NATIONAL REVIEW

Neil Gorsuch's First Chance to Undermine the Administrative State

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November 22, 2017

When Neil Gorsuch was nominated to the Supreme Court, pundits focused on two aspects of his judicial record: his dedication to textualism in statutory interpretation and his skepticism of the growth of the administrative state. These beliefs align the justice with a growing chorus of lawyers and academics who think the judiciary has become too deferential to executive agencies, allowing bureaucrats to interpret statutes contrary to how Congress wrote them.

Well, later this month the Court will hear a case that, precisely because it doesn't involve a hot-button issue such as immigration or transgender bathroom access, could be the perfect vehicle for reasserting judicial review of a relatively unfettered bureaucracy. Digital Realty v. Somers involves the question of who gets whistleblower protection under Dodd-Frank, an issue that is clearly addressed in the statute but has nonetheless bedeviled the courts, generating a jumble of contradictory rulings and confusion in the workplace.

Congress passed Dodd-Frank in the wake of the 2008 financial crisis, and the law's whistleblower provisions provide incentives for employees to report securities violations to the Securities and Exchange Commission. The goal was to strengthen the agency's ability to prosecute the sorts of misdeeds that contributed to the crisis. Congress thus defined a "whistleblower" as an "individual who provides . . . information relating to a violation of the securities laws to the Commission."

The current case involves a Dodd-Frank claim by a man named Paul Somers against his previous employer, Digital Realty Trust. Somers alleges that he was fired in 2014 for reporting violations of the Sarbanes-Oxley Act of 2002 (one of the laws covered by Dodd-Frank's whistleblower provisions) to company management. Digital moved to dismiss this claim because Somers had failed to report the alleged violations "to the Commission" as the law requires.

Not only is this language clear in Dodd-Frank, but different provisions in Sarbanes-Oxley apply to internal whistleblowers. These protections require administrative review before a case reaches the federal courts, and they come with lower potential damages and a shorter statute of limitations. In other words, Congress determined that statutes incentivizing two different activities with distinct policy ramifications — reporting to the SEC versus to company executives or anyone else — should provide different protections. The law's plain language should have thwarted any attempt at administrative mischief, but the SEC was feeling particularly inspired as it promulgated rules for enforcing Dodd-Frank. The agency maintained Congress's definition during the public-comment period of that process, but before the rule became final, the agency surreptitiously decided it could improve on Congress's work. In the final rule, it expanded the anti-retaliation provision to include individuals who merely reported a violation — without necessarily reporting it to the SEC. The SEC gave no explanation or notice for this change, but simply ruled by fiat. According to the SEC's creative interpretation, people reporting protected activity to anyone — local police, their kid's soccer coach, maybe even a think-tank scholar — qualify for Dodd-Frank's whistleblower protections if they can claim a nexus between that reporting activity and the employer's retaliatory behavior.

Some have attempted to justify this kind of overreach by invoking the Supreme Court's 1984 ruling in Chevron v. Natural Resources Defense Council. There, the high court held that agency interpretations are due judicial deference when (1) the statute is ambiguous and (2) the agency's rule is reasonable. Neither condition applies here. Nevertheless, both the district court and the Ninth Circuit cited Chevron in rejecting Digital's commonsense reading of the statute. Thus the parties will argue over whether Congress meant to limit Dodd-Frank's whistleblower protections to persons reporting violations to the SEC when Congress expressly defined a whistleblower as an individual who reports protected activity to the SEC.

This case epitomizes how Chevron deference has gone too far. What started as a necessary tool for preventing courts from unduly meddling in administrative decision-making has warped into courts' refraining from checking the executive branch altogether. Reasonable people can disagree as to whether Congress got the law right. But it's not an agency's role to rewrite laws it dislikes. The SEC essentially nullified Sarbanes-Oxley and unilaterally expanded Dodd-Frank's whistleblower provisions.

The SEC essentially nullified Sarbanes-Oxley and unilaterally expanded Dodd-Frank's whistleblower provisions. What self-respecting plaintiff's attorney would pursue a Sarbanes-Oxley claim arising from internal reporting when Dodd-Frank's easier, more lucrative path beckons? If an agency is entitled to deference under such circumstances — where the text is so clear and the rulemaking process so suspect — it raises questions about the whole enterprise of judicial review.

While Digital Realty has played second fiddle to the flashier cases up this term, it may be the case with the most significant and long-lasting practical effects. Indeed, whether the justices scold lower courts for manufacturing ambiguity to trigger Chevron or call for a broader rethink of judicial deference — just so long as they don't simply agree with the SEC's statutory interpretation, which seems unlikely — it will bring us one step closer to restoring constitutional balance among the branches of government. Sometimes big gifts arrive in small packages. Digital Realty v. Somers, one of this term's "sleeper" cases, may just be the one Justice Gorsuch and his colleagues were waiting for.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute, which filed an amicus brief supporting Digital Realty before the Supreme Court.