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A series focused on nonpartisan reasoned solutions in the nation's interest to the central challenges we face in order to provide prosperity for all Americans.

The Future of Administrative Law

Over the last several Terms, a series of Supreme Court decisions has dramatically changed the contours of administrative law (the law governing the powers of regulatory agencies). Broadly, these cases have sharply restricted the scope of agencies' permissible powers as well as those of independent regulatory agencies such as the Securities and Exchange Commission (SEC). Taken together, these cases form what former Solicitor of Labor and Chairman of the Administrative Conference of the United States Marshall Breger has termed a "new paradigm" of administrative law. In particular, the recent cases of *Lucia v. SEC*, *SEC v. Jarkesy*, and *Loper Bright Enterprises v. Raimondo* pose significant questions for the future of administrative law—questions that can be definitively answered only by future court decisions, although Congress and agencies themselves can play a useful role as well.

It is not the purpose of this Brief to criticize the Supreme Court's decisions or to provoke further litigation. Rather, it is our intention to analyze the current situation of administrative law after these decisions and, in the spirit of CED's book *Smart Regulation,* to offer suggestions for how Congress, agencies, and the business community can adapt to this new reality (including the potential for increased costs and regulatory uncertainty), prepare for the future, and ensure that administrative law and regulatory agencies accomplish the purposes which Congress intends and the public demands. Regulatory certainty is important; so is fair adjudication and a fair process.

Trusted Insights for What's Ahead™

- The cases the Supreme Court decided concern the powers of government agencies and the manner in which administrative law judges (ALJs) are appointed. Taken together, they dramatically restrict agencies' powers and increase the powers of courts.

THE CONFERENCE BOARD

- *SEC v. Jarksey* raises questions about the future of ALJs in a wide variety of agencies for at least some types of enforcement actions, including at the Food and Drug Administration, the Environmental Protection Agency, the Labor Department, and the Consumer Financial Protection Bureau, among others. Those agencies now face the prospect of litigation challenging their statutory authority; some of these cases are likely to reach the Supreme Court.
- It is likely that the *Jarkesy* decision will lead to restrictions not only on enforcement agencies' powers but limits on their actual enforcement actions as well, given their limited budgets and the greater expense of bringing suit in Federal court. However, earlier final decisions reached by ALJs and administrative agencies are likely not subject to challenge because of the decision.
- By eliminating deference to agencies where statutes are ambiguous, *Loper Bright Enterprises* will lead to greater litigation against agencies' regulations, and the burden of proof has shifted decisively in areas where it is not clear that Congress has not spoken clearly.
- The decision will affect virtually every business, including matters concerning environmental law, labor law, financial services regulation, agriculture, health care, and other major areas.
- Overall, the decision may mean less regulation in highly regulated sectors over time as agencies must establish that Congress clearly delegated them authority to regulate on a particular matter. It will also force Congress to speak more clearly in enacting statutes giving power to agencies.

Recommendations

This series of recommendations is designed to help Congress, agencies, and business adapt to the new era and ensure that administrative law fulfills the purposes which Congress intends.

Recommendations for Congress

- Congress must speak with greater clarity in delegating authority to agencies and ground those delegations in constitutionally permissible areas.
- In response to an expected increase in enforcement matters and questions on agencies' regulations coming to trial, Congress may wish to increase the number of Federal judges.

Recommendations for Agencies

- Agencies should keep their regulations within the bounds Congress has delegated and follow the Administrative Procedure Act in letter and spirit.
- Agencies should keep merit-based appointment of ALJs and ensure their impartiality, high standards, decisional independence from the agency, and removal protections.
- Openings for ALJs should be publicized widely to ensure a diverse range of candidates; selection criteria should be published, and procedures for selection developed. Agencies should ensure the hiring of ALJs who will act with impartiality and maintain the appearance of impartiality, and should avoid politicizing the appointment process. An ethics code for ALJs should be adopted.

- Agencies can adopt operating manuals to guide the work of ALJs and the hearings they conduct, in particular regarding standards of evidence and precedential decisions.

Recommendations for Courts

- Courts should exercise their renewed powers with care. They should be reluctant to reopen settled litigation, be cautious about issuing quick procedural injunctions without examining the facts, and seek to address regulatory matters quickly for the benefit of all parties.

Recommendations for Business

- Returning to the framework of the Administrative Procedure Act will require business' active participation in the regulatory process. Business should not fear this participation.

- Businesses should prepare now to navigate this new regulatory environment. Business leaders should consider active membership of trade associations, and businesses in highly regulated industries should not be afraid to engage in dialogue with agencies that regulate them, meeting with regulators and submitting comments to proposed regulations.

Background: The Powers of Congress, Agencies, and Courts

The Constitution delegates powers among three co-equal branches of government: Legislative, Executive, and Judicial. Under the Constitution, the Legislative passes laws, the Executive implements laws, and the Judiciary interprets laws. The tension between the powers of these branches has been a recurring theme of American government, particularly after the vast expansion of the administrative state beginning in the Progressive movement of the early Twentieth Century. To provide order to the growing number of regulations, cases, and hearings arising under Federal regulations and ensure fairness, in 1946, Congress passed the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559.

Administrative Law Judges

The APA (5 U.S.C. § 3105) also provides for the appointment of ALJs, "as many" as necessary for an agency to conduct proceedings required by its governing statutes. Under the traditional scheme, ALJs enjoy decisional independence, an agency cannot determine an ALJ's compensation, ALJs receive cases in rotation rather than direct assignment, may not receive *ex parte* communications, cannot be supervised by an agency employee involved in investigation or enforcement (to remove the risk of pro-agency bias), and cannot be removed except for cause by the Merit Systems Protection Board after a formal hearing. (More broadly, there is also a category of "non-ALJ adjudicators" appointed according to other statutes governing specific agencies' powers.) Further, the APA also required that ALJs be appointed only through a process of competitive examination. In sum, the APA sought what ALJ regulations of the Occupational Safety and Health Administration describe as a "fair, full, and impartial proceeding."

That proceeding is not, however, identical to that conducted in a Federal court by an "Article III" Federal district judge. While the Supreme Court has said that in some ways ALJs are "functionally comparable to trial judges," it has also described ALJ proceedings at the Social Security Administration as "inquisitorial rather than adversarial [.]"

In all, 26 agencies employ ALJs in some capacity. They include agencies as varied as the Drug Enforcement Administration (enforcement and regulatory cases under the Controlled Substances Act); the Federal Communications Commission ("conducting the hearings ordered by the Commission," while Initial Decisions of ALJs may be appealed to the Commission" (a similar process applies at the Federal Energy Regulatory Commission)); USDA ("over fifty statutes" require APA hearings, and their decisions can be appealed to the Secretary), the Consumer Financial Protection Bureau, and even parts of the military (rules of procedure cover US Coast Guard hearings). By far the largest number of ALJs serve at the Social Security Administration, adjudicating hundreds of thousands of cases relating to benefits.

Lucia v. SEC and its Impact

In 2018, the Supreme Court, in a majority opinion by Justice Elena Kagan, decided *Lucia v. SEC*, holding that ALJs at the Securities and Exchange Commission are "Officers of the United States" under the Appointments Clause of the Constitution (Article II, § 2, Clause 2) and thus must be appointed either by the President, an agency head, or a court; any other method of appointment is unconstitutional. Concurring in part and dissenting in part, Justice Stephen Breyer wrote that the decision risked "transforming [ALJs] into dependent decision makers," threatening their independence and opening the possibility that ALJs who rule against the agency could be fired.

In response to *Lucia*, the Trump Administration issued a blanket Executive Order exempting all ALJs appointed under the APA (including at major regulatory agencies such as EPA, HHS, and Labor) from the competitive civil service and stating that "at least some—and perhaps all" ALJs counted as "Officers of the United States"—a massive shift of power to political appointees in the Executive Branch, which the Order justified on the ground that "ALJ decisions have, with increasing frequency, become the final word of the agencies they serve." (It could also indicate the high quality of ALJ decisions that superiors, including senior agency officials, had no strong ground to reverse.) The Office of the Solicitor General then issued guidance suggesting that "non-adversarial" ALJs might be "Officers" as well. Following the Executive Order, the Office of Personnel Management proposed regulations to implement it by moving all ALJs to the excepted services, but they were never adopted. Several commentators noted the potential vulnerability of the ALJ system after *Lucia* and the response of the Administration, with one terming it "a signal of intent to consolidate executive power" in political appointees.

Despite *Lucia*, methods of appointment of ALJs (and their powers) continue to vary widely across agencies, particularly for ALJs who do not decide cases. In 2018, both Labor and HHS adopted new procedures for hiring ALJs—but each chose an agency merit-based system rather than a purely political system. If ALJs are indeed "Officers of the United States" as the Court concluded, then it will be essential to keep merit appointments to ensure that ALJs are truly impartial and have decisional independence from the agencies they serve. The powers of some ALJs are declining as well. In 2023, the FTC revised its Rules of Practice to weaken the role of ALJs in deciding cases, presumably to avoid further litigation on the subject after the Supreme Court's decision in *Axon Enterprise, Inc. v. FTC*; instead of an "initial decision," for instance on a merger, the ALJ will issue a "recommended decision," and the Commission itself will take a greater role, not as an "appeal" but as an "exception" to the recommendation—all designed to assure courts that the Commission itself (appointed under the Appointments Clause), not the ALJ, is the true decisionmaker.

SEC v. Jarkesy and the Future of Administrative Law Judges

This past Term, in *SEC v. Jarkesy*, the Supreme Court both eliminated the right of the SEC to bring suits for fraud before ALJs and took a major step towards restricting agencies' use of ALJs more broadly, although it did not explicitly state that in the opinion's formally narrow holding.

While the SEC can prosecute cases in regular Federal district courts, it has also pursued administrative adjudication of cases under the "public rights" doctrine (essentially, the idea that the SEC is acting on behalf of the public rather than of private parties), which the Court has accepted up to now as providing an exception to the Seventh Amendment's guarantee of a jury trial in Federal cases where the amount in controversy exceeds $20. In addition, because the Seventh Amendment applies to "Suits at common law," the SEC argued that cases that arise under equity jurisdiction are exempt from the requirement, because modern securities law claims are different than common-law claims for fraud, particularly those brought in courts at the time the Constitution was ratified.

Background to the case

The case grew out of an SEC enforcement action against George Jarkesy under the Dodd-Frank Wall Street Reform and Consumer Protection Act in which the SEC claimed that two hedge funds had engaged in fraud. Under the law, the SEC had a choice and decided to use its internal enforcement mechanisms (including an ALJ) rather than bringing it to Federal court for a trial. After an ALJ ruled against Jarkesy, the full Commission upheld the judgment, including civil monetary penalties and disgorgement of profits. Jarkesy appealed, and in May 2022 the US Court of Appeals for the Fifth Circuit ruled that SEC's use of the ALJ, with the possibility for significant civil penalties, violated the Seventh Amendment right to a jury trial.

The *Jarkesy* Decision

Chief Justice Roberts' opinion

Chief Justice Roberts wrote the majority opinion for the Court, joined by five other Justices (Alito, Barrett, Gorsuch, Kavanaugh, and Thomas). Roberts stated that the Seventh Amendment right to jury trial "in Suits at common law" at issue "is not limited" to the definition of common law actions in 1789 but includes any "statutory claim that is 'legal in nature.'" In other words, just because Congress assigned the enforcement power to an agency under a statute does not override the Seventh Amendment guarantee. In particular, for the majority, "money damages are the prototypical common law remedy," and therefore the SEC's attempt to seek civil monetary penalties puts its enforcement action within the reach of the Seventh Amendment. (Plaintiffs may of course waive their right to a jury trial and instead be tried solely before a judge.)

Justice Sotomayor's dissent

In a strongly worded dissent joined by Justices Kagan and Ketanji Brown Jackson, Justice Sonia Sotomayor called the decision a "power grab" that would cause "chaos [.]"Noting that Congress had approved the policy of permitting Federal agencies to impose civil monetary penalties, Sotomayor wrote that the decision "upends longstanding precedent and the established practice of its coequal partners in our tripartite system of government [.]" More specifically, Sotomayor wrote that "for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a

statutory right that inheres in the Government in its sovereign capacity" (a case that only the Government, and not a private party, could have brought).

Analysis of the Decision

From the summary above, Roberts' opinion can seem uncontroversial, even conclusory. Congress authorized ALJs when writing or amending authorizing statutes of Federal agencies and, at least implicitly, reaffirms this perspective every year in the annual appropriations process. And various court decisions have upheld ALJs' powers. But Congress cannot override a constitutional guarantee; the Supreme Court has the ultimate power of judicial review in determining whether a statute is constitutional.

Viewed from another perspective, however, the decision is far more radical. Until this decision, a Federal agency's action against a defendant for violation of the statutes it enforces arise from those *statutes*, not from violations of the common law (put more simply, Jarkesy was charged with fraud within the meaning of the Dodd-Frank Act, not common law fraud).

The distinction matters because the text of the Seventh Amendment provides for jury trials "in Suits at common law." But is an action for a violation of a regulation adopted under the Administrative Procedure Act or a statute giving enforcement power to an agency truly a suit "at common law," and if so, on what ground? The traditional view in administrative law has been that statutory claims are not claims under common law. This is precisely the point the majority rejects: "what matters is the substance of the action, not where Congress has assigned it."

The Public Rights Doctrine

A foundation for the view that statutory claims brought by Federal agencies are different than those under the common law is the "public rights doctrine," which dates back to an 1856 Supreme Court decision, *Murray's Lessee*. More recently, the Court's decision in *Atlas Roofing v. OSHA* in 1977 held that Congress can pass statutes authorizing suits that are "unknown to the common law"—and thus beyond the reach of the Seventh Amendment's guarantee of a jury trial in civil cases. *Atlas Roofing* includes language providing that for "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning the factfinding function [the equivalent of a jury trial] and initial adjudication to an administrative forum with which the jury would be incompatible." Those are the kinds of cases in which ALJs have been used in a variety of agencies beyond the SEC, typically matters that often rely on expert knowledge of a regulated industry.

In contrast, Roberts' originalist interpretation of the Constitution is clear: he wrote that the "hallmark" of whether something is a public right is "whether it is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." Those actions—which include imposing monetary penalties—in the majority's view clearly fall under the Seventh Amendment. (This leaves out, for instance, cases about collecting taxes due (clearly a government function) and other areas that fall within the government's exclusive power.)

Applicability of the Decision

The Court's ruling, while quite wide in its principle, was considerably narrower in application. Strictly, it applies only to defendants accused of fraud by the SEC and likely other agencies ("A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator"), and the Court noted that previous decisions of ALJs, including those which imposed civil monetary penalties, are not subject to being reopened in new litigation simply because of *Jarkesy*. This leaves open, however, the question of how far the decision will go in practice.

Juries decide many complex questions in both civil and criminal law. The issue is not whether juries are workable, it is whether they are required. Where, as in the Dodd-Frank law, the government has an option between an administrative remedy and a suit involving a jury trial, *Jarkesy* very likely applies, and the government should use a jury trial to exercise enforcement power, binding itself to Federal courts' strict rules on evidence. (One difference between a jury trial in an Article III court and a proceeding before an ALJ is different, often broader, rules on the admissibility of evidence.)

More generally, however, the Court has effectively called into question the workability and future of about 200 statutes implemented by a large number of agencies and even whether the ALJ system can long continue in its current form, a question raised implicitly in *Lucia*. How far the Court is willing to go—notably, where a statute gives an exclusive or quasi-exclusive enforcement right to a Federal agency—will be at issue once other suits based on different statutes come before it. In 1789, there was no administrative state. This leads to a question as to the extent to which the public rights doctrine will remain a permissible exception to the Seventh Amendment right to a jury trial. If the court narrows the public rights doctrine, much of the current structure of the administrative state and agency enforcement of laws and regulations could be called into question. With additional decisions of the Court, five years from now, it is possible that the system could look very different, forcing agencies to choose between less enforcement or more expensive enforcement through jury trials and forcing Congress to review statutes in which it has delegated power to agencies. Agencies would be wise to consider carefully how they will proceed with future enforcement actions.

Back to the Supreme Court

Jarkesy, though, is only one of a series of Supreme Court decisions which raise significant questions about the future of the administrative state. In particular, starting with *West Virginia v. EPA*, the Roberts Court has restricted agencies' discretion in favor of clear delegations of authority from Congress and, as here, increasing the power of the courts. In so doing, however, it seems inescapable to conclude that the net effect of these decisions will be less regulation.

Some agencies have specific authority from Congress to use civil monetary penalties for their own budgets (including enforcement efforts); if they are unable to enforce their statutes through these proceeds, then either their budgets will fall (with correspondingly less enforcement) or Congress will have to provide greater funds. Bringing cases to trial can be expensive. As one law professor noted in response to the decision, "[t]he SEC doesn't have infinite resources, and so if the cost of settlement goes up, it means they're going to have fewer resources to bring enforcement actions."

The more challenging issue—almost certain to reach the Supreme Court in two or three Terms—is whether Congressional statutes that include (as Sotomayor wrote in dissent) the "Occupational Safety

and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and many others" are themselves vulnerable to a Seventh Amendment challenge. It is understandable that the Court made a somewhat narrow ruling on the case before it rather than a sweeping abolition of the role of ALJs that would have been disruptive to the workings of so many agencies. But those agencies must now consider how to operate—and what enforcement matters to bring—in a new and uncertain regulatory environment.

The End of *Chevron* Deference

This Term, the Supreme Court also reversed 40 years of precedent in a major case with implications for all regulated industries. In *Loper Bright Enterprises v. Raimondo* (and its companion case, *Relentless, Inc. v. Department of Commerce*), the Court overturned a 40-year precedent that courts should defer to agency interpretations of statutes if a statute is ambiguous.

In 1984, the Supreme Court ruled in *Chevron U.S.A. v. Natural Resources Defense Council* that courts must defer to agencies' "reasonable interpretations" of regulatory statutes in situations in which Congress has not spoken clearly to bind the agency in making regulations. In practice, this has applied with particular force when those agencies have adopted an interpretation of a statute through "notice-and-comment" rulemaking under the APA, in which the agency has received formal comments on the record and considered them in developing final regulations. (Insufficient consideration of major comments in a regulatory proceeding has always been grounds to challenge a final regulation in court.)

Specifically, *Chevron* upheld the Reagan Administration's interpretation of the Clean Air Act. While three Justices did not participate in the case, the decision of the others was unanimous; Justice John Paul Stevens' opinion was joined by Justices ranging in ideology from Justices Thurgood Marshall and William Brennan to Chief Justice Warren Burger and Justice Lewis Powell (a former regulatory attorney). Yet in recent years, "*Chevron* deference" has come under heavy criticism, particularly from the business community and conservative scholars, as giving too much power to agencies, power that should be reserved to Congress (with limits on the powers it can delegate to the Executive Branch) and to courts.

Background to the Case

In 2020, the National Marine Fisheries Service adopted regulations requiring certain fisheries (specifically, vessel operators) to pay for observers on their boats to collect data on fish stocks and monitor for overfishing. The program ended in 2023, and the money was later reimbursed. When the case reached the Supreme Court, the plaintiffs argued that it should be used to overturn *Chevron* deference.

The *Loper Bright* Decision

Chief Justice Roberts' Majority Opinion

Given the importance of the decision, it is unsurprising that Chief Justice Roberts wrote the majority opinion, joined by five other Justices (Alito, Barrett, Gorsuch, Kavanaugh, and Thomas). He also delivered part of it from the bench, another sign of its importance. Roberts wrote strongly that *Chevron* deference is "unworkable" and that it "prevents judges from judging," requiring an end to "our 40-year misadventure with *Chevron* deference [.]"

Roberts was also concerned to note, however, that *Chevron* was inconsistent with the APA, writing that because the APA provides procedures for both Federal agencies and for courts to review regulations, this "makes clear that agency interpretations of statutes . . . are *not* entitled to deference. Under the APA, it thus remains the responsibility of the court to decide whether the law means what the agency says." In response to an expected charge that courts cannot handle technical matters better handled by agency experts, Roberts defaulted to Congress' authority: "Congress expects courts to handle technical statutory questions" and have the benefit not only of the parties' briefs but of *amici curiae* briefs that can cover technical issues. Roberts also noted that agency interpretations of statutes change and thus Chevron "allows agencies to change course even when Congress has given them no power to do so." (On the other hand, Congress cannot control the legal and policy interpretations of the co-equal Executive Branch, which can change for many reasons, including change of Administrations.) Roberts did note, however, that a court may consider an agency's interpretation of the statute as part of its review. (A court is legally bound at least to consider the agency's interpretation if the agency is before it as a party to a case, absent a procedural challenge such as standing or mootness.)

Justice Neil Gorsuch's concurring opinion was even stronger: "the Court places a tombstone on Chevron no one can miss." He also argued that the impact of the decision would be less than many advocates fear: "all today's decision means is that, going forward, federal courts will do exactly as this Court has done since 2016, exactly as it did before the mid-1980s, and exactly as it had done since the founding: resolve cases and controversies without any systemic bias in the government's favor."

Justice Kagan's Dissent

Justice Kagan read part of her dissent from the bench, a sign of strong disapproval. She noted that courts have deferred to agencies simply because of their greater expertise in technical matters subject to regulation. Because of this, *Chevron* has been "applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest."

In Kagan's view, the decision means, in effect, not only that the Supreme Court has "exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law" but also that earlier decisions that relied on *Chevron* deference may become subject to review and reversal: "Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification.'" Accordingly, she wrote that the decision "will cause a massive shock to the legal system"; "[a] rule of judicial humility gives way to a rule of judicial hubris."

Analysis of the Decision

Clearly, the decision will lead to even greater litigation against agencies' regulations, and the burden of proof has now shifted decisively against agencies' statutory interpretations in areas where Congress has not spoken clearly. It thus shifts power from agencies to courts to decide the proper interpretation of statutes and therefore many technical matters subject to regulation. But those decisions will likely turn first on questions regarding delegations of authority rather than on substantive determinations of technical matters. The decision will affect virtually every business, including matters concerning environmental law, labor law, financial services regulation, agriculture, health care, and other major

areas. Overall, the decision may mean less regulation in highly regulated sectors over time as agencies must establish that Congress clearly delegated them authority to regulate on a particular matter.

In essence, the decision forces agencies to argue with even greater force—generally facing an uphill battle—that Congress has spoken clearly in giving an agency power to adopt particular regulations. Speaking of proposed regulations on electric vehicles, for instance, a former EPA General Counsel noted that "[t]he question is going to be, 'Did Congress clearly intend to give EPA authority to force a fundamental shift in the transportation sector?' And the answer may very well be that Congress can certainly do that itself, but there's no indication that Congress intended to give EPA that power."

The ruling dramatically expands the power of courts. Proponents argue this restores an earlier system; opponents counter that the course of administrative law has changed drastically in the interim, to which proponents ask whether this was a positive development. It is true, however, that "agency interpretation" of rules has frequently changed with changes in Administration. Whether Congress intended this level of deference, based on changes in political control, is an open question, but many regulations (net neutrality being a prominent example) have changed back and forth repeatedly in recent years, all of which leads to regulatory uncertainty and deters investment in related economic sectors, and Congress has not stepped in to resolve the issue.

The decision relies heavily on the principle that courts are unbiased—but courts are also not necessarily experts in a given area. Individual judges must consider an astonishingly wide variety of matters, may well not have previous expertise in each area, and must rely on the briefs of the parties and evidence presented before the court in rendering a decision. But the deferral to agency expertise has been, as Justice Kagan argued, a "cornerstone" of administrative law. That has now ended.

Impact of the Decision

It is difficult to argue with Justice Kagan's conclusion that the impact of the decision will be profound and far-reaching. The principal and almost immediate impact will be an increase in litigation challenging regulatory decisions, and it will become harder for agencies to justify their decisions. As an official of the US Chamber of Commerce noted, "agencies are going to have a hard time defending their legal positions. That means it will be easier to challenge some regulations than it used to be. That obviously has a real impact on whether it's worth bringing some cases." Similarly, an official of the National Federation of Independent Business suggested that many groups are considering new litigation: "Should we reexamine any ongoing litigation or aggressive investigation in light of this decision? Are there new areas of attack we can raise?" The National Association of Manufacturers, calling the decision a "game-changing transformation," said that it would "fight back new regulations we are facing today as well as whatever may come our way in the next administration." The American Bankers Association stated it would "fight to ensure that bank regulators follow the law every time they exercise their powers."

Many of the cases involving *Chevron* deference concern environmental law. Using a similar line of analysis to the ruling in *West Virginia v. EPA*, in *Ohio v. EPA*, the Court stayed enforcement of EPA's "Good Neighbor Plan" imposing limits on downwind air pollution from activities in other states as insufficiently grounded in the Clean Air Act and noting that plaintiff states were likely to prevail on a claim that the regulation was "arbitrary or capricious." This has implications for other major environmental rules

likely to come before the Court, such as rules on emissions from natural gas power plants and efforts to promote adoption of electric vehicles.

Interestingly, Justice Amy Comey Barrett dissented in *Ohio v. EPA*, noting that

> The Court today enjoins the enforcement of a major [EPA] rule based on an underdeveloped theory that is unlikely to succeed on the merits. In so doing, the Court grants emergency relief in a fact-intensive and highly technical case without fully engaging with both the relevant law and the voluminous record. While the Court suggests that the EPA failed to explain itself sufficiently in response to comments, this theory must surmount sizable procedural obstacles and contrary record evidence.

Her dissent may be viewed as a warning shot against the quick use of injunctions to decide regulatory cases, particularly with the end of *Chevron* deference.

The Future of Agencies' Regulatory Agendas

After these cases, how will agencies be able to plan their regulatory agendas? While many of Congress' major laws, particularly regarding the budget, have been lengthy, it is hard to imagine Congress enacting laws with the length and precision of major regulations. Many regulations are based on statutes from eras in which statutes were somewhat shorter, in which Congress expected (and directed) that agencies would issue implementing regulations. Particularly in environmental regulation, both Congress and agencies have assumed that statutory schemes are sufficiently flexible to permit agencies to regulate in new areas (notably in response to climate change), an assumption the Supreme Court has now rejected.

It is also important to note the breadth and potential far-reaching impact of *Loper Bright*. Consider, for instance, that the Inflation Reduction Act gave the Internal Revenue Service authority to issue regulations for the tax incentives in that law. Could those interpretations now be vulnerable to challenge on the ground that Congress did not speak clearly enough? Or would revenue interpretations be seen as a special case? Courts will consider many such questions along these lines in the coming years.

Clearly, where Congress truly wishes an agency to regulate, it must speak with even greater clarity than in the past. In the Inflation Reduction Act, for instance, Congress did define EPA's authority to regulate greenhouse gases as pollutants under the Clean Air Act, though any regulations citing that authority would still be vulnerable on the ground that Congress might not have spoken clearly enough.

Broadly speaking, it will now be easier for a court to stop than to approve new regulations, ending what Justice Gorsuch termed the "systemic bias in the government's favor"—which in practice frequently meant approval of greater government action. Over time, therefore, the decision likely means less regulation than in the era of *Chevron* deference. Though many businesses may welcome that prospect, an era of continued high levels of litigation—and associated uncertainty for business—also lies ahead. As the NFIB official quoted above noted, agencies may want to "put their pen down and pause" before issuing regulations. More radically, West Virginia Attorney General Patrick Morrisey (the lead plaintiff in *West Virginia v. US*) stated that with the *Loper Bright* decision, "[w]e are a little further along today in our effort to dismantle the administrative state." That is the prospect which so worries Justice Kagan. It will

now be up to Federal courts—and ultimately the Supreme Court—to determine how much further curbs on regulatory action and regulatory policy will go.

In the meantime, it will be more costly—and take longer—both for Congress to pass legislation with greater specificity and for agencies to develop regulations, also with greater specificity. Adjudication of cases will almost certainly take longer (and be more expensive) in Federal court, which can raise costs for businesses and pose particular challenges for directors and officers of companies who have responsibility for the business as a whole and legal and regulatory risks. Agencies, for their part, may be more reluctant to reach decisions quickly and could default to greater rigidity rather than exercising flexibility, fearing litigation.

Impact on Financial Services

The decision could have a particular impact on financial services regulation. Taken literally, the decision applies to the Treasury Department's interpretation of the Internal Revenue Code. Here as elsewhere, Congress will need to be clear about the extent of the delegation it has given Treasury. To be sure, *Loper Bright* did permit agencies to "fill up the details of a statutory scheme" and "regulate subject to limits imposed by a term or phrase that leaves agencies with flexibility . . . such as 'appropriate' or 'reasonable.'" Congress must act, in short, through what the Court in 1927 termed an "intelligible principle" underlying the delegation. In practice, it seems unlikely that the Court would upend the system of regulations adopted under the Internal Revenue Code, particularly after having declined to take a somewhat related radical step this term in *Moore v. United States*. But there is no blanket exception for the IRS, and it is entirely possible that *Loper Bright* challenges may become a feature of tax litigation. If so, Congress may need to reaffirm its delegation of authority to Treasury in more explicit terms.

A similar consideration arises with respect to the Federal Reserve System. Here again, the Court gave no blanket exception, although other cases may imply that the Court believes the Fed is constitutional—but its ability to expand its powers beyond explicit statutory delegations may be subject to litigation, forcing Congress into a deeper supervisory role over the Fed's powers and a greater say in financial regulation.

Courts should make these types of determinations based on Congress' intent. For instance, with respect to the Telecommunications Act of 1996 (and its predecessor statutes), it seems clear that Congress intended to regulate only radio and television—but not streaming, which did not exist at the time of enactment. For the FCC to seek that power itself absent Congressional authorization would go far beyond "fill[ing] up" a statutory scheme. Still, a question remains as to how government can react with swiftness to emergencies in the absence of clearly delegated powers from Congress. This issue lay at the heart of the COVID-19 vaccination cases the Court considered in 2022; *Becerra v. Louisiana* ruled that the Labor Department did not have power to enforce a broad vaccination mandate while *Biden v. Missouri* permitted enforcement of a mandate for health care workers under a different statute with different powers.

Quite simply, Congress must speak with greater clarity. In response to *West Virginia v. EPA*, for instance, the Inflation Reduction Act explicitly gave EPA power to regulate greenhouse gases by defining them as air pollutants, but litigation on this issue is hardly over, and agencies will have to be more careful to ground their exercise of power in clearly delegated authority.

For their part, agencies may be starting to heed the Court's warnings. For instance, a final rule earlier this year from the Federal Maritime Commission on demurrage and detention billing requirements adopted under the Ocean Shipping Reform Act of 2022 deleted a section from the proposed regulation on the ground that the proposal was not specifically required by law. This is the way administrative law is supposed to work and a model of what CED has termed Smart Regulation: agencies interpreting the plain meaning of the statute and giving deliberate consideration of and favorable response to major public comments on the rule.

The Role of Business

All stakeholders affected by a regulation have a right to bring suit against an agency implementing it. Business is no exception. But while not all businesses can or should bring litigation, all businesses should prepare now to navigate this new era of regulatory uncertainty and change. Business leaders should consider active membership of trade associations that will represent industry's point of view to the government, and businesses in highly regulated industries should not be afraid to engage in dialogue with the agencies that regulate them, meeting with regulators and submitting formal comments in response to proposed regulations. Returning to the framework of the APA will require business' active participation in the regulatory process.

For many regulated businesses, regulatory uncertainty can be as damaging as excessive regulation. Each can discourage new business activity, with serious consequences for the economy. Courts should use their new powers wisely and exercise them with deliberate speed as they will now be significantly more responsible for delivering the regulatory certainty on which business depends and the absence of which can raise costs and deter economic activity.

Conclusion: A Way Forward

As both agencies and business take stock of the new environment, courts will provide answers on the future of ALJs and how agencies will be able to issue regulations on major questions such as those involving environmental or labor law. But each stakeholder can take steps to improve the system.

Congress

Congress will have to speak with greater clarity on the delegations of power it gives to agencies and ground those delegations in constitutionally permissible areas (for instance, respecting the right to jury trial). Given the greater expense of bringing cases in Federal court, Congress may also wish to increase agencies' enforcement budgets, lest enforcement fall simply because agencies no longer have the ability to impose civil monetary penalties without a long and expensive trial. In response to an increase in the number of matters, both enforcement matters and questions on agencies' regulations, expected to come to trial, Congress may also wish to increase the number of Federal district judges, who would have to be confirmed by the Senate before they could hear these cases. Lengthy litigation raises costs for business and agencies and rewards only those who can most bear its costs; parties deserve swift consideration of their claims and swift decisions.

Agencies and Appointment of ALJs

Agencies, too, will have to respond to the Court's decisions or risk further litigation. Where agencies have a choice between an ALJ system or filing in Federal court, they should generally seek to file in Federal court to avoid losing an enforcement action on *Jarkesy* grounds. As noted above, some agencies responded to *Lucia* with merit-based selection systems. If agencies are to take the appointment power instead of the Office of Personnel Management, they can still retain significant elements of a merit-based system, including a competitive examination with high standards for appointment, functional independence from the agency, and removal protections. An ethics code for ALJs, as the American Bar Association has recommended, is also a wise step.

More specifically, the Administrative Conference of the United States recommends four proposals for ALJ appointments: first, "to publicize their ALJ openings" on both government and private websites to "reach a diverse range of candidates"; second, "to formulate and publish ALJ selection criteria"; third, "to develop procedures to review and assess ALJ applications," each to prevent bias in the appointment system; and fourth, "to ensure the hiring of ALJs who will carry out the functions of the office with impartiality and maintain the appearance of impartiality [.]" These principles are wise and would strongly avoid the danger of politicization of ALJ appointments that arose after *Lucia*.

Indeed, the idea that ALJs are appointed through a fundamentally political process involving a politically appointed agency head—and serve in the "excepted service" as political appointees with uncertain tenure and the possibility of removal other than for good cause raises the real danger of judges who could be biased against private parties bringing cases against agencies—is precisely the danger the APA was enacted to avoid.

Operating Manuals

Despite *Jarkesy*, ALJs will likely continue to have a role at the SEC and other agencies, for instance in adjudicating matters such as debarments or issues involving self-regulated organizations. While ALJs are meant to be independent, some have in practice tended to favor the agencies they serve. Agencies would benefit from more qualified ALJs and agencies' adoption of operating manuals to guide their work and the hearings they conduct, in particular regarding standards of evidence, precedential decisions, and other matters to standardize an agency's approach to hearings.

An operating manual is not the same as a reporter of judicial decisions, but it can set out a series of administrative practices reflecting precedents and an agency's approach. The SEC adopted a manual under Commissioner Mary Shapiro after Congress enacted the Securities Enforcement Remedies and Penny Stock Reform Act of 1990; had it taken a similar step after the enactment of the Dodd-Frank Act, then either case against Jarkesy might not have been brought through an administrative proceeding or the standards of evidence used in agency proceedings might have come closer to those used in Federal court. A manual also avoids a situation in which an ALJ decides to defer to an agency, such as the SEC, on a case of first impression—violating the spirit of independence of ALJs and making an agency itself prosecutor, jury, and judge.

There is some tension here: the FTC, for instance, withdrew its operating manual as a part of reinforcing the perspective that the Commission itself decides on important questions such as mergers rather than an ALJ. But they can still be useful tools for an agency, particularly one in the Executive Branch rather

than an independent commission. EPA's manual, for instance, is extensive, but it is also clear that the "document is solely intended as guidance. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person." That reinforces ALJs' independence from the agency—an essential feature of the system. More agencies should consider adoption of manuals, in particular raising the standards for admissibility of evidence in ALJ hearings.

Courts

Courts should exercise their renewed powers with care. They should be extremely reluctant to reopen settled litigation on the basis of *Jarkesy* or *Loper Bright*; as Justice Barrett notes, they should be cautious about issuing quick procedural injunctions without an investigation of the facts; and they should seek to address regulatory matters quickly to increase certainty for all parties, the regulator and the regulated. This may well require an increase in the number of Senate-confirmed Federal judges.

Return to the APA Framework

Congress enacted the APA to ensure that agency hearings were conducted with impartiality and with the best evidence possible in support of developing and implementing regulations themselves. Agencies are not courts. Taken together, the Supreme Court's decisions sharply restrict agencies' discretion in administrative law and remind agencies that while they may exercise some quasi-judicial functions, they are not courts in the same way as Article III courts are.

Indeed, while ALJs are meant to be functionally independent and non-political, agencies themselves are part of the Executive Branch, a political branch. Agencies' interpretations of many statutes, from the Clean Air Act (climate change) to the Telecommunications Act (net neutrality) have changed frequently and regularly with the change of Administrations. One can argue that Congress expected this by writing statutes that are vague or expansive and that Congress understands that changes in political control of Administrations can mean changing interpretations of statutes. Changing interpretations may be appropriate from a political or policy standpoint (regulations should change as the evidence for or against them changes), but it also underscores the Chief Justice's views that in the end, judges should decide and agencies' interpretations of their own statutes may not be uniquely reliable.

In response, then, agencies should return to the APA framework with fresh determination rather than seeking ways around it. One virtue of regulation under the APA is that it increases participation and ensures that all parties have an opportunity to comment on regulation and that the agency has considered all comments, including those regarding its jurisdiction, in preparing a final rule for implementation. Following this framework in letter and spirit is perhaps the best way to reduce the large volumes of litigation that will likely arise after the momentous decisions of this past Supreme Court Term while ensuring fairness to all parties and "smart regulation" in regulated industries.

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