Perez v. Mortgage Bankers Association, No. 13-1041

The Administrative Procedure Act ("APA") requires agencies to use notice-and-comment rulemaking when issuing regulations within their authority unless the regulations consist of "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Despite that statutory requirement, the nation's leading court on administrative law—the U.S. Court of Appeals for the D.C. Circuit—has long followed its Paralyzed Veterans doctrine, which requires agencies to use notice-and-comment rulemaking to issue interpretive rules differing significantly from earlier rules.

Today, in Perez v. Mortgage Bankers Association, No. 13-1041, the Supreme Court rejected the Paralyzed Veterans doctrine. In an opinion by Justice Sotomayor, the Court emphasized the APA's text in holding that the exemption from notice-and-comment rulemaking for interpretive rules is categorical.

This decision will make it easier for agencies to change their views as to how a statute should be interpreted, an issue that arises most frequently when a new administration comes into power. But the decision is perhaps more notable for what it does not decide. In earlier cases, Chief Justice Roberts and Justices Scalia, Thomas, and Alito have urged the Court to reconsider whether courts should defer to agency interpretations of their own regulations. That issue is implicated in this case, because the underlying facts involve the Department of Labor's shifting positions as to whether mortgage loan officers are exempt from overtime wage requirements under regulations interpreting the Fair Labor Standards Act. But the seven-Justice majority alluded to the issue only in a footnote, mentioning that deference under Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), is "not an inexorable command" and that "it is the court that ultimately decides whether a given regulation means what the agency says."

Three Justices wrote separate opinions on the Auer/Seminole Rock doctrine. Justice Alito joined most of the majority's opinion and wrote separately to note that he "await[s] a case in which the validity" of those decisions "may be explored through full briefing and argument." Justice Scalia concurred in the judgment. He agreed that Paralyzed Veterans was inconsistent with the APA and argued that the Court should abandon the Auer/Seminole Rock doctrine on statutory grounds. Justice Thomas likewise concurred in the judgment. He agreed that Paralyzed Veterans was inconsistent with the APA and argued that the Court should abandon the Auer/Seminole Rock doctrine on constitutional grounds.

Today's decision should be of interest to federally regulated industries because it clarifies that notice-and-comment requirements do not apply to attempts by agencies to revise existing interpretive rules. At the same time, several Justices appear to remain interested in addressing agency interpretations of their own regulations. The Court may be willing to address that issue in a future case, which could have significant implications on administrative law and, in turn, on federally regulated entities.

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