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FACT SHEET

The Supreme Court Has Intensified Its Assault on Federal Agencies and Impaired Their Ability To Protect Americans' Health, Safety, and Financial Well-Being

September 26, 2024

Introduction

- **Damage Done.** In recent years, the Supreme Court has not only gutted individual liberties but also escalated its attacks on the agencies that protect the public from a wide range of threats, including predatory financial practices. As a result of the Court's increasingly pro-industry and anti-agency decisions, Americans have fewer protections against financial fraud, the cops policing the financial markets have fewer tools with which to punish and deter predatory conduct, and those who become the victims of shady financial practices have fewer remedies at their disposal when they seek to recover their losses and hold wrongdoers accountable. The unsettling take away is clear: Thanks in large measure to the Supreme Court, Americans are increasingly on their own when it comes to protecting their savings, investments, and retirements.
- **Roadmap.** In our current report on the Supreme Court, released on September 26, 2024, we review the Court's recent and overwhelmingly negative decisions in the area of financial regulation and administrative law; look ahead to the term about to begin on Monday, October 7, 2024; and close with a review of some reforms that have garnered fresh attention in response to the Court's most extreme and ideological decisions. Here are the highlights.

Recent Decisions

- ***West Virginia v. EPA.*** The Court's assault on the administrative state accelerated two years ago, during the Court's 2022-2023 term. In *West Virginia*, the Court officially enshrined the so-called "major questions doctrine," giving judges vast discretion to nullify agency rules that have broad economic and political significance, unless the agency can point to exceptionally clear statutory authority for the rule. The doctrine has been widely criticized because it has no real foundation in the law, it establishes vague and subjective standards for courts to apply, and it creates a powerful weapon that industry can use—and is using routinely—to challenge important and beneficial rules.

- **A trilogy of poorly reasoned and harmful decisions.** During the Court's most recent 2023-24 term, the Court further intensified its assault in a series of three decisions that stand out as examples of especially bad jurisprudence and bad policy.
    - The Court emphatically overruled a longstanding precedent by announcing that courts may no longer defer to an agency's interpretation of an ambiguous statutory provision that Congress has trusted the agency to implement (*Loper Bright*), thus enabling judges to substitute their own preferences in statutory construction for the expert judgments of the agencies most familiar with the law.
    - The Court declared open season on agency rules, no matter how old, by essentially nullifying the general time limit on court challenges to those rules (*Corner Post*), thus opening the door to attacks on rules that are even decades old.
    - And the Court erased the ability of the Securities and Exchange Commission—as well as other agencies—to seek civil penalties through enforcement actions decided by administrative law judges (*Jarkesy*), forcing agencies to seek such relief only through more costly and resource-intensive jury trials in court.
- **Some Positive Outcomes.** Fortunately, the Court also got it right in some instances. It upheld the funding mechanism for the Consumer Financial Protection Bureau ("CFPB"), removing a dark cloud of uncertainty over the very existence of one of the most successful consumer protection agencies in history (*Consumer Financial Services Ass'n*). And it sided with whistleblowers by refusing to saddle them with a harsh evidentiary burden when they pursue claims for retaliation against their employers (*Murray*). On balance, though, the Court's decisions last term unquestionably weakened the ability of agencies to protect the public. These decisions foreshadow more of the same in the next Supreme Court term and for years to come.

The Upcoming Term

- **Cases to be Decided.** During the forthcoming term, which begins on Monday, October 7, 2024, the Court will address a number of cases presenting important issues affecting pleading standards confronting plaintiffs seeking recovery for fraud, damages calculations, and the contours of the arbitrary and capricious standard in administrative law, which determines the fate of most agency rules subject to judicial review.
    - In the *Nvidia* and *Facebook* cases, the Court will address the pleading requirements that victims of securities fraud must satisfy to bring their claims in court and the types of risks that companies must disclose to investors.
    - In *Dewberry Group*, the Court will resolve a dispute over the scope of disgorgement in a trademark case, addressing whether the wrongdoer can be forced to give back the profits taken in by *affiliates*.
    - And in *FDA*, the Court will address a series of questions surrounding the types of agency decisions that can be deemed arbitrary and capricious and therefore warrant the nullification of an agency rule or action.
- **Petitions for Certiorari.** The Court is also facing a number of "petitions for cert.," or requests for review, which if granted could lead to additional important decisions affecting standing

(the nature of the injury that suffices to allow federal courts to hear a claim), the preemption of consumer protections under state law, and the duties of those who are responsible for managing retirement plan assets (fiduciaries).

Solutions

- **To Neutralize Bad Decisions.** The Court's intensely ideological decisions that undermine agencies' ability to protect the public have triggered a fresh wave of thinking about how to counteract those decisions. They include:
    - Increased reliance on state law protections;
    - Federal legislation to correct errant Court rulings;
    - Intensified advocacy by those who comment on rules and file amicus briefs in court to defend and support agency actions under the principles declared by the Court; and
    - Potential reforms to the judicial nomination process, the practice of forum shopping by industry challengers to agency rules, and even changes to the standing doctrine, which often prevents public interest advocates from advancing important claims in federal court
- **To Change the Court Itself.** In addition, ideas for reform in the way the Court is structured and how it operates have surfaced, based largely on President Biden's call in a July 29, 2024 *Washington Post* op-ed. They include:
    - Term limits for the Justices; and
    - A binding code of ethics applicable to the Justices.

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