1992

The Supreme Court's Administrative Law Docket: Proceedings from the Administrative Conference of the United States

Marshall J. Breger
The Catholic University of America, Columbus School of Law

COLLOQUIUM

THE SUPREME COURT'S ADMINISTRATIVE LAW DOCKET: PROCEEDINGS FROM THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES*

Introduction

THE HONORABLE MARSHALL J. BREGER**

Chairman Breger: Good afternoon, ladies and gentlemen. My name is Marshall Breger. I am chairman of the Administrative Conference of the United States (Administrative Conference or Conference).

As most of you know, the Administrative Conference is an independent agency charged with studying and promoting fairness and efficiency in federal administrative processes. Stated another way, the Conference is the Federal Government's administrative law expert and think tank.

Today's colloquy, "The Supreme Court's Administrative Law Docket," will focus on Supreme Court cases decided last term that dealt with administrative law questions. We hope that this will become a yearly event at the Conference. However, our distinguished panel of speakers has been invited to go beyond discussion of the past and to speculate a little about the significance those decisions have for the future. You, of course, are invited to, by your questions, encourage them to explore further.

Supreme Court jurisprudence has always been closely intertwined with administrative law. In its early years, American administrative law was taught together with constitutional law under the rubric of

---

* The Conference reproduced here as edited was held at the American Society of Association Executives in Washington, D.C, on September 19, 1991. The participants were asked to discuss the major cases decided by the United States Supreme Court in the preceding term.

** Solicitor, United States Department of Labor. B.A., M.A., 1967, J.D., 1973, University of Pennsylvania; B. Phil., 1970, Oriel College, Oxford University. At the time of this Conference, Mr. Breger was the Chairman of the Administrative Conference of the United States.

"public law."[1] It focused on such "big-picture" questions as the implication of separation of powers, the delegation of legislative authority, and the nature of judicial review.

With the coming of the New Deal, and later the Administrative Procedure Act,[2] the emphasis of administrative law shifted from questions of legitimacy and accountability to the procedures governing agency adjudication and rulemaking. Administrative law became, if you will, the study of the civil procedure of agency practice.

In recent years, administrative law has returned to questions of democratic theory and the allocation of power among the branches of government. I think this is a good thing. This renewed interest encompasses such topics as the distribution of powers between the branches, judicial deference to agency interpretations, the famed *Chevron* doctrine,[3] presidential oversight of agency rulemaking, and the meaning of due process in informal administrative adjudications.

The Court's administrative law decisions last term reflect this shift back to "big-picture" questions. I believe the Court's administrative law docket can be broken out into several categories. First, there are those decisions that deal with separation of powers and delegation of powers under the Constitution. One such case is *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*[4] wherein the Supreme Court affirmed the District of Columbia Circuit's conclusion that a Board of Review created by Congress to oversee the regional airport authority violated separation of powers principles. The Court reasoned that the Board could exercise an executive function, yet consist of selected Members of Congress.[5] The Court reached this conclusion even though the Board members were appointed to serve in their personal, not in their official, legislative capacities.

Another decision in this category is *Freytag v. Commissioner of In-*

1. "Public law" is the general field of law concerned with the structure of government and the relationship between citizens and their government. Thus, a standard public law periodical in Great Britain might include commentary on such subjects as constitutional law, public administration, and administrative law issues. "Private law," in contrast, concerns itself with the resolution of disputes between private persons. *See generally* PUB. LAW (Stevens & Son, Co., London, England, United Kingdom, 1956-1991) (providing overview of public law in Great Britain).

2. Administrative Procedure Act of 1946, Ch. 324, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1988)).

3. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

4. ___ U.S. ___, 111 S. Ct. 2298 (1991).

5. *Id.* at 2311-12.

ternal Revenue[6] involving a challenge to the Tax Reform Act, which authorized the chief judge of the Tax Court, a so-called Article I court, to appoint commissioners, now called special trial judges. The Supreme Court held that the chief judge's power to designate such special trial judges to preside over any proceeding, regardless of complexity or amount, does not run afoul of the Appointments Clause of Article II of the Constitution.[7] The Appointments Clause, as you may recall, requires the President to nominate and the Senate to approve, "officers of the United States,"[8] but it allows Congress to vest the appointment of "inferior officers in the President alone, in the Courts of Law, or in the Heads of Departments."[9]

The Court concluded that a special trial judge is an "inferior officer" and must be appointed as prescribed in Article II.[10] A majority went on to find the appointment valid because the Tax Court is a "court of law" within the meaning of Article II.[11]

The final decision in this category is *Touby v. United States*.[12] In *Touby*, the Supreme Court rejected a challenge to an amendment to the Controlled Substances Act, which authorized the Attorney General to classify on a temporary, emergency basis controlled substances.[13] The challengers claimed that the statute violated the non-delegation doctrine,[14] which generally provides that Congress may not constitutionally delegate its legislative power to another branch of government. However, the courts have consistently upheld delegations of power to the executive branch as long as Congress establishes "an intelligible principle" that can be followed by the delegate.[15] The Court concluded that the delegation in question met that test.[16]

The second category of Supreme Court administrative law decisions are those which address questions of deference to agency interpretations and actions, a category familiar to most as the *Chevron* doctrine cases. In *Rust v. Sullivan*,[17] the Supreme Court upheld, against a constitutional attack, Department of Health and Human Services (HHS) regulations that limit the ability of federally funded family planning

6. ___ U.S. ___, 111 S. Ct. 2631 (1991).
7. U.S. CONST. art. II, § 2, cl. 2.
8. *Id.*
9. *Id.*
10. *Freytag*, 111 S. Ct. at 2640.
11. *Id.* at 2645.
12. ___ U.S. ___, 111 S. Ct. 1752 (1991).
13. *Id.* at 1758.
14. *Id.* at 1756-58.
15. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).
16. *Touby*, 111 S. Ct. at 1756-57.
17. *Id.* at 1759.

clinics to counsel patients about the use of abortion as a method of family planning. In doing so, the majority relied in part on *Chevron* jurisprudence.[18]

A curious case raising the issue of judicial deference to agency interpretations is *Pauley v. BethEnergy Mines.*[19] *Pauley* involved the black lung benefits program originally created by Congress in 1969 to be administered by the Department of Health, Education, and Welfare (HEW). The HEW Secretary was authorized to promulgate regulations regarding the determination and adjudication of claims.[20] Congress later amended the law, assigning responsibility away from HEW to the Department of Labor (DOL). However, Congress provided that any new criteria established by the Labor Secretary "shall not be more restrictive than the criteria"[21] earlier adopted by HEW.

DOL's regulations were challenged as violating this provision, yet the Supreme Court held that the DOL's rules were entitled to judicial deference,[22] over the objection of Justice Scalia. Justice Scalia objected to the fact that the deference was through the DOL, even though the rules initially were set out by HEW.[23]

The third category of Supreme Court administrative law decisions addresses standing, ripeness, and exhaustion of administrative remedies, the "gatekeeping" doctrines which determine whether or not parties can have their claims or grievances heard in federal court. Although these cases were not numerous in the last term, this is an area that appears to be evolving, or at least moving, in the Court's jurisprudence.

One standing case decided last term was *Air Courier Conference of America v. American Postal Workers Union,*[24] in which the Court held that the District of Columbia Circuit misapplied the zone of interests test, as explained by the Court in *Clarke v. Securities Industry Association.*[25]

Far more attention, however, was focused on a case to be decided this coming term. It involves an appeal from the Eighth Circuit deci-

---

18. *Rust*, 111 S. Ct. at 1767.
19. ___ U.S. ___, 111 S. Ct. 2524 (1991).
20. 30 U.S.C. § 921 (1988).
21. 30 U.S.C. § 902(F)(2) (1988).
22. *Pauley*, 111 S. Ct. at 2534-35.
23. *Id.* at 2540 (Scalia, J., dissenting).
24. ___ U.S. ___, 111 S. Ct. 913 (1991).
25. 479 U.S. 388, 399 (1987) (describing "zone of interests" test as "a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision").

sion in *Lujan v. Defenders of Wildlife*,[26] which held that the environmental group had standing to challenge a Department of Interior regulation interpreting the Endangered Species Act to not apply to actions taken in foreign countries. The interest in this case stems from its similarity to *Lujan v. National Wildlife Federation*,[27] in which the Court denied the National Wildlife Federation standing to challenge the Bureau of Land Management's land withdrawal review program.[28]

This review of cases is not exhaustive. It is a brief introduction, however, to the Court's administrative law docket of last year.

Our distinguished speakers will take it from here and, most important, tell us what these cases really mean. Leading off, focusing on separation of powers cases, is Theodore B. Olson, a partner in the law firm of Gibson, Dunn & Crutcher. Mr. Olson is a litigator with extensive experience in the fields of constitutional law, media litigation, commercial disputes, and appellate practice, including appearances before the Supreme Court. Between 1981 and 1984, he was the Assistant Attorney General at the Office of Legal Counsel (OLC). OLC, as you may well know, formulates and articulates the Executive's position on constitutional issues. Mr. Olson is a member of the Administrative Conference, as well as a member of the Council of the American Bar Association's (ABA) Section of Administrative Law and Regulatory Practice.

Mr. Olson will be followed by Professor Thomas O. Sargentich, who will comment on the state of the *Chevron* doctrine. Professor Sargentich teaches at the Washington College of Law, The American University, and has written extensively on administrative and constitutional law issues. Tom also is an alumnus of the OLC, serving there from 1978 to 1983.

Our last speaker will be Professor William F. Funk, who will address recent Court cases dealing with standing and ripeness and what the future may hold in this area. Professor Funk currently teaches at the Lewis and Clark Northwestern School of Law. Prior to joining the academic ranks, he served at the Department of Energy, on the staff of the House Intelligence Committee, and also in the OLC at the Department of Justice.

As you will note, you have to have worked at OLC to be a panelist. Without that credit on your resume, you are reduced to being a moderator.

Following the speakers' presentations, I will invite the speakers to

26. 911 F.2d 117 (8th Cir. 1991).
27. ___ U.S. ___, 110 S. Ct. 3177 (1990).
28. *Id.* at 3187.

argue and debate amongst each other. After this exchange, I will invite questions from the floor.

SEPARATION OF POWERS AND THE SUPREME COURT: IMPLICATIONS AND POSSIBLE TRENDS

THEODORE B. OLSON, ESQ.*

Mr. Olson: As I look around this room, I see a powerful array of expertise on the subjects that we are discussing today. I am sure that my co-panelists feel as I do that we are engaging today in a colloquy and not a presentation. So perhaps we should regard our role as simply getting the discussion started by turning to the cases the Supreme Court decided last year.

I will discuss the three cases on separation of powers that Marshall mentioned. Just to confuse you, I will discuss them in the reverse order.

The Supreme Court did decide three cases last term that have implications for the separation of powers. The first, *Touby v. United States*,[29] involves the extent to which Congress can delegate legislative, or what might be regarded as legislative, power to the executive branch.

The Controlled Substances Act[30] authorizes the Attorney General to specify products, the manufacture, possession, sale, or distribution of which may subject an individual to criminal prosecution.[31] The statute articulates some fairly specific standards to which the Attorney General must adhere when designating a substance for inclusion on the controlled substance list. He must start by having the affirmative recommendation by the Secretary of HHS[32] and must then consider a number of very specific factors.[33] There is also a process of review and

---

* Mr. Olson is a partner at Gibson, Dunn & Crutcher in Washington, D.C. B.A., cum laude, 1962, University of the Pacific; LL.B., 1965, Boalt Hall School of Law, University of California. He was formerly the Assistant Attorney General with the Office of Legal Counsel, Department of Justice.

29. ___ U.S. ___, 111 S. Ct. 1752 (1991).

30. 21 U.S.C. §§ 801-889 (1988).

31. *Id.* § 811(a).

32. *Id.* § 811(b) (stating that recommendations of Secretary shall be binding on Attorney General, and if Secretary recommends that drug or other substance not be controlled, Attorney General shall not control drug or other substance).

33. *Id.* § 811(c) (listing factors: (1) its actual or relative potential for abuse; (2) scientific evidence of its pharmacological effect, if known; (3) state of current scientific knowledge regarding the drug or other substance; (4) its history and current pattern of abuse; (5) scope, duration, and significance of abuse; (6) what, if any, risk there is to public health; (7) its psychic or physiological dependence liability; (8) whether substance is immediate precursor of substance already controlled under this subchapter).