LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Justices' CFPB Alliance May Save SEC Courts, Not Chevron

By **Katie Buehler**

Law360 (May 22, 2024, 7:55 PM EDT) -- A four-justice concurrence to the U.S. Supreme Court's decision upholding the Consumer Financial Protection Bureau's unique funding scheme last week carries implications for other cases pending before the court that challenge the so-called administrative state, or the permanent cadre of regulatory agencies and career government enforcers who hold sway over vast swaths of American economic life.

The concurrence is a good omen for parties asking the justices to secure the future of administrative courts, experts said, but does nothing to assuage concerns about another challenge seeking to dismantle a decades-old doctrine granting broad judicial deference to federal regulators to interpret the practical effect of federal statutes.

A 7-2 Supreme Court majority sided with the Biden administration to uphold the funding structure given to the CFPB in the Dodd-Frank Act, the landmark 2010 financial reform law that created the agency to tighten oversight of banks, mortgage lenders and other consumer financial providers. (Samuel Corum/Bloomberg via Getty Images)

Justice Elena Kagan secured the support of Justices Sonia Sotomayor, Brett Kavanaugh and Amy Coney Barrett when she wrote a brief concurrence to the court's 7-2 ruling that the CFPB's funding mechanism didn't run afoul of an originalist interpretation of the U.S. Constitution's appropriations clause, which gives Congress authority to oversee the nation's spending.

In addition to reviewing the clause's text and history, as well as evidence about appropriations practices around the time the Constitution was ratified as the majority opinion did, Justice Kagan argued that the Supreme Court should further consider the practices of the last 200-plus years. The bureau's funding scheme, which independently pulls money from the Federal Reserve rather than from the Treasury under Congress' supervision, is a product of centuries of innovation and adaptation in appropriating funds, she wrote.

"The way our government has actually worked, over our entire experience, thus provides another reason to uphold Congress's decision about how to fund the CFPB," Justice Kagan said.

The five-page concurrence was easy to overlook, especially against the originalism debate between Justice Clarence Thomas, who wrote the court's majority opinion, and Justice Samuel Alito, who wrote a

dissent joined by Justice Neil Gorsuch. However, the significance of the opinion can't be ignored, lawyers and law professors told Law360.

In many ways, Justice Kagan simply continued the Supreme Court's longstanding internal debate over the proper method of constitutional interpretation: whether the actions of the nation's founding generation alone or the country's history as a whole should drive the justices' analysis. But she also showed that the court's six-justice conservative supermajority isn't a monolith, and that new subdivisions may be forming among its members.

Justices Kavanaugh and Barrett's sign-on to Justice Kagan's concurrence suggests one of the supermajority's fault lines could save certain aspects of the administrative state.

"It suggests there is a middle segment of the court that is going to be a little cautious about sweeping one leg out from under an agency," Crowell & Moring LLP partner Amanda Berman said.

The CFPB decision bodes well for the U.S. Securities and Exchange Commission in a constitutional challenge to its in-house courts system that the justices are reviewing, Berman and others told Law360. On the other hand, the decision's vote lineup likely won't stick when the Supreme Court decides the fate of its so-called Chevron doctrine, a 40-year-old ruling instructing courts on when to defer to federal agency interpretations of ambiguous statutes.

That's because of the different types of questions being asked in each case, said Michael Herz, a professor at Yeshiva University's Benjamin N. Cardozo School of Law. The SEC dispute is another instance of constitutional interpretation that asks the justices to determine how much restraint to place on a federal agency.

The Chevron case is completely different, Herz said. "Chevron isn't really a question of constitutional law. It's a self-imposed restraint of the judiciary. We don't know what exactly will emerge from the case, but what emerges will not be the strong version of Chevron," he said.

Justice Kagan and her three concurring colleagues could easily win the vote of Justice Ketanji Brown Jackson and possibly even that of Chief Justice John Roberts, both of whom joined the CFPB majority opinion, in a similarly reasoned ruling in favor of the SEC, Herz said.

DLA Piper partner Peter Karanjia, though cautious about predicting the outcome of future cases, agreed.

"This could be interpreted as a signal that these members of the court are somewhat wary of far-reaching structural arguments that would upend longstanding practices," he said. "It could work as a thumb on the scale in favor of preserving the status quo against more novel theories."

"If the theory is all four signatories are votes against overruling Chevron," Karanjia continued, "I think that's going a bit too far."

The concurrence mostly mirrors the questions and comments Justices Kavanaugh and Barrett raised at oral arguments in both cases, with a few exceptions, Karanjia said.

In the SEC case, hedge fund manager George R. Jarkesy Jr. and his investment firm Patriot28 LLC allege that the agency's use of administrative law judges to enforce fines and penalties for violations of the Securities and Exchange Act defies the Seventh Amendment's right to a jury trial. A Fifth Circuit panel

agreed with Jarkesy in May 2022 and deemed the system unconstitutional.

At oral arguments in November, the government focused on how tradition and practice support its claim that the agency's in-house court system is legal.

Brian Fletcher, principal deputy U.S. solicitor general, told the court that federal agencies have long protected public rights and used administrative proceedings to pursue enforcement claims against individuals and entities that violate them.

"It's immigration, it's seizing goods, it's taxes, it's customs, all throughout our history," he said. "It happens all the time."

Although Justice Kavanaugh told Fletcher it "seems problematic" that the government can deprive individuals of property and money without a jury trial, the modern history of administrative adjudications — specifically those pursued in the early 1800s by the commission that would become the Steamboat Inspection Service — could sway him into upholding the SEC's system, according to Peter Strauss, a professor emeritus at Columbia Law School.

"My reading of the concurrence is that Kavanaugh and Barrett would accept that course of action" with a caveat, he said. "They might say, 'Well, yes, Congress can do this sort of thing, but it has to be clear.'"

Justice Barrett's questions focused on, among other things, the limits of Congress' power to authorize administrative adjudications and the key factors in deciding when a process triggers the right to a jury trial. She also seemed wary of the "really big change" Jarkesy was promoting with his arguments against in-house court systems.

But during January oral arguments over the Chevron doctrine, Justice Kavanaugh made it clear that he sees no future for the precedent, Karanjia said.

Two New England fish companies — Loper Bright Enterprises and Relentless Inc. — have asked the Supreme Court to overturn its 1984 decision in Chevron v. Natural Resources Defense Council that created the doctrine, claiming it wrongly protects federal agencies from judicial review and encourages aggressive rulemaking by presidential administrations. Panels of the D.C. and First Circuits used the doctrine to dismiss the companies' separate challenges to a National Marine Fisheries Service rule requiring them to pay part of the cost of hosting federal compliance monitors aboard their ships.

Justice Kavanaugh, a former White House staffer under President George W. Bush, echoed the companies' aggressive rulemaking criticism in an exchange with U.S. Solicitor General Elizabeth B. Prelogar.

"You say 'don't overrule Chevron because it would be a shock to the system,' but the reality of how this works is Chevron itself ushers in shocks to the system every four to eight years when a new administration comes in, whether it's communications law or securities law or competition law or environmental law," Justice Kavanaugh said. "It's just massive change. That is at war with reliance. That is not stability."

Justice Barrett, who has voted with Justice Kavanaugh in each of the court's six split opinions as of Wednesday, seemed more concerned about the effects of a ruling overturning the Chevron doctrine on the concept of stare decisis, or respecting prior decisions. She was also curious about whether the

doctrine meshes with other canons of statutory interpretation.

While it's hard to pin down Justice Barrett's stance on the issue, Berman said oral arguments made it pretty clear that a majority of justices are in favor of axing the Chevron doctrine as we know it.

But the alliances displayed in the CFPB decision are likely to return in other cases dealing with constitutional interpretation, she said.

"We'll sometimes see this kind of alignment, particularly if the question is one that would completely take the legs out from under an agency or when the justices are cautious of going too far," Berman said. "But they don't see Chevron as going too far."

--Editing by Adam LoBelia.
