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Supreme Court Is Far From Finished With Reining in US Agencies

By Noel Francisco and Hashim Mooppan

- *Jones Day partners examine agency deference in new term*
- *Two cases could show court's interest in further limits*

Last year's US Supreme Court term was momentous, especially regarding administrative law—the laws that regulate the regulators. Looking ahead to the new term starting Oct. 7, one of the big questions is whether the administrative state is set for another drubbing. The answer might not be as clear as expected.

A defining trait of the Roberts Court has been to temper big decisions with gradualism—some gas, followed by some brakes. The question isn't whether this court will further scale back the administrative state, but how, and how fast. The coming year will offer insights into those questions, both in terms of the cases the court decides and those it doesn't.

The justices have already agreed to hear arguments in *Garland v. VanDerStok* during the first week of October. The case asks whether the Bureau of Alcohol, Tobacco, Firearms, and Explosives' new regulations of ghost guns, which are collections of parts that can be assembled to create a gun, fit within its authority to regulate "firearms" under the Gun Control Act of 1968.

The challengers say no, reasoning that the law's text and long-understood meaning have always been that "firearms" mean completed firearms or the actual frames or receivers of such firearms. The government says yes, on the view that the ATF's authority should be read broadly to include weapons parts kits (and items that can be readily converted into a frame or receiver), which it says would better effectuate Congress's objectives and allow the ATF to adapt to unforeseen problems.

Now that the high court overturned Chevron deference to federal agencies, *Garland* offers a high-profile example of the court's independent statutory judgment in action. It will ask not whether the ATF should be able to regulate here, but whether Congress already has given it the power to do so.

Another notable case will be *FDA v. Wages and White Lion Investments* . That case concerns how

the agency chooses to wield its statutory authority. Here, the challengers, who sell nicotine e-liquids, contend the Food and Drug Administration told e-cigarette applicants to follow one set of criteria, then employed another in denying their applications (or in the words of the Fifth Circuit, pulled a “surprise switcheroo”).

A growing theme across the court’s administrative law cases has been that regulators must “turn square corners” if regulated parties must do so as well. This case will implicate a fundamental balance within administrative law: The need for courts to respect the discretion that Congress has afforded expert agencies versus the importance for courts to ensure that agency action is reasonable and reasonably explained (that is, not arbitrary and capricious).

But these cases are a small part of the picture. The Supreme Court only has filled up a fraction of its docket for this term. More petitions are pending or likely forthcoming; some could become landmark precedents.

Two examples are worth flagging—both, coincidentally, named Consumers’ Research. One raises a challenge about the scope of *Humphrey’s Executor*, the New Deal-era case used to bless the numerous laws that create independent agencies whose heads are insulated from removal and supervision by the President.

Another involves the nondelegation doctrine, which cabins Congress’s ability to transfer its legislative power to unelected administrative agencies. In each case, the justices have a clean opportunity to address another pillar of administrative law. How they approach those opportunities will speak volumes about the years ahead.

The upshot of the court’s last term is that the old days of administrative law—where agencies decide the bounds of their own authority—are over. On the doorstep of the 2024 term, the issue becomes what the new days look like. There is no doubt this court isn’t finished with administrative law. There is still much work to be done to bring agencies within constitutional bounds and restore power to the Constitution’s enumerated branches.

Whether the 2024 term launches another blockbuster year, or something quieter, the trajectory of administrative law seems clear. It’s bending away from unchecked administrative power toward a more traditional sense of constitutional government. The upcoming term will offer meaningful insight into how far the court is willing to go, and at what speed.

The cases are: Garland v. VanDerStok , 2024 BL 136256, U.S., 23-852., 4/22/24 ; FDA v. Wages & White Lion Invs., L.L.C. , 2024 BL 225070, U.S., 23-1038., 7/2/24 ; Consumers' Rsch. v. Consumer Prod. Safety Comm'n , 2024 BL 15742, 5th Cir., 22-40328, 1/17/24 ; Consumers' Rsch. v. FCC , 2023 BL 223114, 5th Cir., 22-60008, 6/29/23

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