

March 10, 2015

Perez v. Mortgage Bankers Association

Supreme Court Holds that Agencies Can Amend or Repeal Interpretive Rules Without Notice-and-Comment Procedures

SUMMARY

The U.S. Supreme Court yesterday held that agencies are not required to follow notice-and-comment rulemaking procedures when amending or repealing their interpretations of existing regulations. The Court ruled that the D.C. Circuit's longstanding *Paralyzed Veterans* doctrine, which required agencies to follow notice-and-comment procedures when changing interpretive rules, was contrary to the text of the Administrative Procedure Act and exceeded the scope of judicial review authorized by Congress. The Court suggested, however, that changed interpretations should be subject to more searching review by courts, especially when regulated entities have extensively relied on the prior interpretation, and may face limitations in retroactive application. Three Justices wrote separately to question the fundamental appropriateness of judicial deference to agencies' interpretations of their own regulations. Though the Court directed that an agency will need to provide a more substantial justification for its new interpretation if the new interpretation unsettles serious reliance interests or if it is based on factual findings contrary to prior findings, yesterday's decision may make it easier for an agency to modify or even reverse its interpretation of existing regulations.

BACKGROUND

The Administrative Procedure Act (APA) requires administrative agencies to follow notice-and-comment rulemaking procedures when promulgating regulations, but it exempts from those requirements so-called "interpretive rules"—agencies' public statements as to how they construe statutes they administer and their own regulations.¹ Recognizing that such an exemption allows agencies to change settled interpretations without public input, the D.C. Circuit had developed a line of cases known as the *Paralyzed Veterans* doctrine that required agencies to follow notice-and-comment procedures when

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significantly amending a prior definitive interpretation of a regulation.² Although some other courts of appeals had declined to adopt the *Paralyzed Veterans* doctrine, the D.C. Circuit's centrality in handling administrative law matters made the doctrine relevant to many revisions of interpretive rules.³

The dispute underlying yesterday's decision arose out of an agency interpretation of regulations implementing the Fair Labor Standards Act (FLSA). The FLSA provides federal minimum wage and overtime guarantees for certain workers but exempts "administrative" employees, a category of workers defined by Department of Labor (DOL) regulations.⁴ In 1999 and 2001, the DOL issued Opinion Letters concluding that mortgage-loan officers are not administrative employees under the agency's regulations. In 2006, the DOL reversed course and issued an Opinion Letter stating that mortgage-loan officers are exempt administrative employees under those regulations. In 2010, the DOL did another about-face and issued an Administrator's Interpretation withdrawing its 2006 letter and opining that mortgage-loan officers are not exempt from FLSA regulations. The DOL did not use notice-and-comment rulemaking to issue any of these letters or interpretations.

The Mortgage Bankers Association (MBA) filed suit in 2011, alleging that when the DOL reversed course in its latest 2010 interpretation, it was required to use notice-and-comment procedures under the *Paralyzed Veterans* doctrine. The district court denied the MBA's motion for summary judgment,⁵ but the D.C. Circuit reversed.⁶ The Supreme Court granted review to resolve the conflict among the courts of appeals over the *Paralyzed Veterans* doctrine.

YESTERDAY'S DECISION

In *Perez v. Mortgage Bankers Association*, No. 13-1041, the Supreme Court yesterday held that the D.C. Circuit's *Paralyzed Veterans* doctrine is inconsistent with the text of the APA. The APA expressly exempts interpretive rules from notice-and-comment requirements, and the Court reasoned that that exemption applied equally when agencies amend or repeal existing interpretive rules.⁷ As such, the Court said, the *Paralyzed Veterans* doctrine exceeded the scope of judicial authority under the APA, which "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."⁸

The Court rejected the MBA's defense of the *Paralyzed Veterans* doctrine on two grounds. First, the Court held that when an agency revises its interpretation of what a regulation means, that does not constitute an amendment of the regulation itself and thus does not mandate the use of notice-and-comment procedures.⁹ In doing so, the Court did, however, reiterate its prior holding that a revised interpretation of an agency regulation "is entitled to considerably less deference than a consistently held agency view."¹⁰ Second, while acknowledging concerns that agencies at times may invoke interpretive rulemaking "to skirt notice-and-comment provisions," the Court said that the APA contains safeguards against such tactics, including the "arbitrary and capricious standard" and the requirement of a "more substantial justification" when a new interpretation unsettles substantial reliance interests or is based on

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factual findings contrary to those that underlay the prior interpretation.¹¹ Moreover, the Court reasoned, Congress can and often does adopt safe-harbor provisions shielding from liability acts that conformed to prior interpretations.¹² In any event, the government conceded at oral argument that even without such a safe harbor, agencies' ability to bring enforcement proceedings against regulated entities based on conduct that conformed to the prior interpretation may be limited by principles of retroactivity.¹³

Justices Scalia, Thomas, and Alito each concurred in the judgment to emphasize practical problems and constitutional issues inherent in affording judicial deference to agencies' interpretations of their own regulations. Justice Scalia argued that, although the Court was correct that the *Paralyzed Veterans* doctrine "did not comport with the APA," it was an attempt to limit agencies' ability, even incentive, to draft vague regulations and then fill in the interstices through binding interpretive rules promulgated without following notice-and-comment procedures.¹⁴ He therefore urged the Court to abandon the deference it currently affords to agencies' interpretations of their own regulations, a view that Justice Alito's brief concurrence suggests he may share.¹⁵ In a lengthy separate opinion, Justice Thomas argued that such deference violates the separation of powers.¹⁶

IMPLICATIONS

As *Perez* shows, when administrations change, agencies often reverse course in their interpretations of their own regulations, and now those revisions are conclusively not subject to notice-and-comment procedures. The Court acknowledged concerns that yesterday's ruling may even provide an incentive for agencies to rely disproportionately on interpretive guidance so as to avoid the burden of notice-and-comment requirements or to promulgate broadly worded regulations so as to reserve the ability to revise guidance without public input.

To allay such concerns, the Court suggested that there may be limits on the government's ability to apply new interpretations of agency regulations retroactively. The Court noted that Congress often adopts statutory safe harbors, and it emphasized the government's concession at oral argument that "an agency's ability to pursue enforcement actions against regulated entities for conduct in conformance with prior agency interpretation may be limited by principles of retroactivity."¹⁷ Companies and individuals should raise and preserve retroactivity defenses when facing agency enforcement actions based on changed interpretations.

Finally, courts may take a harder look at agencies' changed interpretations. The Court underscored that an agency must "provide more substantial justification" for a new interpretation if the prior policy had created "serious reliance interests" or if it "rests upon factual findings that contradict those that underlay its previous policy."¹⁸ It is also worth noting that three Justices wrote separately to signal their willingness to reconsider the line of cases that grants deference to agencies' interpretations of their own regulations.

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Accordingly, companies and individuals should raise and preserve challenges to such interpretations and to courts' deference to them.

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ENDNOTES

¹ 5 U.S.C. §§ 553(b)-(c).

² *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), *cert. denied* 523 U.S. 1003 (1998).

³ *Compare Shell Offshore Inc. v. Babbitt*, 238 F.3d 62, 629-30 (5th Cir. 2001) (adopting *Paralyzed Veterans* doctrine), *with Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1031-33 (9th Cir. 2008) (rejecting *Paralyzed Veterans* doctrine), *cert. denied* 555 U.S. 1208 (2009).

⁴ 29 U.S.C. §§ 206-207, 213(a)(1).

⁵ *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 205-08 (D.D.C. 2012).

⁶ *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013).

⁷ *Perez v. Mortgage Bankers Ass'n*, 575 U.S. ___, No. 13-1041, slip op. 7-8 (Mar. 9, 2015).

⁸ *Id.* at 8-9 (quoting *Vermont Yankee Nuclear Power Corp. Natural Resources Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

⁹ *Id.* at 9-10. The Court held that the MBA had waived any argument that the rule in question was properly characterized as a legislative rule, not an interpretive rule. *Id.* at 14.

¹⁰ *Id.* at 10 n.4 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

¹¹ *Id.* at 12-13.

¹² *Id.* at 13.

¹³ *Id.*

¹⁴ *Mortgage Bankers*, slip op. at 4 (Scalia, J., concurring in the judgment).

¹⁵ *Id.* at 5.; *id.* at 1-2 (Alito, J., concurring in part and concurring in the judgment).

¹⁶ *Id.* at 8-16 (Thomas, J., concurring in the judgment).

¹⁷ *Id.* at 13 & n.5 (majority opinion).

¹⁸ *Id.* at 13.

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