A Review of Significant Supreme Court Decisions of the 2023-2024 Term

By Kevin R. Eberle

For three summers, this annual recap of the Supreme Court's recently concluded terms has included both opinions which captured the media spotlight (even if they quickly faded from public consciousness) and those that practicing lawyers would quite possibly use (even if no person-on-the-street would recognize them). This year's recap will do the same, including cases ranging from administrative law to presidential immunity.

Before recapping the cases, it is important to check back in on a trend that has been mentioned in the last two editions and shows no sign of reversing: the decrease in Americans' faith in the Supreme Court as an institution. Gallup polls now report that only 16% of the country has a great deal of confidence in the Supreme Court while 40% overall have "[h]ardly any confidence at all."[1]

While the Supreme Court has been a political branch since 1789, 70% of Americans now feel the justices make decisions "to fit their own ideologies" instead of "provid[ing] an independent check on other branches of government by being fair and impartial."[2] Part of the problem might be the increasingly rancorous tone of Senate hearings for appointees, and surely part of the problem is the near-constant attacks on the judicial system at-large and near-constant attacks on specific justices.

Last year's review highlighted the need for some form of rules of ethics at the Court, whether mandated by Congress or self-imposed by the Court, to stanch the bleed of public support. The Court adopted rules of ethics in November 2023,[3] but the rules were widely mocked as being more loophole than rule. Even the Court's statement upon their release was chided as condescending; the Court explained it was adopting the rules only because of the public's "misunderstanding" of how the Court operates.[4]

Regardless, the Court continued to produce legally, politically and culturally important cases. Among lawyers, this term will be remembered for the first two cases described below that fundamentally changed the power of the three branches of our federal government, shifting power away from the executive branch to the judicial branch.

Laws mean what *courts* say they mean, not executive agencies

***Loper Bright Enterprises. v. Raimondo*, ___ S. Ct. ___ (2024) (6-1)**

In Raimondo, the Court upended the roles of the branches of government in a case that will potentially be the remembered as the most consequential—albeit not the most memorable—case of the term

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and will very likely impact cases of South Carolina lawyers involved in almost every area of law. While Congress enjoys the ability to pass laws affecting an extraordinarily wide range of topics, Congress does not typically possess subject-matter expertise, nor do members of Congress have specific experience to craft detailed laws on those topics. Therefore, federal statutes very frequently use broadly worded pronouncements such as commands that public transportation be "readily accessible" to the disabled, that school lunches include "nutritious food," or that banks are "adequately capitalized." Members of Congress might easily see the need for potable water, but they are less likely to know how many micrograms of lead are too much for "safe" drinking water.

Ambiguous language in statutes is unavoidable, so someone will eventually have to interpret it. Forty years ago, the Court decided Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. and created the "Chevron standard" that required courts to defer to the interpretation of ambiguous laws given by an executive agency within its area of expertise.[5] In that case, the Clean Air Act had used undefined terms which the EPA had given a meaning to. The Court decided that the interpretation of the statute was at least reasonable and would therefore be used by the judiciary: "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[6] In Raimondo, Chevron was not merely overruled but was utterly flipped.

In 1976, Congress recognized that overfishing posed a problem, and it responded with the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The National Marine Fisheries Service (NMFS) (i.e., the executive agency charged with implementing the MSA) created regulations based on recommendations from regional fishery management councils. One such regulation required vessels fishing for herring to carry federal observers to watch for overfishing and to pay the observers $700 a day.

The problem, according to vessel owners forced to pay the monitors' cost, was that, while the MSA authorized such pass-through charges in some scenarios, it was silent as to the fees as applied to Atlantic herring fishing vessels. The case before the Supreme Court asked whether the federal agency charged with enforcing the law was entitled to have its interpretation upheld (if it was a reasonable interpretation of the statute) or whether the lower courts had erred by giving deference to the agency's interpretation.

Chief Justice Roberts, writing for a six-justice majority, began his opinion with a discussion of the judicial branch in American government, leaning heavily on famous quotes from early sources such as the Federalist Papers and Marbury v. Madison: "'It is emphatically the province and duty of the judicial department to say what the law is.'"[7] He noted that, while executive interpretations might be one source to help interpret legislative commands, the courts were ultimately not bound to follow the executive interpretations or the courts would not truly be independent. He returned to the same point over and over: It is for the courts to say what the law is. While Congress has the power to grant agencies the power to interpret Congressional intent, absent an express delegation, the power rests with the courts.

Chief Justice Roberts wrote that regulations that had already been approved using the Chevron deference during the last four decades should be considered safe, but the dissent pointed out that any judge could easily contrive some special context to justify reexamining earlier uses of Chevron deference. Whether all regulations are open to attack or just those starting now, any lawyer whose client is unhappy with the consequences of a regulation would be wise to return to the original statute to see whether the action was spelled out in the text of the statute. If not, a challenge might be justified.

Administrative courts are suspect

***Securities and Exchange Commission v. Jarkesy*, ___ S. Ct. ___ (2024) (6-3)**

Administrative law was the subject of another important case involving a shift of power from the executive branch to the judicial branch. The Court ruled that one of the primary ways that the Securities and Exchange Commission enforced its rules was a violation of the Seventh Amendment.[8] Many executive agencies—perhaps two dozen—rely on in-house tribunals without juries instead of traditional actions filed in federal court. Sidestepping federal courts might make the agencies more efficient, but the Court opined that a defendants' right to a jury trial was more important.

The Securities and Exchange Commission (SEC) was created by Congress after the 1929 Wall St. Crash to enforce a collection of securities laws enacted in the 1930s and 1940s. The SEC was allowed to bring enforcement cases either in a traditional Article III proceeding in a federal court or in-house. The choice meant that different rules of procedure and evidence would apply, different decisionmakers would preside, and most importantly the defendant would not have a jury during an in-house proceeding.

George Jarkesy, a hedge fund manager, was accused of misleading investors. The SEC chose to proceed against him in an in-house proceeding where an administrative law judge employed by the SEC ruled against Mr. Jarkesy. The civil penalty and the disgorgement of profits totaled about $1 million.

When the case reached the Supreme Court, the majority ruled that Mr. Jarkesy had been entitled to a jury trial. The Seventh Amendment had been easy to agree upon in the Bill of Rights because of the importance of jury trials to Colonists; in fact, the British effort to strip the right to jury trials from

some actions had even been a justification listed in the Declaration of Independence. Whether a party has a right to a jury trial requires an examination of the nature of the claims; equitable and admiralty claims do not give rise to jury actions, but common law claims do. The majority found that an SEC penalty for monetary relief for fraud was a very clear example of a claim meriting a jury trial. The civil penalties were meant to punish and deter, not to compensate; thus, the actions were common law cases.

Even the dissent basically agreed with the majority up to that point. However, the sides parted over a historical carve-out to jury trials which allowed executive tribunals to resolve cases over "public rights," not simply "private rights." Such cases involve "the collection of revenue; aspects of customs law; immigration law; relations with Indian tribes; the administration of public lands; and the granting of public benefits."[9] The majority admitted that the contours of the "public rights" doctrine relied upon "'frequently arcane distinctions and confusing precedents.'"[10] The Court "has not definitively explained the distinction between public and private rights," and the majority did "not claim to do so" in the new case. In the end, the majority decided the "public rights" doctrine was not compelled by the very few cases the SEC and dissent cited.

The practical significance of the case is that parties to in-house proceedings before a range of federal agencies including the FDA, EPA, and FCC are now possibly better able to have their cases heard by a jury. The rules governing federal court cases might help some litigants, and lawyers should consider their ability to control where their cases are decided. But an important collateral consequence of the ruling is that it will certainly reduce the income some agencies make from in-house, civil penalty cases, especially when Congress does not appear ready to fund the agencies otherwise.

Bans on sleeping outdoors can be enforced against those with nowhere to go

***City of Grants Pass v. Johnson*, ___ S. Ct. ___ (2024) (6-3)**

While the Court has hardly been unanimous in many of its rulings, every justice agreed that homelessness is a severe problem. Justice Neil Gorsuch, the Court's only member from the American West, began the majority opinion by highlighting the size and scope of the homeless crisis, especially in the West; the five states with the highest homeless rates are all in the West.[11] To combat the many problems homeless encampments create, Justice Gorsuch listed just some of the efforts cities have employed including increased shelter capacity and investments in mental-health and substance-abuse programs. One common response—the one at issue in the case—criminalizes sleeping and camping in public places, including sidewalks, streets and city parks.

The dispute arose from Grants Pass, a small town in southern Ore-

gon. After complaints about people sleeping in alleyways and property damage, Grants Pass enforced ordinances that banned sleeping in public spaces. Grants Pass had no homeless shelter, and the only privately operated one was run by a religious organization that required attendance at Christian services.

The majority found that the ordinances were not unusual because cities and states across the country have long imposed similar penalties. The penalties escalated from a fine to a temporary order banning camping in the parks and eventually to a maximum of 30 days in jail. An earlier decision by the Ninth Circuit held that penalties violated the Eighth Amendment's ban on cruel and unusual punishments.[12]

The challenge to Grants Pass's ordinances was not based on any of the Constitution's provisions preventing the government from making certain activities unlawful such as the First Amendment, the Equal Protection Clause, or the Due Process Clause. Instead, the challenge was based on the Eighth Amendment which, as the Court explained, does not focus on the illegal behavior itself but instead on "what happens next"—the resulting punishment.[13]

Much of the Court's opinion was spent reacting to a 1962 Supreme Court opinion[14] which had found a law against drug addiction to be an Eighth Amendment violation. The Court explained that even the parties to that 1962 case would have been surprised that the Court chose the Eighth Amendment to resolve that case since even the parties themselves had devoted just a few lines to that. Moreover, the case had not been subsequently used to invalidate other criminal laws whose violations were "unavoidable" to people of certain statuses.

The Court distinguished laws that criminalize statuses (e.g., homelessness) and those that criminalize associated conduct (e.g., camping in public places). The dissent argued that the distinction opened the door to criminalizing status indirectly by making unavoidable consequences of the status unlawful. The majority was unpersuaded and, perhaps in recognition of the predicament faced by the homeless, listed several defenses that homeless defendants might raise such as necessity and diminished capacity.

In the end, the Court returned to where it began and restated that homelessness is a complex problem with many causes that many cities have tackled with many possible solutions. The Eighth Amendment, however, would not limit the things that a government might criminalize—including sleeping in public places—just the resulting punishments.

In South Carolina, homelessness is an issue garnering increased attention. In Charleston, for example, homeless encampments were removed by the city when they grew to include more than 100 people living in tents under elevated roads.[15] Many cities in South Carolina have laws forbidding actions similar to Grants Pass's ordinance.[16] Whether other South Carolina communities will use the Grants Pass decision to change their tac-

tics in combatting homelessness remains to be seen: the case certainly broadens their options.

Bankruptcy settlements cannot protect most nonparties

***Harrington v. Purdue Pharma, L.P.*, ___ S. Ct. ___ (2024) (5-4)**

In any other case, the legal issue decided in Purdue Pharma might have been a minor blip in Supreme Court coverage that only bankruptcy lawyers paid attention to. But because the litigant happened to be trying to avoid personal liability for the opioid crisis, mass media took note.

In 2019, facing countless civil suits for its role in marketing OxyContin, Purdue Pharma filed for Chapter 11 bankruptcy. The Sackler family—the controlling family of Purdue Pharma—began "milking" their company by distributing about $11 billion in Purdue Pharma's resources, draining the company's assets by 75%. To safeguard those distributions, Purdue Pharma included a term in its bankruptcy plan which would have immunized the Sackler family from all tort liability including future claimants in exchange for the return of more than $4 billion of the $11 billion.

In most Chapter 11 bankruptcies, the debtor gets to rebuild itself with a clean slate, free of future litigation, but only in exchange for handing over whatever it must make its creditors (including tort victims) whole. The effect of Purdue Pharma's plan would have been to grant the Sackler family that same protection yet not expect them to contribute virtually all their fortunes in return. Not surprisingly, many claimants would not consent, so the Sackler family ponied up more than $1 billion more to attract more consents, particularly from states which had sued Purdue Pharma. More consents came, but the total did not even approach the $11 billion in questionable distributions, much less the family member's billions of personal fortunes earned from Purdue Pharma in the years before the opioid crisis started.

At issue was whether non-debtors could receive the same discharge protections given to debtors by piggybacking on the debtor's bankruptcy plan but not contributing virtually all their assets in return. The answer turned on the meaning of § 1123(b)(6) of the Bankruptcy Code that allows courts to approve plans with "any other appropriate provision not inconsistent with the applicable provisions of this title."[17] The Court rejected the idea that literally any term not otherwise forbidden could be included. The majority fell back on several familiar standards of statutory construction to arrive at the conclusion that the sort of provisions which §1123(b)(6) could cover did not extend to claims against parties that were not even seeking bankruptcy protection. (Such third-party discharges to which the debtors consented were different and would not be impacted by the decision.)

The majority also jousted with the dissent on a case-specific policy basis offered by the Sacklers. The family contended that, if they did not get discharge protection, they would take their toys (i.e., the more than $12 billion in returned distributions) and go home (i.e., let creditors pursue them individually in court). While the dissent valued the security of a detailed contribution from the Sacklers, the majority pointed out that the reality of countless civil suits might just as well prompt an even more generous contribution from the Sacklers, leading to a consensual deal.

The impact of the decision is more far-reaching than just the opioid litigation. Already other mass torts have led parties to use the same sort of tactic, including the Boy Scouts and the Catholic Church in response to sexual abuse claims. The tactic might have been generated in the context of enormous mass torts, but the dollar figures involved did not actually drive the decision of the Court. As a result, those practicing in bankruptcy court should work harder to ensure consent to terms involving protection for non-debtors—possibly by asking more from the non-debtors—since the bankruptcy court

cannot otherwise approve them.

Presidential immunity

***Trump v. United States*, ___ S. Ct. ___ (2024) (6-3)**

This annual recap began with two cases of very real, practical application to lawyers involving the administrative state. Almost no client will have ever heard of them, but the opinions can very foreseeably impact clients' cases for years to come. At the other end of the spectrum is Trump v. United States, a case that more lay people know about than probably any other but that will likely never be used by any South Carolina lawyer in practice.

The Court ruled that former President Donald Trump is partly immune from prosecution for his activities surrounding the outcome of the 2020 election. Chief Justice Roberts, writing for the conservative majority, said Mr. Trump had at least presumptive immunity for all official acts. The trial judge would have to perform an intensive factual review to separate official and unofficial conduct. Then, if necessary, the trial court would have to decide if the government could overcome the presumption by showing that prosecution would not intrude on the authority and functions of the executive branch.

The majority admitted that nothing in the Constitution mentioned presidential, criminal immunity before creating for the first time a three-tiered immunity system. First, when a president exercises the "core constitutional powers" of the office, he or she will be absolutely immune. Those core powers include commanding the military, granting pardons and many international actions, but most importantly for Mr. Trump's case, executing the laws.[18] On the other hand, no immunity exists for a president's unofficial or private acts. But, as to the broad range of "official acts" between those poles, a president will be immune, either presumptively or absolutely. The immunity for any official act must be absolute, "unless the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'"[19]

A significant portion of the majority's opinion was devoted to the division between official and unofficial acts. The Court observed that dividing the categories was "difficult" in part because of the paucity of cases raising the issue. A president's ability to act boldly without the chilling effect of possible criminal actions was countered by the public interest in fair and effective enforcement of criminal laws. In the end, the Court landed on the side of the executive branch: Official acts are those taken "so long as they are not manifestly or palpably beyond his authority."[20] Even that broad statement was enlarged when the Court specifically noted that conduct is not automatically unofficial merely because it is illegal.[21] And even further, the motivation for presidential actions cannot be considered while categorizing conduct as one or the other.

The majority and dissenting views saw the case in two very different ways. The majority considered its opinion as a "farsighted," academic matter and wanted to distance itself from the notion that its ruling was a case-specific reaction: "[U]nlike the political branches and the public at large, we cannot afford to fixate exclusively, or even primarily, on present exigencies."[22] For the dissent, the case was about Mr. Trump.

In the end, the Court swept away much of the government's prosecution against Mr. Trump, ruling that his discussions with his acting attorney general about pressuring some states to reject the outcomes of the election were absolutely immunized. In addition, the Court technically left his pressure campaign on Vice President Pence to reject unfavorable electors and his public comments and Tweets on and around January 6 for the lower court to categorize, but strongly suggested that both were also official, thereby immunizing them too unless the government can overcome the presumptive immunity. Even the remaining actions—mainly Mr. Trump's direct dealings with state election officials—were remanded for a long and complicated study before any criminal case could move forward.

The dissent very strongly disagreed. The immunity bestowed on former presidents would "reshape the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law."[23] The dissent rejected the majority's characterization of its ruling as very limited and noted that calling the immunity merely presumptive for non-core, official acts was meaningless: "It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes."[24] Traditionally, dissenting opinions from the Court conclude with, "I respectfully dissent." Justice Sotomayor not only omitted "respectfully," she ended with this: "With fear for our democracy, I dissent."[25]

Conclusion

The most significant and headline-grabbing cases of the Court often involve individual rights (e.g., abortion, free speech and freedom of religion). In contrast, this term will be recalled as focused far more on the machinery of the federal government, especially on the powers of the branches of government. The executive branch lost much of its power when Chevron was reversed and many administrative enforcement hearings were invalidated, but the power of the person comprising the executive branch was greatly expanded with a strong immunity insulating his or her actions as president.

In another politically charged case asking whether Mr. Trump could be removed from the ballot in specific states based on the Insurrection Clause, the Court—in a rare unanimous, per curiam decision—ruled that Colorado was powerless to enforce the Insurrection Clause absent a Congressional mechanism for doing so.[26] In a concurring opinion, Justice Jackson broke the

fourth wall and added this message to those reporting on the Court: "The Court has settled a politically charged issue in the volatile season of a Presidential election. Particularly in this circumstance, writings on the Court should turn the national temperature down, not up."[27] Those covering the Court seem to have overlooked Justice Jackson's wish and proceeded to analyze this term's output in the context of the politics of the moment. Whether the national temperature on the Supreme Court will cool before it reconvenes in October is debatable.

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Endnotes

[1] AP-NORC Center for Public Affairs Research (June 2024), available at https://apnorc.org/projects/confidence-in-the-supreme-court-remains-low/.
[2] *Id.*
[3] Supreme Court of The United States, *Statement of the Court Regarding the Code of Conduct* www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf
[4] *Id.*
[5] 467 U.S. 837 (1984).
[6] *Id.* at 866.
[7] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).
[8] *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).
[9] 603 U.S. at ___ (citations omitted).
[10] *Id.* at 708 (quoting *Thomas v. Union Carbide Agricultural Prods.*, 473 U.S. 568, 583 (1985).
[11] 144 S. Ct. 2202, ____ (2024). Could only pin cite using the other reporter: 219 L.Ed.2d 941, 949 (2024)
[12] *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019).
[13] *Id.* at 602.
[14] *Robinson v. California*, 370 U.S. 660 (1962).
[15] Diane Knich, "City official begin moving homeless out of Tent City," Post and Courier, Apr. 5, 2016, at Metro 3.
[16] City of Charleston Ord. § 19-238 (prohibiting sleeping in vehicles in public places); City of Columbia Ord. § 14-105 (prohibiting, among other things, "urban camping").
[17] 11 U.S.C. § 1123(b)(6).
[18] *Trump v. United States*, 144 S. Ct. 2312 (2024).
[19] *Id.* at 2318. (quoting *Fitzgerald*, 457 U.S. at 754).
[20] *Id.* at 2318. (quoting *Blassingame*, 87 F. 4th 1,13(CADC)).
[21] *Id.* at 2377.
[22] *Id.* at 2318.
[23] *Id.* at 2355. (Sotomayor, J., dissenting)
[24] *Id.* at 2361. (emphasis added).
[25] *Id.* at 2346. (Sotomayor, J., dissenting).
[26] *Trump v. Anderson*, 144 S. Ct. 662 (2024).
[27] *Id.* at 671. (Jackson, J., concurring).