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Limiting Agency Power, a Goal of the Right, Gets Supreme Court Test

By Adam Liptak

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WASHINGTON — The Supreme Court heard arguments Wednesday on whether to cut back the power of administrative agencies, a central goal of the conservative legal movement.

The issue may seem technical, but there was little question that the justices viewed it as momentous.

“This sounds like the greatest judicial power grab since Marbury v. Madison,” Justice Stephen G. Breyer said.

He was half-joking, and his comment was greeted by laughter. He quickly added that the Marbury decision, which in 1803 established the basis for the Supreme Court’s power of judicial review, had been “correctly decided.”

But Justice Breyer’s remark nonetheless underscored a split on the court over whether to defer to expert agencies or to insist on independent judicial review of their actions.

The precise question in the case was whether the court should overrule a pair of decisions that required judges to defer to agencies’ reasonable interpretations of their own ambiguous regulations. The decisions — Bowles v. Seminole Rock & Sand Co. in 1945 and Auer v. Robbins in 1997 — have been the subject of much criticism, and several justices have urged the Supreme Court to revisit them.

Justice Elena Kagan, perhaps thinking of other decisions that may be at risk as well, said the court should not lightly overrule its precedents. “We need a good reason for it,” she said, particularly when Congress is free to address the matter. “I mean,” she said, “we used to.”

The case, Kisor v. Wilkie, No. 18-15, concerned a regulation of the Department of Veterans Affairs concerning disability benefits. In ruling against James Kisor, who served in Vietnam as a Marine and later received a diagnosis of post-traumatic stress disorder, a federal appeals court relied on the department’s interpretation of one of its regulations.

Paul W. Hughes, a lawyer for Mr. Kisor, said that shifting agency interpretations, made without notice to the public or comment from it, were at odds with federal law and fairness.

“What happens in cases like this,” he said, “is the regulated public is not able to participate in the underlying lawmaking process that leads to the ultimate rules. And that is not just some speed bump along the administrative process. This matters as a practical matter a great degree.”

Solicitor General Noel J. Francisco defended the challenged precedents but only to a point, saying they should be sustained in their “core applications.”

That halfhearted defense did not go unnoticed. “There might be a problem of a lack of adversarialness here,” Justice Kagan said.

Mr. Francisco said a properly limited version of the challenged precedents would play an important role.

“It promotes national uniformity, predictability and political accountability,” he said. “If a rule is subject to multiple reasonable interpretations, the choice of which one to adopt is made by a single more politically accountable agency, rather than in dozens and perhaps hundreds of different district courts across the country.”

Justice Neil M. Gorsuch, who has been critical of agency power, appeared unpersuaded, saying that Mr. Francisco’s proposed revised version of judicial deference had too many factors.

“As I understand it,” he told Mr. Francisco, “there are six elements of your test. We have to decide whether the regulation is ambiguous, whether the interpretation is reasonable, whether it’s consistent, whether it was made by someone at a high level, whether there was fair notice and whether it was made by somebody with expertise.”

“Is that a recipe for stability and predictability in the law,” Justice Gorsuch asked, “or is that a recipe for the opposite?”

Justice Gorsuch added that he was inclined to trust judges over bureaucrats.

“The one thing you’re going to know is you’re going to have an independent judge decide what the law is in your case, consistent with the statute that says an independent judge shall decide all questions of law,” he said. “That seems to me a significant promise, especially to the least and most vulnerable among us, like the immigrant, like the veteran, who may not be the most popular or able to capture an agency the way many regulated entities can today.”

Justice Breyer countered that judges cannot be experts in all things and are not as politically accountable as agency officials. “We know that, democratically speaking, agencies aren’t very democratic,” he said, “but there is some responsibility, and there are one group of people who are still less democratic, and they’re called judges.”

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