# A WORLD TURNED UPSIDE DOWN; NAVIGATING THE RECENT SUPREME COURT REGULATORY DECISIONS

UNC Banking Institute March 27, 2025 from 2:15 – 3:30 p.m.

## PANEL SUMMARY

In a series of decisions over the past year, the Supreme Court has changed the legal landscape for financial regulators addressing everything from deference accorded to their statutory interpretation to the length of time in which regulations can be challenged. Adding to the uncertainty caused by these decisions is an administration that has acted quickly through executive orders and the newly formed Department of Government Efficiency (**DOGE**) to both remove agency independence and reduce the resources available to carry out their mission with little regard to legislative safeguards.

A panel of nationally recognized regulatory counsel from preeminent law firms, in-house leaders and academia, will provide insights into what all of the changes mean for the institutions they are advising and how they are helping those institutions navigate the space between an aggressive administration and a more methodical judiciary attempting to keep up.

## REDUCTION OF THE POWER OF THE ADMINISTRATIVE STATE

**1. End of Chevron Deference – deference previously afforded to agency interpretation has been substantially eroded.**

1.1. In *Loper Bright Enters. v. Raimondo*, the Supreme Court overturned longstanding precedent known as the *Chevron* doctrine, which gave deference to an agency's reasonable interpretation of congressional statutes that are "silent or ambiguous with respect to the specific issue at hand." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)

1.2. Following *Loper Bright* "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."

1.3. There are a number of likely changes that will result from the Court's decision in *Loper Bright*.

1.3.1. The decision may impose limitations on the current administration by limiting its ability to create regulations that address potential ambiguities in legislation.

1.3.2. The decision may also have the effect of encouraging market participants to challenge existing regulations that are no longer entitled to deference.

1.3.3. There are a number of areas where agencies have interpreted arguably ambiguous statutory language that are now likely to be more forcefully challenged:

1.3.3.1. The Office of the Comptroller of the Currency (**OCC**) interpretation of what constitutes the "business of banking" under 12 C.F.R § 7.1000.

1.3.3.2. The Securities and Exchange Commission's (**SEC**) expansion of the definition of "dealer" in their February 2024 rulemaking to capture liquidity providers.

1.3.4. The standard the courts will apply when assessing regulations where the statutory language is ambiguous remains to be defined.

1.3.4.1. The Supreme Court noted that *Skidmore* deference survives *Loper Bright*, but to what end is unclear.

1.3.4.2. In her dissent, Justice Kagan questions the logic of the majority by pointing out that under *Skidmore*, agency interpretations "constitute a body of experience and informed judgment" that may be "entitled to respect." However, given that *Loper Bright* takes issue with interpretations of "ambiguity", it is not a far reach to next question interpretation of "respect" and possibly weaken *Skidmore* deference.

1.4. Despite these potential challenges, the *Loper Bright* decision may not be as significant as it might otherwise appear.

1.4.1. The overturning of *Chevron* had largely been anticipated and the Supreme Court had not relied upon *Chevron* for almost a decade.

1.4.2. *Chevron* deference was only applicable in limited circumstances.

1.4.2.1. Deference was required only where a court disagrees with an agency's statutory interpretation that was nonetheless "reasonable."

1.4.2.2. Deference to agency interpretation for ambiguous regulations remains under *Kisor v. Wilkie*. 588 U.S. 558, 563 (2019) (upholding *Auer* deference with the majority opinion written by J. Kagan who dissented in *Loper Bright*)

1.4.3. Congressional delegation of authority to agencies is unaffected.

1.4.4. Agency fact finding is unaffected because *Loper* is limited to conclusions of law.

1.4.5. Mere reliance on *Chevron* does not invalidate prior decisions.

**2. Laws and regulations existing and enforced for decades can be challenged by newly affected parties.**

2.1. In *Corner Post v. Board of Governors of the Federal Reserve System*, the Supreme Court held that a claim under the Administrative Procedures Act does not accrue under the six-year statute of limitations applicable to lawsuits against the United States until the plaintiff is injured by final agency action. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys*., 603 U.S. 799 (2024).

2.2. As the dissent pointed out:

2.2.1. "there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face."

2.2.2. "allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses."

2.2.3. "the Court wreaks havoc on Government agencies, businesses, and society at large."

2.3. Despite the concerns expressed by the dissent, it is not clear that Corner Post will lead to a waive of relitigation.

2.3.1. Corner Post only applies to Administrative Procedure Act challenges.

2.3.2. As the Solicitor General noted, it is a "relatively uncommon . . . circumstance where a person who was not injured when the rule was promulgated becomes injured at a later date."

2.3.3. We have not seen a flood of new litigation since *Corner Post*. In 2015, the Sixth Circuit applied the rule that the Supreme Court ultimately adopted in *Corner Post*. There was not a significant uptick in litigation following that decision either.

**3. Agencies have been directed to proactively rescind regulations.**

3.1. President Trump issued the executive order "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative" on February 19, 2025. The Deregulatory Executive Order requires agencies to coordinate with the Department of Government Efficiency (**DOGE**) and the Office of Management and Budget (**OMB**) to provide a list of regulations that are:

3.1.1. unconstitutional or that raise "serious constitutional difficulties";

3.1.2. based on unlawful delegations of legislative power;

3.1.3. based on anything other than the best reading of the underlying statute;

3.1.4. related to matters of social, political, or economic significance and not authorized by clear statutory authority;

3.1.5. significant costs upon private parties which are not outweighed by public benefits;

3.1.6. harmful to certain national interests; and

3.1.7. impose undue burdens on small business and impede private enterprise and entrepreneurship.

3.1.8. Informed by *Loper Bright* and the Trump administration's priorities, this may lead to a significant number of regulations being identified.

**4. Agencies' ability to force parties to resolve matters within agency created proceedings has been significantly curtailed.**

4.1. In *SEC v Jarkesy*, the Supreme Court held that a party against whom the SEC brings a civil enforcement proceeding seeking a penalty for alleged securities fraud has a Seventh Amendment right to a jury trial in federal court. *SEC v. Jarkesy*, 603 U.S. 109 (2024).

4.2. Historically, the SEC has experienced significantly greater success in proceedings before their administrative law judges. Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), (comparing the SEC's 90% success rate before ALJs in contested cases from October 2010 through March 2015 to its 69% success rate in federal court over the same time period).

4.3. Administrative proceedings are typically cheaper than federal litigation, and given other Administration priorities, this may further limit the ability for agencies to bring enforcement actions if they know they will be forced to litigate these issues in a more costly forum.

4.4. It is probably too early to tell whether this will lead to a fundamental change in agency enforcement actions.

4.5. Questions also remain regarding what this decision means for self-regulatory organizations like FINRA. They may be subject to the same fate based on Judge Walker's concurring opinion that FINRA ALJ's are essentially carbon copies of SEC ALJs. *Alpine Sec. Corp. v. Financial Industry Regulatory Authority Inc.*, No. 23-5129, ECF No. 2086156 (2024).

**5. Preemption of state consumer laws will require an individualized analysis of whether there is significant interference.**

5.1. In *Cantero v Bank of America, N.A.*, the Supreme Court set out a new test for "significant interference" in evaluating preemption. *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024).

5.2. To determine whether significant interference exists, a court must:

5.2.1. look to the text and structure of the state law;

5.2.2. conduct a nuanced comparison of prior Supreme Court decisions; and

5.2.3. apply "common sense".

5.3. Prior to *Cantero*, courts would not always conduct an individualized inquiry and would rely upon agency interpretation to conclude whether a state law was preempted.

5.3.1. After *Cantero*, it is unclear whether the revised regulations that OCC adopted after the Dodd-Frank Act was passed will be upheld.

5.3.2. *Cantero* analysis is based on the interference with a national bank's powers, based on the text and structure of the law in question, not the magnitude of impact on a particular bank, avoiding a result that could have varied by bank.

5.3.3. *Cantero* in a footnote leaves open two potential preemption arguments: OCC preemption regulations and Title 12 of the U.S. Code, Section 371, and the OCC regulations thereunder governing the authority of national banks to make real estate loans.

5.4. How *Cantero* will be interpreted going forward is unclear.

5.4.1. The issue is being litigated before the 1st, 2nd and 9th Circuits.

5.4.1.1. First: *Conti v. Citizens Bank, N.A.*, 2022 U.S. Dist. LEXIS 175804.

5.4.1.2. Second: *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024) (remanded to the 2nd Circuit for further consideration).

5.4.1.3. Ninth: *Kivett v. Flagstar*, FSB, No. 21-15667, 2024 WL 3901188 (the 9th Circuit granted rehearing after initially concluding there was no preemption).

5.4.2. On December 20, 2024, the U.S. District Court for the Northern District of Illinois applied *Cantero's* principles for evaluating claims of National

Bank Act preemption of state law. The court granted a preliminary injunction from enforcement of Illinois's Interchange Fee Prohibition Act (the "IFPA" or, the "Act") against national banks and federal savings associations. *Illinois Bankers Association et. al. v. Raoul,* No. 24 C 7307, 202 WL 5186840 (N.D. Ill., Dec. 20, 2024).

5.4.2.1. While the District Court's ruling to partially enjoin the IFPA is noteworthy in and of itself, the ruling is particularly notable for the preemption analysis undertaken by the court in reaching its preemption decision.

5.4.2.2. In applying *Cantero's* preemption analysis framework, the District Court also looked to Supreme Court precedent and found that the IFPA's restrictions resulted in a greater degree of interference with a national bank's powers than other state laws where the Supreme Court had found preemption.

**STRENGTHENING OF THE EXECUTIVE**

**6. Sweeping view of Presidential immunity has emboldened the Trump administration.**

6.1. In *Trump v. United States,* the Supreme Court held that the president has absolute immunity for core presidential actions and presumptive immunity for a wide range of activity that might be official, unless a conviction for such activities would not intrude into the authority of the executive branch. *Trump v. United States,* 603 U.S. 593 (2024).

6.2. The Court further held that in determining whether an action was official, there could be no inquiry into a president's motives.

6.3. While the decision was based on action taken by President Trump in relation to his first term, it is a legitimate question of whether President Trump would be taking certain of his actions in the beginning of his second term without this decision.

6.4. This blanket immunity may forever change the behavior of the presidency.

**7. The unitary executive theory and the potential challenge to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).**

7.1. On February 18th, the Trump administration announced an Executive Order 14215 requiring all agencies to:

7.1.1. "submit draft regulations for White House review—with no carve-out for so-called independent agencies, except for the monetary policy functions of the Federal Reserve;" and

7.1.2. "consult with the White House on their priorities and strategic plans."

7.2. The Trump administration has also terminated several federal employees without following statutory procedures including the Inspectors General and the head of the Office of Special Counsel.

7.3. The Trump administration approach to the termination of agency leaders and federal employees generally is based on the unitary executive theory.

7.3.1. The theory stems from Article II, Section 1 of the U.S. Constitution. Section 1 which says, "the executive Power shall be vested in a President of the United States of America." Under the theory, the President can remove any appointed subordinate official of the Executive Branch.

7.3.2. The Supreme Court held that the President can remove top executive agency officers appointed by Congress at will and that for cause requirements are not enforceable. *Collins v Yellen*, 594 U.S. 220 (2021) and *Seila Law v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020).

7.4. The Trump administration has only shown some caution with respect to the Federal Reserve. In Executive Order 14215, the Trump administration excluded the "monetary policy functions of the Federal Reserve" from their disregard of "so-called independent agencies".

7.4.1. The question that has yet to be decided is whether there is a difference when it comes the removal of Fed Chair?

7.5. Thus far the courts have provided some resistance to the administration's attempts to remove federal employees in contravention of federal law.

7.5.1. The D.C. District Court Judge Amy Berman Jackson extended an earlier temporary restraining order when she issued a decision holding that the Trump administration violated the law when it fired Dellinger. This decision was entered after the Supreme Court let the original order remain in effect.

7.5.1.1. The U.S. Court of Appeals for the District of Columbia Circuit, paused Judge Jackson's March 1 order while the appeal continues, acknowledging its order "gives effect to the removal of" Dellinger "from his position as" special counsel.

7.5.1.2. After the Court of Appeals decision, Dellinger dropped his appeal agreeing to leave the position.

7.5.2. On March 6th, District Court Judge held that the Trump Administration's termination of Gwynne Wilcox from her role as Chair of the National Labor Relations Board was illegal. *Wilcox v. Trump*, Case 1:25-cv-00334-

BAH (Mar. 6, 2025). The decision reinstated Wilcox to serve out the remainder of her five year term which started in 2023.

7.5.2.1. Wilcox's removal left the board with only two members effectively freezing its ability to operate.

7.5.2.2. The Administration acknowledged that it did not follow the law in removing Ms. Wilcox, but instead argues that the President's constitutional power is unchecked in the area of terminating executive employees.

7.5.2.3. The Court focused its analysis on the Supreme Court's *Humphrey's Executor* decision because the Constitution does not contain any removal provisions for multi-member boards or commissions

**EFFECTS OF CONSOLIDATION AND REDUCTIONS IN STAFFING**

8. There are also multiple reports the Trump Administration is looking to consolidate the federal banking regulators. These reports typically focus on the consolidation of the FDIC and perhaps the CFPB into the OCC. It could also include consolidation of the Federal Reserve' role as a regulator. This is the latest in a long line of proposals to consolidate the banking regulators.

    8.1. Financial crises have led to the elimination of multiple regulators including the Office of Thrift Supervision, Federal Savings and Loan Insurance Corporation, and the Federal Home Loan Banking Board, but reform efforts have not led to the type of fundamental restructuring that appears to be under consideration by the Trump administration.

9. In addition to the potential consolidation, DOGE is in the process of proposing sweeping job cuts across the federal government.

10. These two efforts may materially limit the amount of regulation and enforcement actions taken by the agencies.