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'Administrative State' Attacks Soar To High Court Crescendo

By **Jeff Overley**

Law360 (September 29, 2023, 3:29 PM EDT) -- After methodically amassing U.S. Supreme Court victories against agency enforcers and regulators, a legal crusade against "administrative state" powers is poised to parlay piecemeal wins into a climactic conquest during the high court's new term, which is already teeming with anti-agency cases.

The concerted campaign by right-leaning lawyers, think tanks and business groups is on the verge of victory after years of steadily gaining momentum, especially amid the Supreme Court's rightward shift during the Trump administration. In that period, the most important developments included Supreme Court decisions involving the Consumer Financial Protection Bureau's structure, the U.S. Securities and Exchange Commission's enforcement and the judiciary's deference to agency views of murky regulations.

All three of those topics — the CFPB's structure, the SEC's enforcement and judicial deference to agencies — are back on the high court's docket in the term kicking off Monday. But all three are returning in cases with far higher stakes. And whereas the three topics previously generated decisions in three separate terms, they're now all teed up for decisions in this term, setting the stage for a seminal showdown over the federal government's oversight of industry.

Key Anti-Agency Cases

Challenges to administrative agencies have accelerated at the Supreme Court, which will hear several such challenges this term.

LUCIA v. SEC, 17-130

— Decided: June 21, 2018
— Summary: Justice Elena Kagan, joined by five conservatives, wrote that SEC administrative law judges are subject to the appointments clause and therefore cannot simply be hired like typical employees; instead, they must be installed by the commission.
— Implications: As one example, the Fifth Circuit relied on Lucia when concluding that for-cause removal protections for the administrative law judges are unconstitutional. That conclusion is now before the Supreme Court in SEC v. Jarkesy.

KISOR v. WILKIE, 18-15

— Decided: June 26, 2019
— Summary: Opinion by Justice Elena Kagan upheld the so-called Auer deference, which tells courts to accept reasonable agency interpretations of their own ambiguous rules. The opinion, however, imposed extensive limits on Auer, including that rules must be "genuinely ambiguous," represent an agency's official position and implicate agency expertise.
— Implications: Although Auer survived, it was "maimed and enfeebled — in truth, zombified," as Justice Neil Gorsuch wrote in a concurrence. It's possible that the court will take a similar tack by preserving yet weakening the Chevron deference. But in the Kisor decision, Chief Justice John Roberts wrote, "I do not regard the court's decision today to touch upon" Chevron.

SEILA LAW v. CFPB, 19-7

— Decided: June 29, 2020
— Summary: 5-4 opinion along ideological lines noted that the CFPB director had "vast rulemaking, enforcement and adjudicatory authority," and held that the director's protections from firing violated the separation of powers.
— Implications: Seila has reverberated widely. As one example, the Supreme Court cited it when holding in U.S. v. Arthrex that administrative patent judges were unconstitutionally appointed. Another example was the Ninth Circuit's citation of Seila when, in Washington v. U.S. Department of State, it reviewed presidential power to remove 3D-printed guns from the U.S. Munitions List.

AMG CAPITAL MANAGEMENT v. FTC, 19-508

— Decided: April 22, 2021
— Summary: Unanimous opinion in a payday lending case held that a key section of the Federal Trade Commission Act doesn't authorize the FTC to seek restitution or disgorgement.
— Implications: One of several decisions, in the high court and the circuit courts, curtailing the FTC's enforcement powers in recent years. The AMG decision has been cited in a pending Fifth Circuit case where biotech company Illumina recently accused the FTC of an "unprecedented exercise of administrative power."

U.S. v. ARTHREX, 19-1434

— Decided: June 21, 2021
— Summary: Five conservative justices held that the "unreviewable executive power" exercised by administrative patent judges is unconstitutional.
— Implications: Like the Seila Law decision one year earlier, this continued a trend of rulings against allowing certain administrative officials to act with unusually strong independence.

COLLINS v. YELLEN, 19-422

— Decided: June 23, 2021
— Summary: The justices removed tenure protections for the Federal Housing Finance Agency's director, saying, "A straightforward application of our reasoning in Seila Law dictates the result here."
— Implications: The outcome illustrated how a decision about one agency official's independence can echo across the federal bureaucracy.

WEST VIRGINIA v. EPA, 20-1530

— Decided: June 30, 2022
— Summary: 6-3 opinion along ideological lines rejected government restrictions on greenhouse gas emissions and included the first explicit use of the major questions doctrine, requiring clear congressional authorization when administrative policies carry vast "economic and political significance."
— Implications: According to the majority, the doctrine had long existed without being formally invoked, and it addresses a recurring problem of agencies "asserting highly consequential power beyond what Congress could reasonably be understood to have granted." The dissenters, however, dubbed the doctrine a new legal canon designed to "prevent agencies from doing important work, even though that is what Congress directed."

AXON ENTERPRISE v. FTC, 21-86; SEC v. COCHRAN, 21-1239

— Decided: April 14, 2023
— Summary: Unanimous holding that constitutional challenges to the structure of the FTC and the SEC can bypass administrative appeals and start in federal court.
— Implications: The holding empowered targets of enforcement to avoid years of in-house proceedings, raising the chances of successful constitutional challenges. In a concurring opinion, Justice Clarence Thomas cited "serious constitutional issues" with administrative adjudication of certain rights and endorsed further review in a future case.

BIDEN v. NEBRASKA, 22-506

— Decided: June 30, 2023
— Summary: Exactly one year after ending its term with a 6-3 decision outlining the major questions doctrine, the court ended its most recent term with another 6-3 decision that again

invoked the doctrine when erasing a Democrat-led administrative policy — this time, the forgiveness of roughly $400 billion in student loan debt.
— Implications: The decision laid bare the divisions among conservatives and liberals on administrative law. Chief Justice John G. Roberts Jr. concluded the majority opinion by describing a "disturbing" trend of dissenting justices accusing colleagues of "going beyond the proper role of the judiciary." Justice Elena Kagan concluded her dissent by calling the doctrine "specially crafted to kill significant regulatory action," and she declared that "from the first page to the last, today's opinion departs from the demands of judicial restraint."

DANCO LABORATORIES v. ALLIANCE FOR HIPPOCRATIC MEDICINE, 23-236; FDA v. ALLIANCE FOR HIPPOCRATIC MEDICINE, 23-235

— Decided: TBD.
— Summary: This challenge to Food and Drug Administration approval of the abortion drug mifepristone isn't explicitly about weakening administrative powers. But it focuses on the Administrative Procedure Act, and its central debate — whether judges should override the FDA's scientific decisions — echoes the debate over judicial deference to regulators more broadly. After the Fifth Circuit sided partly with those opposed to approval, the FDA and a drugmaker sought high court review.
— Implications: Supporters of the FDA, including industry groups, have warned that the challenge, if successful, would badly damage pharmaceutical research and development.

CFPB v. CFSA, 22-448

— Decided: TBD
— Summary: A Fifth Circuit panel of Trump-nominated judges deemed unconstitutional the Consumer Financial Protection Bureau's funding, which comes from the Federal Reserve System. The panel also invalidated a payday lending rule challenged by the Consumer Financial Services Association of America, a trade group.
— Implications: Numerous observers have warned that affirming the decision would cast doubt on much of the CFPB's work since its creation after the 2008 financial crisis.

SEC v. JARKESY, 22-859

— Decided: TBD.
— Summary: The high court is weighing three questions about the SEC's administrative enforcement. A Fifth Circuit panel of GOP-nominated judges ruled 2-1 that aspects of in-house enforcement violated the right to a jury trial, reflected an unconstitutional delegation of legislative power and impeded the presidential duty to "take care that the laws be faithfully executed."
— Implications: The Fifth Circuit's decision illustrated how one Supreme Court loss for administrative agencies can snowball, because it was based partly on the high court's 2018 ruling in Lucia v. SEC. Going forward, the decision threatens "massive impacts" and could upend agency adjudication more broadly, a Fifth Circuit judge — also a GOP appointee, but not a member of the panel — wrote when the appeals court voted 10-6 against en banc rehearing.

LOPER BRIGHT ENTERPRISES v. RAIMONDO, 22-451

— Decided: TBD.
— Summary: This case, nominally about a federal requirement that fishing vessels pay for compliance monitors, has become a vehicle that the justices may use to either overrule Chevron deference or clarify when a statute is ambiguous and deference is required.
— Implications: The Chevron deference's disappearance or diminishment could be a sea change for how Congress writes laws, how agencies regulate and how often regulations survive legal challenges.

Sources: Court records; Law360 reporting.

"I've followed the Supreme Court for over two decades, and I have not seen such a categorically heavy emphasis on administrative law cases being so prominent on the docket at the start of the term," Greenberg Traurig LLP shareholder Paul M. Seby, who specializes in challenging environmental regulations, told Law360 in an interview.

Skye Perryman, president and CEO of the Democracy Forward Foundation, which recently filed amicus briefs supporting the CFPB, the SEC and judicial deference, echoed that description, saying in an interview that "this term could fundamentally alter the contours of the regulatory state."

"This is certainly an incredibly significant term, with a lot at stake for people and communities in the country," Perryman, who previously practiced at Covington & Burling LLP and WilmerHale, told Law360.

Making matters more momentous, the justices will likely hear additional cases — including a fierce fight involving abortion rights — focused squarely on themes of agency independence and judicial deference. A single thread connecting the cases is a conservative-led campaign targeting the federal bureaucracy; in 2017, when the campaign started picking up steam, White House strategist Steve Bannon famously described an anti-regulatory mission seeking the "deconstruction of the administrative state."

Although right-leaning litigants have propelled that mission to the cusp of crowning achievements in the current Supreme Court term, they've been boosted by left-leaning justices, who have joined and even authored opinions agreeing with attacks on federal agencies. Sometimes, the liberal assent has arguably entailed horse-trading: opinions in controversial cases have occasionally ended up being unanimous, but also less sweeping than expected, to the chagrin of the most conservative justices.

But there are reasons to think that compromise and cooperation are becoming more elusive. Most visibly, Justice Elena Kagan has pivoted from penning majority opinions in administrative cases — including the SEC and judicial deference cases decided a few years ago — to penning pugnacious dissents accusing the conservative wing of policymaking disguised as judging.

When the six GOP-nominated justices last year **rejected climate regulations** and outlined the major questions doctrine, requiring clear authority for vastly significant rules, Justice Kagan accused the majority of inventing a "special canon" to further its **"anti-administrative state stance."**

And when the same six conservatives in June **rejected student loan forgiveness** and again invoked the major questions doctrine, Justice Kagan accused the majority of exceeding its "proper, limited role in our nation's governance" with a doctrine "specially crafted to kill significant regulatory action." Those comments elicited a rebuke from Chief Justice John G. Roberts Jr., whose majority opinion identified "a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary."

Rising rancor, a muscle-flexing majority and a jam-packed docket could augur a transformative term for administrative law. The upcoming term "may deliver a serious blow to the seemingly unchecked power of the federal administrative state," Lawrence S. Ebner, general counsel of the Atlantic Legal Foundation, which has filed amicus briefs supporting the anti-agency cases, told Law360.

As this term unfolds, however, it's reasonable to think that the conservative and liberal blocs could bridge their deepening divide. Some of the pending challenges against agencies have been roundly pilloried, including by GOP-appointed judges, and others offer obvious avenues for give and take.

And so, while the term could be a game changer for proponents of smaller government, it might also draw the line at the most aggressive theories of administrative excess, reinforcing long-standing principles favoring certain uses of regulatory authority.

"The agencies might actually win some cases, after getting a real beating over the past couple of terms," Judson O. Littleton, co-head of Sullivan & Cromwell LLP's Supreme Court and appellate practice, told Law360. "The narrative of, 'The administrative state is going to be destroyed by the Supreme Court' — I do think that that's overblown. But we'll see."

In Key Cases, High Court 'Didn't Have Much of a Choice'

Although the fledgling term includes several administrative cases, they arguably fall into two camps: cases that the high court wanted to accept, and cases that the high court essentially needed to accept. The latter category mostly consists of controversial cases that have cried out for Supreme Court review because of their broad impact. In those cases — including SEC v. Jarkesy and CFPB v. Community Financial Services Association of America — the Fifth Circuit handed down far-reaching rulings against administrative agencies.

"The biggest driver is the Fifth Circuit, because the court had to take Jarkesy and the CFPB," Lisa S. Blatt, chair of Williams & Connolly LLP's Supreme Court and appellate practice, told Law360. "I wouldn't say that's the court showing an interest — it didn't have much of a choice."

In the CFPB case, the Fifth Circuit **deemed unconstitutional** the bureau's funding via the Federal Reserve System, rather than periodic congressional appropriations, and invalidated a payday lending rule. The conclusion **cast a cloud of uncertainty** over every CFPB rule issued since its creation following the 2008 financial crisis.

"This is an incredibly important case, because a decision holding the CFPB's funding unconstitutional could have profound consequences" for the bureau and other agencies with distinctive funding schemes, Brianne J. Gorod, chief counsel of the progressive Constitutional Accountability Center, told Law360.

The recent momentum behind administrative suits includes Seila Law v. CFPB, where the Supreme Court in 2020 ruled 5-4 against tenure protections for the bureau's director. In the same case, however, the high court ruled 7-2 against striking down the entire CFPB based on the unconstitutional protections; several experts told Law360 that the bureau is also likely to survive its latest trip to One First Street, where arguments are set for Tuesday.

"The CFPB funding … decision from the Fifth Circuit surprised a lot of people," Littleton said. "I wouldn't be surprised if the CFPB wins that case."

Gorod echoed that outlook, telling Law360, "The argument that the CFPB's funding is unconstitutional is completely at odds with the text and history of the Constitution's appropriations clause."

In SEC v. Jarkesy, the Fifth Circuit delivered **a triple-whammy ruling**, holding that in-house enforcement flouted the Seventh Amendment right to trial by jury, reflected an unconstitutional delegation of congressional power and bestowed unconstitutional removal limits on administrative law judges.

The 2-1 ruling, issued by a panel of GOP-nominated judges, led to a rehearing request, which failed on a 10-6 vote that was accompanied by **a forceful dissent** from U.S. Circuit Judge Catharina Haynes, a nominee of President George W. Bush. Judge Haynes, who wasn't on the panel, wrote that the majority opinion "deviated from over 80 years of settled precedent," threatened "massive impacts on the directly involved statutes," and might upend agency adjudication "more broadly."

The dissent from Judge Haynes also accused the majority of "incorrectly reading Lucia v. SEC" — another case that has galvanized administrative state suits. In Lucia, a fractured Supreme Court, in a 2018 opinion by Justice Kagan, said the Securities and Exchange Commission's administrative law judges fall under the Constitution's appointments clause and can't be hired like typical employees; instead, they must be installed by the commission.

In SEC v. Jarkesy, the commission stands a good chance of prevailing at the Supreme Court on the Seventh Amendment and nondelegation issues, several sources told Law360. The sources added that removal limits on administrative law judges are a closer call, and that even a prospective ruling against those limits — seen by many as vital to administrative law judge independence — would be highly consequential.

"The ALJ piece, in particular, seems like the most likely place where the court will do something," Sarah M. Harris, a partner in Williams & Connolly's Supreme Court practice, told Law360. "Even if it's just going forward, that is very important for the way most agencies operate."

And if the Fifth Circuit's entire ruling is affirmed, it "could have profound implications for agencies' ability to be able to impose penalties for regulatory violations," Jennifer Mascott, a leader of George Mason University's Gray Center for the Study of the Administrative State, told Law360.

SEC v. Jarkesy joins a recent series of Supreme Court cases involving in-house adjudication of legal disputes. The Lucia case, for example, turned out to be a steppingstone toward the Fifth Circuit's sweeping decision against the SEC's in-house proceedings. And in two consolidated cases — Axon Enterprise v. Federal Trade Commission and SEC v. Cochran — the Supreme Court in April

unanimously said constitutional challenges to the agencies' structures could **skip in-house adjudication** and commence in federal court.

"It seems that there now is this whole other frontier on the adjudicatory side that may be being opened up," Andrew J. Pincus, a leader of Mayer Brown LLP's Supreme Court practice, told Law360. "That's really an area that the court hasn't touched significantly, but could be changed dramatically," perhaps by SEC v. Jarkesy, Pincus said.

Abortion Battle Is 'Part of a Broader Trend'

In addition to the CFPB and SEC suits, there's a third controversial case where the Fifth Circuit issued a far-reaching ruling against an administrative agency and has left the Supreme Court little choice but to grant review. The ruling, in mid-August, **rejected** the U.S. Food and Drug Administration's relaxed restrictions on the abortion medication mifepristone; the FDA and mifepristone seller Danco Laboratories LLC are **seeking review** at the Supreme Court, where an opposition brief from anti-abortion plaintiffs is expected by Nov. 9.

After the Dobbs decision by Supreme Court conservatives in 2022 ended the constitutional right to abortion, mifepristone quickly entered the spotlight; states that have banned abortion nonetheless face difficulties preventing mail deliveries of mifepristone — something that would no longer be permitted anywhere under the Fifth Circuit's ruling, which is stayed pending the Supreme Court's consideration.

Although the litigation is primarily about abortion access, it was brought under the Administrative Procedure Act, and its legal themes strongly resemble the themes of litigation explicitly focused on judicial deference. "The scientists at the FDA deserve our respect and our gratitude, but not our blind deference," Fifth Circuit Judge James C. Ho wrote in mid-August, partly concurring and partly dissenting in the mifepristone ruling.

Judge Ho also cited the Supreme Court's decision in Kisor v. Wilkie — yet another major administrative case of recent vintage — dialing back so-called Auer deference, which tells courts to accept reasonable agency interpretations of ambiguous regulations. "Courts do not defer to agency interpretations of unambiguous regulations," and there is "no basis for deferring" to the FDA, Judge Ho wrote.

But the FDA and Danco, in their petitions for high court review, repeatedly invoked one of the main arguments in favor of deference: that judges lack technical expertise and should therefore give agency specialists the benefit of any doubt. According to the FDA's petition, the Fifth Circuit's holdings "flatly contradict this court's repeated admonitions about the 'deferential' nature" of the Administrative Procedure Act's legal standard. According to Danco's petition, "judicial second-guessing of FDA's scientific evaluations of data will have a wildly destabilizing effect" on drugmakers.

Other observers see clear parallels with the broader set of administrative suits. "Whether it's attacks on the [CFPB], whether it's attacks on the FDA's authority — which is what you see in the mifepristone case — or whether it's attacks on other agencies and the deference accorded to them, this is part of a broader and concerning trend that is seeking to redefine the way that government operates," the Democracy Forward Foundation's Perryman said.

In an interview with Law360, E. Joshua Rosenkranz, who leads the Supreme Court and appellate practice at Orrick Herrington & Sutcliffe LLP and has advised abortion rights supporters, volunteered the mifepristone case as an administrative challenge comparable to the CFPB and SEC matters.

"If the Supreme Court second-guesses the FDA's decision in that case, it would have to be based upon a view of agency decision-making, and the court's ability to override agency decision-making, that is very different from anything the court has applied in the past decades," Rosenkranz said. "And if that is what the court does, that could easily be of a piece with overruling Chevron deference. It's just another version of deference."

Chevron deference is the doctrine crafted under the Supreme Court's 1984 ruling in Chevron v. Natural Resources Defense Council; whereas Auer deference applies to agency views of regulations, Chevron applies to statutes. And Chevron deference's future is the sole question in a likely landmark

case that the Supreme Court has agreed to hear this term — not because it needed to accept the case, but rather because it apparently wanted to do so.

Deference Doctrine Poised for 'Exceptionally Important' Decision

Loper Bright Enterprises v. Raimondo involves the D.C. Circuit's deference to the National Marine Fisheries Service regarding a requirement that herring fishers help pay for compliance monitors. Ever since the 2020 confirmation of Justice Amy Coney Barrett created a 6-3 conservative supermajority, observers have suspected that **Chevron's days were numbered**, given its dim reputation among right-leaning lawyers and jurists.

Rosenkranz recalled that when he was clerking for Judge Antonin Scalia on the D.C. Circuit Court, "Chevron was controversial even back then, and conservatives were already railing against it."

Taken at face value, the criticism is twofold: Chevron conflicts with "textualist" fidelity to the best reading of a statute, and Chevron encourages agencies to play fast and loose with duly enacted laws of Congress, often to the detriment of businesses.

The U.S. Chamber of Commerce expressed both critiques in a July amicus brief calling for deference to be "strictly limited." According to the brief, "it will be a rare occasion on which legal texts are truly ambiguous," and "today's Chevron doctrine … contributes to the expansion of unduly burdensome, unlawful regulations."

The Constitutional Accountability Center's Gorod offered a different spin on the same criticisms of Chevron. She told Law360 that "these attacks are in part ideological," but also "reflect the desire of corporate interests to avoid regulatory efforts designed to protect the public health, safety, welfare and the environment."

In Loper, the justices are explicitly **examining a solitary question**: whether they should overrule Chevron, or at least clarify that a statute's silence in certain circumstances doesn't constitute ambiguity triggering deference. The answer matters because Chevron has been cited thousands of times in court decisions involving almost every nook and cranny of the U.S. economy, frequently rescuing rules of immense importance from industry-backed attacks.

But how much the answer matters is open for debate. Chevron is being used less nowadays amid signs of Supreme Court hostility, and so its disappearance might not be a transformative event. "It's being portrayed as this earth-shattering change, but I just don't know how much reliance there actually has been in the lower courts," Mayer Brown's Pincus said.

Rosenkranz, on the other hand, predicted a tremendous jolt: "The common wisdom is that Chevron is going down. And that will be, I think, about as seismic a change in the structure of government as we've had in decades."

If Chevron ends up dead or debilitated, it's possible that both of those forecasts will, in some sense, prove correct. Most of the lawsuits that would've failed under Chevron might still fail. At the same time, there could be profound consequences for how Congress writes laws, how agencies write rules and how various business sectors operate.

"The Chevron doctrine is so part and parcel of basically everything I do when it comes to agency deference," Wiley Rein LLP partner Claire J. Evans, an appellate litigator specializing in administrative challenges, said in an interview. "Even if every case today would turn out the same, it's almost like a tidal change in regulatory review to think it's not even there."

The thought of Chevron not being there has become easier to imagine because liberal Justice Ketanji Brown Jackson has recused herself from Loper; while on the D.C. Circuit, she heard arguments in the case, although she did not participate in the D.C. Circuit's decision.

Loper has not yet been set for oral argument. The pace of proceedings, and the case's importance, have set the stage for a decision that ends or enervates Chevron when the high court's term climaxes at the end of June — 40 years after the doctrine's debut on June 25, 1984.

But Greenberg Traurig's Seby cautioned against viewing Chevron's demise as a foregone conclusion, and he offered a nuanced assessment of the situation. Conservative justices aren't uniformly hostile to Chevron, so assembling a majority will be tricky. And even if right-leaning justices perceive "tremendous abuse by the executive branch," they also know that aggressive regulation stems from legislative gridlock and inaction, Seby said.

"The agencies in the United States today are exponentially larger than they've ever been. But that's not Chevron's fault. It's Congress' fault," the Denver-based attorney told Law360. "I think that the Supreme Court will remind Congress that the executive branch's [duty] is to implement the law. And you, Congress, make the law. And if you don't make law that has adequate guideposts for the agencies, we're not going to excuse Congress' laziness by letting agencies go roughshod. That's the kind of opinion I [expect]. I think it's going to be an exceptionally important opinion, if there's a majority."

--Editing by Karin Roberts.
