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# Are Administrative Agencies Overstepping Their Constitutional Powers?

By Karen L. Karr / Mar 12, 2015

This was the question tackled by the nine Justices on the United States Supreme Court in the case of *Perez v. Mortgage Bankers Association*. All nine judges agreed that Supreme Court precedent requires courts to defer to a U.S. Department of Labor ("DOL") interpretation of its own regulations; however, three argued that the precedent should be overruled.

**The Narrow Outcome.** This specific case involved the issue of whether mortgage loan originators were exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA"). In 1999, and again in 2001, the DOL issued letters opining that such individuals were nonexempt, thus requiring that they receive overtime. In 2006, the DOL issued another letter, this time opining that such employees fell within the administrative exemption (and thus were not entitled to overtime). In 2010, the DOL reversed course (again) and opined that the employees were not exempt. The Supreme Court held that the DOL's 2010 interpretation was valid (thus requiring such employees to be paid overtime).

**The Bigger Picture.** In 1945 Congress enacted the FLSA and gave the DOL authority to implement it. The Administrative Procedure Act ("APA") requires federal agencies to follow a specific process to pass regulations. The process requires an agency to publish a proposed rule, allow for public comments, and address the public comments before adopting a final rule. In this case, the DOL went through this process to enact regulations delineating and describing the administrative exemption to the FLSA overtime requirements. So long as the resulting regulation is not "arbitrary and capricious," a court will accept the regulation as written.

However, simply applying the regulations to mortgage originators was not sufficient. The regulation itself was too broad to answer the specific question of whether mortgage loan originators were exempt. Therefore, the DOL issued "opinions" which it claimed "interpret" its regulations. According to Supreme Court precedent, courts must defer to an agency's "interpretations" of ambiguous regulations so long as the interpretation itself is not arbitrary and capricious.

In a lengthy concurring opinion, Justice Thomas explained the danger in this approach. He described the history of administrative law, starting with the Civil War, which he said exposed the "dangers of tyrannical government." The Framers of the Constitution resolved this threat with checks and balances. Generally, the legislative branch (congress) makes the laws; the executive branch (the president and agencies) implements the laws; and the judiciary (the court system) interprets the laws and decides legal controversies.

Justice Thomas argued that the current system allows agencies to interpret their own laws, a violation of the system. An agency could, he argued, intentionally publish and seek comment on regulations it knows are ambiguous with the intention to "fill in the blanks" with later, unpublished opinions.

This will not be the last Supreme Court decision we will see on this issue. As federal agencies take more and more actions outside the typical rulemaking process, the Court will need to (and has expressed a desire to) address the role of courts in the process.

If you have any questions about *Perez v. Mortgage Bankers Association*, please contact Karen Karr ([kkarr@clarkhill.com](mailto:kkarr@clarkhill.com) | (480) 684-1108) or another member of Clark Hill's Labor and Employment Group.