that Spokeo violated *his* personal interests.

The Supreme Court reviewed the well-established requirements for standing under Article III (injury-in-fact, fairly traceable to the challenged conduct of the defendant, and likely to be redressed by a favorable court decision). The Court held that the Ninth Circuit’s analysis of the first requirement was incomplete — it had focused on the requirement that any injury be particularized, but overlooked that such injury must also be concrete (*i.e.*, it must actually exist). The Court explained that with an “intangible injury” like the one asserted by Robins, a court may look to Congress’s judgment, but Congress’ role in identifying and elevating an intangible harm does not automatically satisfy the injury-in-fact requirement because a violation of one of the FCRA’s procedural requirements may result in no harm. The Court recognized that not all inaccuracies—such as identifying an incorrect zip code—cause harm or present a material risk of harm.

The Court did not take any position on whether portraying Robins as more successful than he was adequately alleged an injury-in-fact. The Court instead remanded for the Ninth Circuit to consider both aspects of the injury-in-fact requirement – *i.e.*, that the injury alleged be both concrete and particularized.

Wittman v. Personhuballah, 136 S. Ct. 1732 (2016)

When a district court in Virginia struck down a congressional redistricting plan that was to apply to the November 2016 election, 10 members of Congress from Virginia, who were intervenors in the proceedings below, appealed. The Supreme Court held that the intervenors lacked standing to pursue the appeal and ordered the dismissal of the appeal.

The suit began in 2013. Three voters from the affected district challenged the redrawn plan as an unconstitutional gerrymander. The district court agreed. The Commonwealth of Virginia did not appeal, but the intervenor members of Congress did, even though none of them lived in or represented the affected district. (The appeal was taken directly to the Supreme Court under 28 U.S.C. § 1253, which grants a right of direct appeal from certain three-judge district court orders.) The case bounced back and forth between the Supreme Court and the district court. The district court reinstated its findings, and the Commonwealth again filed no appeal. Again, the Congress Member/intervenors appealed. They alleged that they had standing because the redistricting plan would harm some of their re-election prospects. In the meantime, the district court appointed a special master to develop a new plan which the district court approved in January 2016.

By the time the case was heard, only three of the 10 current and former Members of Congress claimed they had standing. The first, Representative Forbes, initially claimed that if the 2013 plan were upheld, his district would become a safe Democratic district and so he would be compelled to run in a different district. After oral argument, however, he informed the Court that he would seek re-election in a different district whether or not the 2013 plan was reinstated. That announcement eliminated standing for Representative Forbes because no injury Forbes might have suffered was likely to be redressed by a favorable decision.

The other two intervenors, Representatives Wittman and Brat, initially argued that as with Forbes’ district, under the 2013 plan a portion of the “base electorate” would be replaced with “unfavorable Democratic voters” reducing the likelihood of their re-election. Even if this were a cognizable injury, the Court found that they had failed to provide any evidence that an alternative plan would reduce their chances of re-election. Thus, they also lacked standing.

Kingdomware Technologies, Inc. v. United States, 136 S. Ct. 1969 (2016)

Under the Small Business Act, the Department of Veterans Affairs is required to set aside contracts to be awarded to small businesses, including small businesses owned and controlled by service-disabled veterans. Later, in the Veterans Entrepreneurship and Small Business Development Act, Congress expanded veterans’

small business opportunities by establishing a 3 percent government-wide goal for contracting with such service-disabled veteran-owned small businesses. Later still, when the government was falling behind in meeting this goal, Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2016, that, among other things, required the Secretary of Veterans Affairs to set more specific annual goals to encourage contracting with these types of small businesses. In that legislation, Congress enacted a “Rule of Two,” which provides that other than for contracts below certain dollar thresholds, the Department “shall award” contracts by restricting competition only to service-disabled veteran-owned small businesses when there is a reasonable expectation that at least two such businesses will submit offers for a contract and that “the award can be made at a fair and reasonable price that offers best value to the United States.”

In January 2012, the Department of Veterans Affairs bypassed the Rule of Two and contracted with a non-veteran owned company for the construction of four medical centers. The work was completed in May 2013. Kingdomware Technologies, Inc., a service-disabled veteran-owned small business, challenged the Department’s decision and ultimately sought declaratory and injunctive relief. The Court of Federal Claims granted summary judgment in favor of the Department and the Federal Circuit affirmed.

The Supreme Court reversed. As a threshold matter, the Court recognized that there was a jurisdictional question under Article III because no court could enjoin the performance of the challenged services or solicit new bids since the work already had been completed. Nor would declaratory relief have any effect on the challenged procurements because the services already had been rendered. The Court decided, however, that this was one of the exceptional situations in which the doctrine of mootness did not bar the Court from considering the case. Because the challenged action was too short in duration to be fully litigated before it either ended or expired, and there was a reasonable expectation that the complaining party would be subject to the same action again, the criteria for “exceptional circumstances” enunciated in *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). First, the Court held that two years is too short a period to complete judicial review of the lawfulness of a procurement contract. Second, the Court held that the Department could reasonably be expected to refuse to apply the Rule of Two in the future for the kind of services provided by Kingdomware and, given that Kingdomware had been awarded previous contracts, it showed a reasonable likelihood that it would be awarded a future contract if its interpretation prevailed.

On the merits, the Court held that the words of the statute are all that matters: if the statutory language is unambiguous and “the statutory scheme is coherent and consistent” . . . “[t]he inquiry ceases.” The Court went on to note that the use of the word “shall” in the statute demonstrates that the Rule of Two is mandatory. While the word “may” implies discretion, the word “shall” usually does not.

Simmons v. Himmelreich, 136 S. Ct. 1843 (2016)

The plaintiff here, Himmelreich, who had been convicted for producing child pornography, had been severely beaten by a fellow inmate. He filed suit first against the United States, which treated the suit as a claim under the Federal Tort Claims Act (FTCA) and successfully moved to dismiss the case because it fell within an exception to the FTCA for claims based on the performance of discretionary functions. Prior to the dismissal of that suit, Himmelreich filed a second suit against the individual prison employees rather than the United States. The FTCA contains a “judgment bar” provision, which states that once a plaintiff receives a judgment in an FTCA suit, whether favorable or not, the plaintiff cannot proceed against individual employees based on the same underlying facts. But the FTCA itself excepts from the judgment bar provision certain types of claims, including those based on the exercise or performance of a discretionary function or duty. The government argued that the judgment bar rule applied in this case; the plaintiff argued that it did not and the Supreme Court agreed with the plaintiff based on a plain language analysis.

Statutory Interpretation

In two other decisions last Term 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.

McDonnell v. United States, 136 S. Ct. 2355 (2016)

This case arose out of the conviction of former Virginia Governor Robert McDonnell, and his wife Maureen McDonnell, on honest services fraud and Hobbs Act extortion charges related to their acceptance of \$175,000 in loans, gifts, and other benefits from a Virginia businessman in exchange for arranging a meeting with Virginia officials, contacting another official, or hosting an event. The jury convicted and the Fourth Circuit affirmed. A unanimous Court reversed and remanded.

To convict the McDonnells, the Government was required to show that the Governor committed an “official act” in exchange for the loans and gifts. An “official act” is defined as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” 18 U.S.C. § 201(a)(3). All of McDonnell’s so-called “official acts” involved arranging for meetings or other forms of get-togethers with the businessman and Virginia officials. He took no other actions. The issue before the Court was whether arranging a meeting, contacting another official, or hosting an event—without more—can be a “question, matter, cause, suit, proceeding or controversy,” and if not, whether it can be a decision or action on a “question, matter, cause, suit, proceeding or controversy.”

The Court first held to be an “official act,” the public official must make a decision or take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition of “official act.” In so holding, Court reasoned that the Government’s position -- namely any action taken by an official in his official capacity is an “official act” -- is not consistent with the plain meaning the statutes and if it were, would raise significant constitutional issues. Section 201(a)(3) limits the definition of “official act” to six types of occurrences—“question, matter, cause, suit, proceeding or controversy.” According to the Court, the last four, “cause,” “suit,” “proceeding,” and “controversy,” connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination. Setting up a meeting does not qualify as a “cause,” “suit,” “proceeding,” or “controversy.” The terms “question” and “matter,” though, can have broad meanings that would include anything or narrow meanings limited to specific controversies or serious matters under consideration. The Court, using *noscitur a sociis*, “a word is known by the company it keeps,” concluded that these two words must be given a similarly narrow reading as the other four words that follow. “If ‘question’ and ‘matter’ were as unlimited in scope as the Government argues, the terms ‘cause, suit, proceeding or controversy’ would serve no role in the statute—every ‘cause, suit, proceeding or controversy’ would also be a ‘question’ or ‘matter.’” This would be inconsistent with the presumption “that statutory language is not superfluous.”

Section § 201(a)(3) also requires that the question or matter must be “pending” or “may by law be brought” before “any public official.” Here, the Court sided with the Government, finding that the businessman’s proposal could in fact be brought before a public official for some form of action. However, setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information does not qualify as a decision or action on the pending question of whether to initiate the study.

The Court reversed and remanded, noting that retrial was possible. In early September 2016, the Department of Justice declined to retry the McDonnells.

RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016)

This was an action by the European Community and 26 of its member states under RICO, alleging that petitioners (RJR Nabisco and related entities (collectively RJR)) participated in a global money-laundering scheme in association with various organized crime groups. Under the alleged scheme, drug traffickers smuggled narcotics into Europe and sold them for euros that—through transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. The complaint alleged that RJR violated 18 U.S.C. §§ 1962(a)–(d) by engaging in a pattern of racketeering activity that included numerous predicate acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act. The district court granted RJR’s motion to dismiss on the ground that RICO does not apply to racketeering activity occurring outside U.S. territory or to foreign enterprises. The Second reversed. On certiorari, a 4-3 Court reversed the Second Circuit.

The Court considered two questions. First, whether RICO’s substantive prohibitions in § 1962 can extend to conduct that occurs entirely overseas and second, whether RICO’s private right of action, contained in § 1964(c), applies to injuries that are suffered in foreign countries. There is a general presumption against applying a statute extraterritorially, which can be rebutted by clear affirmative evidence that the statute was intended to reach beyond our borders. If the statute is not intended reach beyond our borders, it can still apply if the conduct relevant to the statute’s focus occurred domestically; otherwise it cannot.

Applying this test, the Court concluded that § 1962 applies extraterritorially. Among other things, many of the predicate acts necessary to establish a RICO violation contemplate activities outside the U.S. For example, one predicate act includes the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when “the defendant is a United States person,” to offenses that “tak[e] place outside the United States.”

Section 1964, which provides for a private right of action, contained none of these indicia of extraterritoriality. The Court concluded that “[a] private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property.” The Second Circuit had held that the two were not independent and that if § 1962 provided an extraterritoriality reach, so must § 1964. The Court was unwilling to fuse the two. Instead, it focused on the wording of section 1964, which provides a cause of action to “[a]ny person injured in his business or property” by a violation of § 1962. § 1964(c). “The word ‘any’ ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality. See *Kiobel*, 569 U.S., at ___ (slip op., at 7). According to the Court, the statute’s reference to injury to ‘business or property’ also does not indicate extraterritorial application.”

The Reach of Federal Commerce Clause Authority.

Taylor v. United States, 136 S. Ct. 2074 (2016)

Taylor was convicted under the federal Hobbs Act, 18 U.S.C. § 1951(a), for robbing a marijuana dealer in Roanoke, Virginia. The Act makes it a crime to affect commerce, or attempt to do so, by robbery. Taylor argued on appeal that to establish the “affect commerce” element of the crime, the government was required to prove either that the dealer was engaged in an interstate marijuana business or that the particular marijuana he sold had moved across state lines.

The Court rejected that argument, resolving a circuit split. It found the result to be dictated by *Gonzales v. Raich*, 545 U.S. (2005), which held that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession and sale of this controlled substance. Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug theft. By targeting a drug dealer for theft, a robber necessarily affects or attempts to affect commerce over which the United States has

jurisdiction. While thus far the Court has upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature, the activity here, the sale of marijuana, is clearly an economic activity. Finally, Taylor’s argument that the government must prove interstate conduct confuses the standard of proof with the meaning of the element that must be proved. In a Hobbs Act prosecution, the government must prove that defendant engaged in conduct that satisfies the Act’s commerce element, but the meaning of that element is a question of law. And *Raich* established that the purely intrastate production and sale of marijuana is commerce over which the federal government has jurisdiction, so the government satisfies its burden by proving a robbery of a marijuana dealer’s drugs or drug proceeds.

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