

A Coming Seismic Shift in Administrative Law? Or Just a Tremor?

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Article I of the U.S. Constitution articulates the fundamental principles that “[a]ll legislative Powers ... shall be vested in a Congress,” “[t]he executive Power shall be vested in a President,” and “[t]he judicial Power ... shall be vested in one supreme court, and in such inferior Courts as the Congress may ... ordain and establish.” This separation of powers was—and is—a defining feature of the Constitution and, according to the Federalist Papers, meant to be “the great security against a gradual concentration of the several powers in the same department.”

Nevertheless, the modern administrative state consists of a wide variety of agencies that each wield all three powers—legislative, executive, and judicial—with minimal accountability. For example, the SEC is empowered to promulgate regulations, bring enforcement actions, and conduct administrative hearings to enforce those regulations, having its own administrative law judges to try alleged violations. What’s more, administrative agencies often escape judicial review under the standard laid down by the Supreme Court’s 1984 opinion in *Chevron, U.S.A. v. Natural Resource Defense Council*, which says that “[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

In recent years, however, a movement against the mixing of separate powers into single bodies has begun to snowball. For example, in 2018, Florida amended its constitution to prohibit state judges from deferring to an administrative agency’s interpretation of a state statute or rule. In the 2022 case of *Jarkesy v. SEC*, the Fifth Circuit ruled that the SEC’s in-house adjudication of an alleged violation of securities laws violated the Seventh Amendment, that Congress unconstitutionally delegated legislative power to the SEC, and that restrictions on the removal of the SEC’s administrative law judges violated Article II of the U.S. Constitution.

Currently, the constitutionality of FINRA is being challenged in *Scottsdale Capital Advisors Corp. v. FINRA*. There, the plaintiffs allege that FINRA improperly exercises executive power, FINRA's structure violates the "appointments" clause of the Constitution, and Congress improperly delegated legislative powers to FINRA. It remains to be seen whether this lawsuit against FINRA will follow *Jarkesy* and whether the burgeoning trend against the comingling of separate governmental powers in a single agency will become an avalanche. What is certain is that the spate of recent lawsuits challenging the SEC's and FINRA's constitutionality signals an unstable status quo for administrative law.

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