Five Administrative Law Takeaways From Recent Supreme Court Decisions

Article By:
J. Michael Showalter
Samuel A. Rasche
Rachael A. Bryan

The US Supreme Court’s decisions of late have been consequential. While headline-grabbing decisions deal with religious liberties, privacy, and gun control, the Court’s impact on administrative law will have major consequences as well. Administrative law decisions stemmed from cases involving how the executive shaped policy related to climate change, health care, immigration, and public health. Administrative actions are tied together by procedural rules derived from the constitutional separation of powers and the federal Administrative Procedure Act (APA).

Below, we discuss five major trends derived from this term’s decisions related to administrative law and the separation of powers:

1. The “major questions doctrine,” and how it can limit executive-branch authority;

2. How spending can be used to shape behavior in situations where executive-branch authority might otherwise be limited;

3. The fate of “Chevron deference” – i.e., the judiciary’s willingness to defer to the executive branch’s interpretations of statutes agencies are tasked to administer;

4. What discretion executive agencies have to change policies, and what steps they need to defend such changes; and

5. When the Supreme Court will intervene in cases that are moot or which otherwise lower court decision-making might simplify the Court’s resolution of involved issues.

Major Questions Doctrine

The facts that would support a “major questions” analysis of executive actions became clearer with
this term’s decisions. The doctrine drove decisions in major cases related to climate change and public health – NFIB v. OSHA, dealing with the federal vaccine mandate, and West Virginia v. EPA, which addressed greenhouse gas regulations. In sum, the Court says that administrative actions with significant economic and political impact require a close look at authorizing legislation to determine if Congress has authorized the action taken.

Some background on these cases. NFIB v. OSHA – decided first - grappled with whether OSHA exceeded its authority when it sought to require certain employers and their employees to receive a COVID-19 vaccine or be subject to frequent testing requirements. (We discussed this case individually in-depth here.) OSHA based its mandate on its authority to relate workplace hazards. Because the vaccine mandate for businesses with over 100 employees would impact roughly 84 million Americans, the Supreme Court accepted that it was a “major question” that involved “great economic and political significance” and therefore was subject to the major questions doctrine. Accordingly, the executive branch was required to point to specific authority supporting the mandate. Because the executive branch could not point to where Congress gave them the power to enforce a vaccine mandate, the Court overturned it.

This decision either reaffirmed the importance of checks and balances or demonstrated that the “major questions doctrine” could be used to prevent the executive branch from flexibly using “old” public health law to address novel issues associated with an airborne pandemic.

The “major questions doctrine” appeared next in West Virginia v. EPA, which we discussed here. To address the issue of climate change, US Environmental Protection Agency (EPA) developed the Clean Power Plan to address carbon dioxide emissions from power plants that relied on owners shifting from fossil fuels to zero-emitting fuels in 2015. This required closures of fossil fuel generating stations and significant investments from the electric generation sector. After the Supreme Court stayed the Clean Power Plan, the Trump Administration proposed a different rule that mandated actions solely at the fossil fuel-fired units and, simultaneously, declared that the Clean Air Act did not authorize the far-reaching legal rationale of the Clean Power Plan.

After addressing some unique procedural issues, which we will discuss below, the Court characterized the Clean Power Plan as effectively remaking the national energy markets. Applying the major questions doctrine, the Court held that such a broad change to the energy sector required a clear congressional mandate, which was not present in the Clean Air Act. In a concurrence, Justice Gorsuch argued that deferring to agencies on matters of great economic or political significance would amount to “Permitting Congress to divest its legislative power to the Executive Branch. . .”

How Spending Can Be Used to Shape Behavior

Whereas the two decisions above illustrate limits on executive power, in Biden v. Missouri, the Supreme Court allowed the executive branch to use spending to compel COVID vaccinations of employees in certain medical establishments. A vaccine mandate in this context was consistent with past policies because Medicare and Medicaid facilities are routinely forced to follow protocols to receive funding.

Clearly, one takeaway from Biden v. Missouri is that the executive is not without power to influence private behavior, so long as spending is involved. The Court found that in the healthcare space, it would be countercultural for effective administration of a “facility that is supposed to make people well to make them sick with COVID-19.”
The Fate of the *Chevron* Doctrine

A third issue worth discussing is the fate of the "*Chevron* doctrine." Our takeaway is that the "*Chevron*" doctrine may have little force at the Supreme Court level, even if parts of its analysis live on. We base this conclusion on the fact that both *American Hospital Association v. Becerra* and *West Virginia v. EPA* feature limited deference to the executive vis-à-vis the courts. But, neither case discusses *Chevron* at all. Why?

The "*Chevron* doctrine" has been fundamental to modern administrative law while existing in a policy-wonk backwater. The *Chevron* doctrine was born in the 1984 Supreme Court decision *Chevron v. National Resources Defense Council*. It provides federal agencies with the ability to interpret the statutes they are tasked to administer without heavy-handed court intervention. Under the traditional *Chevron* analysis, courts will defer to the federal agency when the relevant statute is ambiguous, and the agency's interpretation is reasonable.

Two major cases seemed to ignore the doctrine, however:

- In *Becerra*, the Court signaled some unwillingness to find statutes "ambiguous." *Becerra* involved the US Department of Health and Human Services' interpretation of the Medicare statute governing hospital reimbursement rates. While the DC Circuit Court of Appeals below found significant ambiguity in the highly technical statute, a unanimous Supreme Court disagreed and held that the plain language of the statute clearly precluded the agency's interpretation. The fact that the Supreme Court found clarity where the DC Circuit saw ambiguity suggests that the Court has significantly raised the bar for the level of ambiguity necessary for it to adopt an agency's interpretation.

- Where *Becerra* limited the impact of *Chevron* based on the text of the statute, *West Virginia v. EPA* established an entire class of cases where *Chevron* will not apply based on the practical impact of the regulation. By embracing the "major questions doctrine" discussed above, the Court signaled that it will not defer to federal agencies on novel issues unless Congress clearly stated an intent to delegate to the agency. The Court focused on the sweeping impact of EPA's proposed emissions regulations, in stark contrast to the DC Circuit's textual analysis of the statutes at issue (and also to the Court's own textual analysis in *Becerra*).

While it appears that the *Chevron* doctrine may currently be gathering cobwebs at the Supreme Court level, it remains to be seen what will happen at the district and appellate levels. Maybe the *Chevron* doctrine will continue to exist as a sorting mechanism below -- scholars have noted that *Chevron* was far more likely to determine outcomes in the lower courts. But at the very least, the Supreme Court has given federal judges powerful tools to avoid deferring to agency interpretations where they are so inclined.

How and When Agencies Can Change Preexisting Policies

A fourth issue worth highlighting may be found in *Biden v. Texas*, which involves the Biden Administration's rescission of the Trump Administration's Remain in Mexico policy.

First, some policy background: Government agencies have broad discretion in setting and changing policies so long as they follow the appropriate procedures. Generally, these procedures are set forth in the APA, a statute that we discuss with great regularity. Under the APA, the executive's decisions
can only be justified or challenged based on the agency’s administrative record. The regulated community can sometimes request that the Court look beyond the administrative record by showing that the agency acted in bad faith or in a procedurally improper manner. The Court’s last significant decision in this area – *Department of Commerce v. New York*, which we summarized [here](#) – evaluated the Commerce Secretary’s attempts to add a citizenship question to the 2020 census. In *Department of Commerce*, extra-record discovery revealed that the Secretary planned to add the question all along and had, in fact, solicited the request for the question from the US Department of Justice (DOJ). The Supreme Court determined that the Voting Rights Act rationale was “contrived” and affirmed the lower court’s decision to bar the US Department of Commerce from asking the question.

Regarding this case: *Biden v. Texas*, which involved the Biden Administration’s rescission of the Trump Administration’s “Remain in Mexico” immigration program – also called the Migrant Protection Protocols (MPP) – evaluated whether the Biden Administration acted appropriately when it rescinded the program. Some background on *Biden v. Texas*:

- In January 2019, the US Department of Homeland Security (DHS) began to implement MPP. Under MPP, certain non-Mexican persons arriving by land from Mexico were returned to Mexico to await the results of their immigration cases. After it took office, the Biden Administration first suspended the program and later terminated it.

- Texas and Missouri challenged the rescission on the grounds that it violated federal immigration law as well as the APA. A Texas federal court accepted the states’ arguments on the grounds that immigration law required DHS to either detain arrivals in the US or in contiguous territory – as MPP did – and that DHS lacked the resources necessary to house arrivals in the US, so a program like MPP was required by statute. The district court entered an injunction requiring the government to “enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under [immigration law] without releasing any aliens because of a lack of detention resources.”

- On appeal, the Secretary of DHS released a second explanation for terminating MPP and sought to vacate the injunction. The appellate court affirmed the lower court’s analysis that the injunction was required and rejected DHS’s second explanation for why the program should be terminated on the grounds that it did not constitute a new or separately reviewable “final agency action,” which triggers APA review.

The Court upheld the rescission of MPP on two grounds: first, because federal immigration law used the word “may” in defining what DHS may do regarding confining persons arriving over land from Mexico. “May” gives the government discretion and establishes contiguous-territory return such as was required by MPP as a tool that the agency “has the authority, but not the duty” to use. Congress could have – but did not – construct the immigration provisions to require MPP.

Additionally, upholding the program required the Court’s consideration of DHS’s during-litigation explanation for why the program should be terminated. The Court accepted the during-litigation explanation because it constituted a wholly new explanation of why the MPP should be terminated. The during-litigation explanation explained that it “superseded” and “rescinded” the earlier termination and then offered “new reasons” that had not been included in the prior rescission. Both
the pre-litigation and during-litigation memoranda were separate “final agency actions.”

Finally, because DHS did not rest on its pre-litigation MPP termination, it was permitted to provide additional justifications for its actions, so long as the agency complied with APA-imposed requirements for taking “new” actions. The Court rejected the states’ charge that there was a “significant mismatch between” the rescission and DHS’s explanation for it. DHS’s “ex-ante preference for terminating MPP – like any other feature of an administration’s policy agenda – should not be held against” its actions. Accordingly, DHS’s rescission of MPP was upheld.

An Increase in Procedurally Irregular Case Resolutions?

A final trend we wanted to highlight is that the Supreme Court appears increasingly willing to wade into disputes at earlier procedural phases than would be typical. Historically, nearly every Supreme Court case has made it to the Court having been fully and finally resolved in lower federal courts. (To be sure, there are some exceptions – most notably the limited class of cases for which the Supreme Court has original jurisdiction, which involve mainly disputes between the states or disputes between ambassadors.) This term, the Court was increasingly willing to wade into disputes which were either arguably moot or have not yet completed their run through lower courts. Three examples:

- **Mootness.** In *West Virginia v. EPA*, during the pendency of litigation, the Biden Administration indicated it would not enforce the regulations at issue and instead would pursue a new rulemaking. The Court found that EPA’s representation that “voluntary cessation does not moot a case” unless it is “absolutely clear that the allegedly wrongful behavior could not be expected to recur.” For the government to moot the case, it would have to suggest that it would not re-impose limitations based on generation shifting – something that it did not do.

- **No lower court finding regarding jurisdiction.** In *Biden v. Texas*, four of the nine justices signed a dissent indicating that lower courts should review whether federal courts had “jurisdiction or authority to enjoin or restrain the operation of” certain immigration laws in light of the Court’s recent decision in *Garland v. Aleman Gonzalez*, which addressed similar issues. While a majority of the court favored reaching a merits decision, four members of the Court favored remanding the case to lower courts for an evaluation of how *Aleman Gonzalez* might alter jurisdictional issues in the case.

- **The Court’s Use of its “Shadow Docket.”** In *Ardoin v. Robinson*, the Supreme Court, in an unsigned order with no explanation, reinstated a district voting map in Louisiana that has previously been deemed discriminatory and harmful to minority voting rights. This case was decided under what has been coined the Supreme Court’s “shadow docket” because it refers to cases decided outside normal procedural regularity: off the regular docket, without oral arguments or written briefs, and before lower courts have fully and finally decided the issue. The Court’s use of its “shadow docket” appears to be occurring with increasing frequency. As the Court is likely to remain polarized next term, we may see additional consequential decisions at the “shadow docket” phase then.

This was clearly a major term with significant decisions in many areas, including administrative law. The Court’s next arguments begin in October. We will keep an eye out for new cases relevant to administrative law.