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Rulings Limiting Federal Agencies May Lead Congress To Act

By **David Coale** (August 4, 2022, 3:30 PM EDT)

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A conservative federal judiciary is expressing growing skepticism about the reach of the administrative state — the sprawling agencies that make up most of today's federal government.

As a result of opinions that limit agency power, Congress may be tempted to respond in-kind with limits on judicial power.

The U.S. Supreme Court's recent West Virginia v. U.S. Environmental Protection Agency opinion may have given support to Congress in that regard, by confirming that Congress can have a uniquely strong interest in particular topics when compared to other branches of government.

Two recent cases illustrate current conservative thinking in the federal courts about the administrative state.

The first is Jarkesy v. U.S. Securities and Exchange Commission, a 2-1 decision by a panel of the U.S. Court of Appeals for the Fifth Circuit in May.

It held that the Seventh Amendment, which preserves the right to jury trial "[i]n Suits at common law," applies to an enforcement action by the SEC that seeks a monetary penalty. It also held that Congress unconstitutionally delegated too much power to the SEC by letting it choose between court or an internal tribunal when bringing an enforcement action.

One month later, in West Virginia v. EPA, the Supreme Court considered a challenge to the EPA's authority to regulate greenhouse gases.

A 6-3 opinion held that regulation of fossil fuel use was a major question, because of its political and economic significance and, as such, required a clear statement by Congress before courts would accept delegation of authority to an administrative agency about that issue.

These cases are rooted in the power of judicial review, given to federal courts by the U.S. Constitution so that they can invalidate unconstitutional laws.

But while courts have judicial review, Congress holds the power of the purse. And Article III, Section I of the Constitution expressly links Congress' spending power to the structure of the federal courts, stating:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

In both Jarkesy and West Virginia, the agencies argued that a ruling against them would undermine a statutory scheme created by Congress — respectively, the securities fraud laws enacted in the early 1930s and the Clean Air Act.

If in response to such opinions, Congress felt that an assertive federal judiciary was undermining this kind of comprehensive statute, it could well consider reconfiguring that scheme to reduce federal court jurisdiction over it.

Such revisions could focus on procedure. For example, administrative law appeals could be consolidated into one intermediate court, much as all patent appeals go to the U.S. Court of Appeals for the Federal Circuit. Or more controversially, such a statute could focus on substance.

A motivated Congress could consider elimination of circuit court jurisdiction over some challenges to the structure of administrative agencies, requiring — for example — that any such appeal go directly to the Supreme Court. As that court is both busy and has the power of discretionary review, it would presumably decline most cases sent to it.

Opponents of such laws could make a legitimate point about the traditional roles and responsibilities of the courts in the review of agency action.

By definition, judicial review requires a judiciary, and courts cannot carry out their constitutional duties unless they have the resources to do so. And laws such as the Administrative Procedure Act have included court review as part of the administrative rulemaking process for decades.

But as Supreme Court Justice Neil Gorsuch noted generally for the court in December 2021 in Whole Women's Health v. Jackson, in declining to exercise jurisdiction over Texas' new S.B. 8 law that allowed civil lawsuits about abortions:

> This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court.

Relatedly, the Constitution does not state any absolute right to any particular pathway to, or structure for, appeal. To the contrary, the Constitution expressly gives Congress considerable authority over that structure.

In fact, the major questions concept developed in West Virginia may support a congressional act that limits court jurisdiction over administrative agencies.

If Congress has such strong lawmaking power in a particular area — a major question — as to make its power presumptively undelegable, it follows that Congress has a corresponding power to limit the involvement of other government branches in such an area. Viewed that way, a limit on court jurisdiction would be a natural extension of Congress' authority about such major issues.

American citizens have rights to sue about the structure of their government. But Congress has the power to shape the fora where those rights can be asserted.

Aggressive judicial scrutiny of agencies created by Congress, based on the power of judicial review, may encourage Congress to aggressively explore the limitation of federal court jurisdiction over agencies, based on its spending power.

The major question concept developed by the Supreme Court in West Virginia v. EPA may provide intellectual support for such an act by Congress by confirming Congress' uniquely important interests in certain significant topics.

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