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Alabama Association of Realtors v. Department of Health and Human Services

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**ALABAMA ASSOCIATION OF REALTORS V.
DEPARTMENT OF HEALTH AND HUMAN
SERVICES**

ADAM B. McDONALD*

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INTRODUCTION

In an attempt to slow the spread of the COVID-19 pandemic, Congress instituted a “new” normal in March of 2020.¹ As part of the “new” normal, the Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“Act”).² The Act included a temporary eviction moratorium on for individuals renting certain properties who participated in federal assistance programs, or were subject to federally backed loans.³

Once the eviction moratorium expired, the Center for Disease Control (“CDC”), an agency under the Department of Health and Human Services (“DHHS”), extended the moratorium without Congress’ consent.⁴ The CDC also expanded the moratorium to include a larger amount of rental properties nationwide, and imposed criminal penalties on those who violated the moratorium.⁵ Although the CDC set the moratorium to expire on December 31, 2020,

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1. Coronavirus Aid, Relief, and Economic Security Act, 15 U.S.C. § 116 (2020).
2. *Id.*
3. *Id.* §§ 9058.
4. Alabama Association of Realtors, et al., v. Department of Health and Human Services, et al., 539 F. Supp. 3d 29, 33 (D.D.C. 2021).
5. *Id.* at 34.

Congress chose to extend it for one month.⁶ After the Congressional extension, the CDC extended the moratorium two more times throughout 2021 without Congressional approval, relying on the Public Health Service Act in doing so.⁷

Realtors, Associations, and others joined action in Alabama and Georgia and filed suit against the CDC on the grounds that the agency lacked authority to implement the moratorium.⁸ The District Court for the District of Columbia agreed with the Plaintiffs and granted summary judgement.⁹ However, the District Court stayed the judgement pending appeal.¹⁰ Ultimately, the case made its way to the Supreme Court of the United States. The Court agreed with the District Court that the CDC lacked the authority to implement the moratorium but declined to vacate the stay of judgment because the moratorium was set to expire in a matter of weeks.¹¹

Astonishingly, the CDC once again extended the moratorium after the Supreme Court decided they did not have the authority to do so.¹² The D.C. District Court and Circuit Court both declined to vacate the stay of the original judgement.¹³ Once again, the Supreme Court was tasked with answering the question of whether the CDC has the authority to extend the moratorium under the Public Health Service Act, or whether the CDC, and the American people, should get back to normal.

I. THE SCOPE OF POWER OF ADMINISTRATIVE AGENCIES

The fundamental question in *Alabama Association of Realtors* concerns the power of administrative agencies when Congress is mute or ambiguous. Specifically, whether the Public Health Service Act, which gives broad authority to the CDC in matters relating to preventing the spread of infectious diseases, allows the CDC to circumvent property laws traditionally reserved to states without the explicit approval of Congress.

6. *Id.*

7. *Id.*; Public Health Service Act, 42 U.S.C. § 264(a).

8. Alabama Association of Realtors, *supra* note 4, at 34.

9. *Id.* at 43-44.

10. Alabama Association of Realtors, et al., v. Department of Health and Human Services, 141 S. Ct. 2485, 2487-88 (2021).

11. *Id.* at 2488.

12. *Id.*

13. *Id.*

Prior to the Supreme Court's decision in *Alabama Association of Realtors*, the Circuits were split as to whether the CDC has the authority to enact or extend the moratorium without Congressional approval.¹⁴ The issue of agency authority has larger implications than just the present case. If agencies are allowed to enact strong regulations without congressional approval, agencies would thus turn into a fourth branch of government—one that does not answer directly to the people and one without much oversight or hurdles.

II. DEVELOPMENT OF ADMINISTRATIVE AGENCY POWERS

Administrative agencies are agencies with quasi-judicial and quasi-legislative functions.¹⁵ Congress created administrative agencies so that regulations concerning specific government functions get implemented quickly by experts in the field.¹⁶ In creating these agencies, Congress delegated at least part of its Article I legislative powers to the agencies in order for the agencies to make rules and regulations.¹⁷ Thus, administrative agencies “have only those powers expressly conferred by the legislature.”¹⁸

Congress sparked the beginning of the fourth branch of government a mere two years after adoption of the Constitution with the creation of the Department of Foreign Affairs in 1789.¹⁹ Fast forward 100 years, and unsurprisingly, Congress continued create agencies and delegate their legislative power to those agencies.²⁰ For example, Congress created the Interstate Commerce Commission (“ICC”) largely to regulate the newest form of transportation—railroads.²¹ At first, states largely disregarded administrative

14. Alabama Association of Realtors, *supra* note 4, at 35.

15. *Federal Research: Administrative Agencies & Regulations*, MERCER LAW LIBRARY (Feb. 16, 2023, 9:53 AM) <https://guides.law.mercer.edu/federal>.

16. *Administrative Law Structures*, LAW SHELF (2023) <https://lawshelf.com/videocourses/moduleview/administrative-law-structures-module-1-of-5>.

17. *See generally* U.S. CONST. art. I.

18. James Buchwalter, et al., *Public Administrative Law and Procedure* § 148, 73 C.J.S. 1 (2023).

19. Jeannie Ricketts, *A Very Brief History of Federal Administrative Law*, OKLAHOMA BAR ASSOCIATION (Nov. 18, 2023) <https://www.okbar.org/barjournal/nov2017/obj8830ricketts#:~:text=Congress%20created%20the%20first%20federal,to%20perform%20other%20related%20duties.>

20. *Id.*

21. *Id.*

regulations and, instead, created their own regulations.²² In an attempt to solve the problem of uniformity across the nation, Congress enacted the Administrative Procedures Act, which details the adjudication and rulemaking process of administrative agencies, and the rules that they must follow.²³ However, with additional regulations and statutes, comes more opportunities for ambiguous and confusing language.

After some period of almost silence from the judiciary, the Supreme Court finally examined the rulemaking authority of administrative agencies in a trio of cases.²⁴ The base case for administrative interpretation is *Skidmore v. Swift* in which the Court held that administrative agencies' decisions and guidance are not binding on courts, however courts should give deference to agencies' expertise.²⁵ Next, the Court decided in *Chevron U.S.A., Inc. v. NRDC* that where Congress has not directly addressed the issue, or if the statute is ambiguous, then courts should pay deference to the agency's interpretation of the statute if that interpretation is "based on a permissible construction of the statute."²⁶ Following the same line of thinking, the Court decided in *Auer v. Robbins* that courts should also give deference to agencies' interpretation of their own regulations when they seem ambiguous, unless it is "plainly erroneous or inconsistent with the regulation".²⁷ This trio of cases, among other Supreme Court cases, gave administrative agencies the legitimacy they needed to not only survive, but thrive.

III. ANALYSIS OF THE CASE

There is a two-step process in determining whether the CDC had the authority to change and extend the eviction moratorium.²⁸ The lower court applied the *Chevron* analysis to determine: 1) whether

22. *Id.*

23. *Administrative Law*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/administrative_law.

24. *Id.*

25. *Skidmore v. Swift*, 323 U.S. 134, 137-40 (1944).

26. *Chevron USA, Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 (1984).

27. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

28. *Alabama Association of Realtors*, *supra* note 4, at 37.

Congress has directly spoken to the precise question at issue; and if not, then 2) is the agency's interpretation permissible.²⁹

A. *Did Congress Speak to the Issue*

If Congress specifically spoke to the issue regarding eviction moratoriums, then the issue would be moot because Congress' voice overrules administrative agencies.³⁰ Originally, Congress enacted the CARES Act, which included a 120-day eviction moratorium for "rental properties that participated in federal assistance programs[.]"³¹ After the CARES Act's moratorium expired in July of 2020, the CDC issued the "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19" which extended the eviction moratorium with some new added changes, thus making the moratorium affect a larger number of Americans.³² Congress did not direct the CDC to extend and overhaul the eviction proceedings, but chose to extend the agency's new moratorium for one month past the date it was set to expire.³³ Later, the CDC extended the order two more times without Congress' approval.³⁴ The district court decided that, although Congress did extend the CDC's eviction moratorium for a short period, that did not mean that Congress gave approval of the Agency's interpretation of The Public Health Service Act.³⁵ In turn, because Congress did not speak directly to the CDC's authority to promulgate the eviction moratorium, and extend it, the question still remains as to whether the CDC had the authority to do so.

B. *Is the Agency's Interpretation Permissible*

Because Congress did not directly address the issue, the second part of the *Chevron* analysis will apply. The second step of the *Chevron* analysis is whether the agency's interpretation of their authority is permissible.³⁶ DHS relied their defense on § 361(a) of the

29. *Id.*

30. *Id.*

31. *Id.* at 33.

32. *Id.* at 33.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 37.

Public Health Service Act.³⁷ Congress, through The Public Health Service Act, authorized the Surgeon General “to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”³⁸ The Surgeon General then delegated his authority to the CDC under 42 F.F.R. § 70.2. DHS claimed that the eviction moratorium gives them “broad authority to take whatever measures it deems necessary to control the spread of COVID-19, including issuing the moratorium.”³⁹

However, the Supreme Court corrected the Government to read the entire statute rather than the sentence directing authority.⁴⁰ The second sentence in 42 U.S.C. § 264(a) directly limits the Agency’s power to regulate, “For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.”⁴¹ The second sentence, according to the Court, seems to limit the authority granted to the Agency in the first sentence of the statute.⁴² If the Agency were free to regulate without restraint, the Agency would be free to regulate almost anything under the guise of protecting the health of Americans. If this were so, it would be possible for the CDC to regulate how many calories Americans intake in order to combat obesity and other absurd regulations. Thankfully, however, the Court interpreted the second sentence of § 264(a) as a limit on Agency power.

Additionally, the Court reemphasized the standard that “We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast ‘economic and political significance.’”⁴³ Through this standard, if statutes do not clearly give an agency the authority to act on a politically significant matter, then it is assumed

37. Alabama Association of Realtors, *supra* note 10, at 2487.

38. The Public Health Service Act, 42 U.S.C. § 264(a).

39. Alabama Association of Realtors, *supra* note 10, at 2488.

40. *Id.*

41. 42 U.S.C. § 264(a).

42. Alabama Association of Realtors, *supra* note 4, at 38.

43. Alabama Association of Realtors, *supra* note 10, at 2489. This is commonly referred to as the major questions doctrine or the major rules doctrine.

Congress reserved that power for itself.⁴⁴ Here, the significance of an eviction moratorium for virtually the entire nation is appallingly high. Not only would the Agency be taking away landlord's source or income, but it would also be encroaching upon property law, an area of law historically reserved to the states.⁴⁵ Therefore, because Congress failed to designate the power to install an eviction moratorium to the DHS, this is a power which they do not, and never did, have.

The Supreme Court summed up its analysis by stating that the moratorium put millions of landlords across the country "at risk of inseparable harm by depriving them of rent payments with no guarantee of eventual recovery."⁴⁶ The Court ultimately vacated the stay of the District Court's judgement, and allowed hundreds of millions of Americans to get back to normal.⁴⁷

IV. LEGAL POLICY OR IMPLICATIONS

Alabama Association of Realtors may be the start of the snowball of reigning in administrative agency power. The Supreme Court paid deference to the plain words of the statute which gave authority to the DHS, and used common sense in applying the major questions doctrine. Because the current Supreme Court is a young, conservative-leaning Court, there is an anticipation that the words of the Constitution will once again be revived and administrative agency power may be reined in—to a degree.⁴⁸

V. CONCLUSION

The days of unwieldy administrative power is over. In deciding *Alabama Realtors*, the Supreme Court determined that the CDC's decision to implement unauthorized regulations under the guise of a national emergency, was unconstitutional because Congress never

44. Michael Sebring, *The Major Rules Doctrine*, GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY (Sep. 17, 2018) <https://www.law.georgetown.edu/public-policy-journal/blog/the-major-rules-doctrine/>.

45. Alabama Association of Realtors, *supra* note 10, at 2489.

46. *Id.*

47. *Id.* at 2490.

48. The continuation of this Court to scrutinize agency regulation power can also be seen in *West Virginia, et al., v. Environmental Protection Agency*, where the Court scaled back the EPA's power to regulate America's industries. 142 S. Ct. 2587 (2022).

delegated the authority to do so. In ending the eviction moratorium, the Supreme Court helped to return America back to a normal legal standard for administrative agencies and back to a normal livelihood for millions of people. Through careful legal reasoning, America finally returned back to normal.