The Judicial Review

An Analysis of Recent Decisions Affecting Public Servants

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Over the past year, issues important to public administration have figured prominently in the Federal Court docket. This section of *Policy Perspectives* reviews federal court cases of particular significance to public servants and public administrators. Only Supreme Court or Court of Appeals cases to which the Supreme Court has recently granted certiorari were selected.

Government Affirmative Action Programs

In *Adarand Constructors Inc. v. Pena*,[1] an opinion with far-reaching implications for government affirmative action programs, the Supreme Court held that all federal racial classification schemes must serve a compelling government interest and must be narrowly tailored to further that interest.[2] In other words, to be upheld, they must survive strict judicial scrutiny.[3] However, despite the definitive language of the majority opinion, an investigation of previous Supreme Court cases detailing affirmative action plans suggests that the long-term impact of *Adarand* may be difficult to predict.

The controversy in *Adarand* concerned a Department of Transportation (DOT) policy to give financial incentive to prime contractors to hire minority contractors on federal highway construction projects.[4] Under the policy, contractors who subcontract a sufficient percentage of their work to "socially or economically disadvantaged firms" are given financial compensation.[5] The Small Business Administration's 8(a) program provides the guidelines by which the DOT determines a firm's status as disadvantaged. Under the 8(a) program, Blacks, Hispanics, Asian Pacifics, Subcontinent Asians, Native Americans, and women may be presumptively designated socially and/or economically disadvantaged.[6]

In *Adarand*, petitioner offered the low bid on a federal highway construction subcontract, but was turned down in favor of a firm which met the statutory definition of disadvantage.[7] Petitioner brought suit, complaining that the government program under which the subcontract was awarded, and by which general contractors on government projects are given a financial incentive to prefer a class of individuals on the basis of race, violated petitioner's Fifth Amendment due process rights.[8] By challenging the DOT program, petitioner also challenged the Small Business Administration's 8(a) program which is the basis for numerous federal affirmative action programs. Both the District Court and the Court of Appeals found for the government—implicitly approving the use of the affirmative action program in the controversy.[9] However, the Supreme Court vacated and remanded the case for further proceedings in light of its opinion.[10]

Justice O'Connor, writing for the Court, began the *Adarand* opinion by discussing the history of Supreme Court affirmative action jurisprudence. The Court's previous treatment of affirmative action programs had been premised on, variously, the origin of the program (state or federal), the purpose of the program (benign or malign) or the race of the individuals helped or hurt by the program.[11] However, in *Adarand*, Justice O'Connor relied heavily on the Court's holding in *Richmond v. J.A. Croson Co.*[12] In *Croson*, a majority of the Court held that the single standard of review for racial classifications should be strict scrutiny, regardless of the origin, underlying purpose, or race subject to a particular classification.[13] Justice O'Connor declared the *Croson* standard to be the governing standard by which any court must henceforth evaluate affirmative action programs. Consequently, in *Adarand*, Justice O'Connor held that on remand the DOT affirmative action program must be subjected to strict scrutiny.[14]

Justice O'Connor's reliance on *Croson* to subject the affirmative action program in *Adarand* to strict scrutiny called into question a third Supreme Court affirmative action case, *Metro Broadcasting Inc. v. FCC*.[15] In *Metro Broadcasting*, decided one year after *Croson*, the Court held that "benign" federal racial classifications need only satisfy intermediate scrutiny.[16] Justice O'Connor's opinion in *Adarand* expressly disapproved of *Metro Broadcasting*'s adoption of intermediate scrutiny. According to Justice O'Connor, the Court in *Metro Broadcasting* (1) ignored *Croson*'s mandate that strict scrutiny be applied to all government race classifications, and (2) failed to properly consider the values of skepticism, consistency and congruence in arriving at its opinion.[17] Justice O'Connor thus declared *Metro Broadcasting* irreconcilable with prior Supreme Court decisional law, and the case was overruled.[18]

The Court's holding in *Adarand* suggests that all racial classifications imposed by federal, state, or local governments will henceforth be subject to strict scrutiny.[19] Under this standard, most affirmative action programs would fail. However, the fact that *Adarand* overruled *Metro Broadcasting* only a few years after *Metro* was decided shows that the intellectual foundation underlying these cases can erode with turnover on the Court. Consequently, the actual significance of *Adarand*, and its implications for the future of affirmative action programs, may not be apparent for several years and/or subsequent terms of the Supreme Court.

Deference to Agency Statutory Interpretation

Several controversies arose last term concerning deference to statutory interpretation by agencies. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[20] the Supreme Court addressed a challenge to a regulation promulgated by the Secretary of the Interior under the Endangered Species Act (ESA).[21] In the course of its decision, the Court impliedly relied on the *Chevron* doctrine—a doctrine with the potential to unify the diverse ways in which courts review agency decisions.[22]

The ESA confers upon the Secretary of the Interior the discretion to implement regulations to protect endangered species from actions by private actors.[23] Pursuant to this discretion, the Secretary may classify certain activities as harmful and may prohibit them.[24] In *Babbitt*, respondents (individuals dependent on the paper industry) challenged the Secretary's definition of "harm", contending that it prohibited activities necessary for their livelihood.[25] The Supreme Court granted certiorari to resolve a conflict between the Ninth Circuit and the D.C. Court of Appeals concerning the appropriate level of deference due the Secretary in this context.[26]

In an opinion authored by Justice Stevens, the majority found that the Secretary's definition conformed to the congressional intent underlying the enactment of the ESA's broad protections for endangered and threatened wildlife.[27] Additionally, Justice Stevens argued that the plain meaning of "harm" covered the activities in controversy.[28] Finally, he reasoned that the Court should be reluctant to interfere where Congress entrusts an agency with broad administrative discretion. Justice Stevens considered both (1) the measure of regulatory expertise required to enforce the ESA, and (2) the extent to which Congress left such enforcement decisions up to the Secretary's volition, indicating Congress's intent to grant broad discretion to the Secretary.[29]

The Court's reluctance to infringe on a Congressional grant of discretion to an agency is reminiscent of the *Chevron* doctrine, articulated by Justice Stevens ten years ago in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council. Chevron* recognized the legitimacy of agency decisions and the institutional competence of Congress to decide when and what amount of authority to delegate to agencies.[30] Based, in part, on these two principles, *Chevron* holds broadly that the Court must give due deference to agencies in their reasonable interpretation of the statutes they administer.[31] Under such a scheme, an agency's reasonable interpretation of a statute is significantly likely to meet with judicial approval. *Chevron*, which was hailed initially as a landmark decision, has subsequently been applied sporadically.[32] Here, the Court appears to have relied on the doctrine in its support of the Secretary's interpretation.

In contrast, in *Atchison, Topeka and Santa Fe Railway Company v. Pena*[33] the Seventh Circuit held that the Federal Railway Administration's (FRA) interpretation of the Hours of Service Act (HSA) did not warrant judicial deference.[34] In so doing, the court rejected both the FRA's assertion that its interpretation of the Act was entitled to significant deference and its explicit reliance on *Chevron* to support this claim.[35]

The dispute in *Atchison* arose out of the FRA's declaration, in 1992, that it had re-interpreted the HSA's maximum hours of service requirement (which affects the number of continuous hours railroad crews may work at one time).[36] The re-interpretation constituted the FRA's first change in its maximum hours regulations since 1907, and was to have uniform application throughout the country.[37] The FRA changed the provision pursuant to a rejection of its interpretation of the HSA by the Ninth Circuit Court of

Appeals.[38] Affected railroads brought a petition for review of the FRA's re-interpretation, challenging the efficacy of the newly announced requirements.[39]

In *Atchison*, the FRA relied on the *Chevron* doctrine to argue that its re-interpretation of the HSA was due sufficient deference to rebuff the railroads' challenge.[40] But Judge Bauer, writing for the majority, identified a series of factors limiting *Chevron*'s application to the instant case. According to Judge Bauer, *Chevron* is applicable only to those agencies with rule-making authority, because rule-making provides significant procedural avenues through which affected parties may seek review of agency rules.[41] These procedures act as a check against unfettered agency power, reducing the need for rigorous judicial review.[42] Here, the parties agreed that the FRA could promulgate only interpretive rules, which provides far fewer avenues for affected parties to seek review of the agency action.[43] According to Judge Bauer, this difference was sufficient to accord the FRA less deference.[44]

Judge Bauer articulated four additional factors militating against judicial deference in *Atchison*: (1) there was no evidence that the FRA's re-interpretation reflected the will of the Congress; (2) for 23 years, the FRA had enforced the Act in a way inimical to its present interpretation; (3) the re-interpretation occurred despite the absence of underlying legislative impetus; and (4) the FRA's re-interpretation was not the result of administrative agency process, but instead occurred as a result of a holding by a circuit court with which the FRA openly disagreed.[45]

Judge Easterbrook, in a concurring opinion, further refined the Seventh Circuit's statement of appropriate deference to administrative agencies in the *Chevron* context. According to Judge Easterbrook, the FRA, as an agency without rule-making or adjudicative powers, could not demand substantial deference to its law-making choices.[46] Judge Easterbrook's analysis divided questions about the appropriateness of judicial deference into three broad categories: (1) where delegation occurs and Congress gives an agency the power to engage in formal rule-making or administrative adjudications, the most substantial judicial deference is required; (2) where a statute gives an agency only the authority to make discretionary choices in pursuit of a particular goal, a court must respect (but not defer to) these choices; and (3) an agency may have a better comprehension of factors such as legislative intent or the ways in which sections of statutory text operate together; accordingly, where neither category 1 nor 2 is present, an agency's views may "persuade where they cannot compel."[47] Here, Judge Easterbrook accorded the FRA's statutory interpretation only persuasive force.

Additional issues regarding deference to agency interpretation arose last term outside the sphere of *Chevron*. In *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Company*,[48] the Supreme Court articulated the scope of an agency's discretion to state a claim for private party interests where the private party is not inclined to pursue the claim. In so doing, the Court held that the Director of the Office of Workers' Compensation Programs (OWCP) has limited discretion under § 921© of the Longshore and Harbor Workers' Compensation Act (LHWCA) to challenge benefit decisions where private claimants express no interest in doing so.[49]

The LHWCA "provides for compensation of workers injured or killed while employed on the navigable waters or adjoining, shipping-related land areas of the United States."[50] In *Newport News*, a party became eligible for and received LHWCA benefits due to a work-related injury.[51] However, a decision by a Benefits Review Board denied additional available benefits to the party under the LHWCA, finding that the employee was partially disabled and was only owed partial-disability benefits.[52] A dispute arose and was referred to an Administrative Law Judge who confirmed the decision of the Board.[53] The Director sought standing as "a person adversely affected or aggrieved" under § 921© to pursue a federal court challenge to the Board's decision, contending that the decision interfered with the performance of her administrative duties and her ability to achieve the purposes of the Act.[54] The original party did not seek review and, in response to an inquiry by the Court of Appeals, expressly declined to take part in the proceeding.[55] The Court of Appeals denied the Secretary standing, and the Supreme Court granted certiorari.[56]

Writing for the majority, Justice Scalia was critical of the Director's reliance on the phrase "person adversely affected or aggrieved," a statutory phrase which Congress generally intends to apply to private litigants concerned with private interests.[57] He could find no precedent in case law, under the Administrative Procedure Act, or in the United States Code's general judicial review provision indicating that an agency in its regulatory or policy-making capacity could be "adversely affected" or "aggrieved" by benefits decisions affecting private parties.[58] Justice Scalia acknowledged that, under § 939© of the LHWCA (where a party is dissatisfied by the result of his appeal) the Director can offer to provide "legal assistance in processing a claim."[59] However, in this case the party stated no dissatisfaction with the out-

come of his claim.[60]

In the course of his opinion, Justice Scalia articulated several conditions under which an agency may bring a cognizable claim in response to a decision concerning the rights of a private person: (1) if the decision hampered an agency's performance in any areas of express statutory responsibilities; or (2) if the decision impaired the responsible agency's ability to process "important administrative and enforcement responsibilities"; or (3) where Congress has explicitly made adjudications the responsibility of the agency seeking to state a claim.[61] None of these instances were in evidence in *Newport News*.[62]

The jurisprudential presumption underlying the *Newport News* decision is that private parties will resolve disputes concerning private interests, particularly when, as here, the agency has no explicit statutory authorization to sue.[63] Justice Scalia declared that before officials such as the Director in *Newport News* may challenge adjudications of private party interests they must first establish that they have "a clear and distinctive responsibility for employee compensation".[64] Here, the Court held that the Director had failed to show how any of her stated injuries fell within the scope of this requirement. As such, the majority affirmed the Court of Appeals decision.

In a separate case last term, the Seventh Circuit refused to give deference to the Federal Reserve System Board of Governor's interpretation of the Expedited Funds Availability Act (EFAA)[65]. In *First Illinois Bank and Trust v. Midwest Bank and Trust*,[66] the court assigned jurisdiction over disputes between "depository institutions" to the Federal Reserve System instead of to the courts.[67]

The initial action heard by the District Court concerned First Illinois Bank's attempt to recover damages as a result of Midwest Bank and Trust's alleged negligent failure in a banking matter.[68] The District Court held that Midwest had failed to comport with the relevant standard of care and entered a judgment for First Illinois.[69] However, on appeal, the Seventh Circuit determined that the District Court had no jurisdiction over the matter and its judgment was vacated.[70]

According to the Seventh Circuit, the District Court erroneously interpreted the EFAA.[71] Under one section of the Act, "any action...may be brought in any United States district court...."[72] However, under a different and, according to the Seventh Circuit, controlling section, only disputes between "depository institutions" and "any person other than another depository institution" may be brought before a court.[73] Both parties in *First Illinois Bank* conceded that they were "depository institutions" within the meaning of the EFAA.[74] Disputes such as these, according to the Seventh Circuit, are to be resolved administratively by the Board of Governors of the Federal Reserve System.[75] (The Board of Governors, in a friend of the court brief had disclaimed authority under the Act to resolve such disputes administratively, and objected to the Seventh Circuit's interpretation of the EFAA.[76])

The court held that the agency's assertion of statutory powerlessness was insufficient to compel a finding of judicial jurisdiction.[77] Rather, the court referred to the characteristics that distinguish the claims depositors bring for adjudication (which involve legally enforceable rights) from those brought by depository institutions (which involve obligations amenable to administrative proceedings).[78] These distinctions, according to the Seventh Circuit, reflect congressional intent to assign the former controversies to the courts and the latter to agencies.[79] Given that this controversy fell into the latter category, the court assigned jurisdiction over the matter to the agency.

Application of the First Amendment to Government Employees and Corporations

Questions arose last term surrounding the applicability of the First Amendment to entities integrally involved with government processes. In *Lebron v. National Railroad Passenger Corporation*,[80] the Supreme Court held that where "the government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for the purposes of the First Amendment."[81] In its opinion, the Court articulated several factors under which such corporations may be deemed government agencies (and their employees held to be government employees).

Lebron involved a National Railroad Passenger Corporation (Amtrak) policy prohibiting political advertising on billboards within its domain.[82] Petitioner challenged the Amtrak policy, arguing that Amtrak's actions circumscribed his First Amendment rights and should be subjected to the same evaluation as the actions of any government entity would be.[83] Amtrak responded by citing its authorizing statute which declares that [Amtrak] "will not be an agency or establishment of the United States Government."[84] Amtrak asserted that its authorizing statute prevented it from being considered a government entity for the purposes of a First Amendment inquiry.[85] The District Court ruled that Amtrak was a government actor, and that its action violated the First Amendment.[86] The Second Circuit Court

of Appeals reversed, and the Supreme Court granted certiorari.[87]

Justice Scalia, writing for the majority, held that where, as here, a government agency's actions implicate the constitutional rights of citizens, it is the Constitution, not the agency or Congress, that will determine the permissibility of the agency's actions.[88] In other words, if Amtrak is the government according to constitutional dictates, First Amendment restrictions apply as they would to any government agency, regardless of any congressional pronouncements to the contrary. As such, Amtrak's reliance on its authorizing statute was erroneous.[89] While circumstances exist in which an agency's authorizing statute may be dispositive of its status (for example, Amtrak's authorizing statute could suffice to cancel those powers and immunities of government agencies that Congress is entitled to eliminate) the Court held that this was not such a circumstance.[90]

In the course of its decision, the Court articulated several factors to be considered when disputes arise concerning the status of corporations established by the government. In a previous case, *Bank of United States v. Planters' Bank of Georgia*,[91] the Court allowed a bank in which the State of Georgia held a noncontrolling interest to be sued in federal court despite the Eleventh Amendment (which precludes suit of states in federal court). The Court held that government privileges do not flow to a corporation simply by virtue of the government's status as a corporator.[92] In *Lebron*, the Court went a step further and held that a corporation is an agency of the government complete with the constitutional obligations of government when (1) the corporation has been specifically created for the pursuit of governmental objectives, and (2) corporate operations are controlled by the government through its appointees.[93] Amtrak, unlike Planters' Bank, fit this description.

The case of *Umbehr v. McClure*[94] involved similar, if not identical, issues. In *Umbehr*, an independent government contractor entered into a contract with Wabaunsee County in Kansas to manage its trash disposal.[95] During his employment, the contractor was a vocal advocate on a variety of civic issues.[96] When his contract was not renewed by the County Commission, he brought suit alleging that his termination was a consequence of his outspokenness.[97] The Tenth Circuit held that independent government contractors are protected under the First Amendment from speech-related government reprisals to the same extent that government employees are.[98] In so doing, the Tenth Circuit put itself in conflict with several other circuits.[99]

In the course of its decision, the court reviewed the treatment given this issue by the Third and Seventh Circuits.[100] Both circuits had relied heavily on two Supreme Court cases, *Elrod v. Burns*[101] and *Branti v. Finkel*.[102] The *Umbehr* court distilled the opinions of these circuits into two significant principles: (1) discretionary government action through political patronage (e.g., disbursement of government contracts) is a tradition rooted in our nation's history, rarely limited by the Supreme Court on account of First Amendment concerns, and (2) the economic and functional differences between independent contractors and public employees counsels against extending to contractors the First Amendment protection traditionally reserved to public employees.[103]

In *Umbehr v. McClure*, the Tenth Circuit rejected the notion that historical practice or alleged economic or practical differences between independent contractors and public employees were sufficient justification to command differential application of First Amendment protection. To arrive at this holding, the court relied on a more recent Supreme Court case, *Rutan v. Republican Party of Illinois*,[104] rather then *Elrod* and *Branti*.[105] In *Rutan*, the Court articulated a more exacting standard to be applied to government actions burdening the speech of its employees: the government may only interfere with employees' freedom of speech when such speech will interfere with the functioning of the government.[106] The *Umbehr* court understood *Rutan* to reduce the force of the Third and Seventh Circuits' opinions, and to circumscribe the precedential value of *Elrod* and *Branti*.[107] As such, the *Umbehr* court concluded that the actions taken by the Wabaunsee County Commission against appellant were unconstitutional; to hold otherwise would be to impermissibly provide less protection for those who contract with the government than for those who are employed by it.[108]

Administration of Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act[109] mandates that any redistricting plan designed by a state with a history of voting discrimination must be submitted to the Department of Justice (DOJ) for approval. Historically, DOJ has implemented an anti-retrogression principle as a tool to evaluate suspect state apportionment plans.[110] Under this principle, any state districting change must enhance the effective exercise of the electoral franchise by minorities. Prior to *Miller v. Johnson*, when a state scheme fell short of the anti-retrogression principle, the DOJ had broad discretion to fashion an appropriate remedial plan. However, the

Court in *Miller* articulated a new governing standard for re-apportionment cases which significantly restricted the discretion of the DOJ in the administration of Section 5.

The controversy in *Miller* concerned the process by which the General Assembly of Georgia, under the scrutiny of the DOJ, implemented a re-apportionment plan.[111] The DOJ rejected the first two plans submitted by the General Assembly (both of which created two majority-minority districts), despite the fact that the plans arguably improved the voting condition of minorities in the state.[112] Responding to the DOJ's concerns, Georgia submitted a third re-apportionment plan which created three majority-minority districts and achieved pre-clearance.[113]

Subsequent to the implementation of the plan, black candidates were elected to Congress from all three majority-minority districts, the first black legislators to be elected to Federal office in the state of Georgia since Reconstruction (despite the fact that Georgia's population is 27 percent black).[114] Five white voters from one of the new majority-minority districts filed an action alleging that the district was a racial gerrymander and a violation of the Equal Protection Clause.[115] Appellants defended the plan, arguing that the Equal Protection Clause's general proscription against race-based decision-making does not apply in the districting context because redistricting by definition requires racial considerations.[116] The District Court found that the Georgia plan did not comport with the mandate of the Voting Rights Act and that it violated the Equal Protection Clause.[117] The Supreme Court granted certiorari.

Writing for the majority, Justice Kennedy identified racial neutrality in governmental decision-making as the central mandate of the Equal Protection Clause. He noted that classifications by race or ethnicity are inherently suspect, and subject to the strictest judicial scrutiny.[118] While Justice Kennedy acknowledged that legislatures engaged in redistricting will be aware of racial demographics, he asserted that such considerations may not be the predominant factor behind districting decisions.[119]

Under the majority opinion in this case, a plaintiff may invalidate a DOJ-mandated state apportionment plan by showing that the legislature subordinated traditional race-neutral districting principles (compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest) to racial considerations.[120] By adopting this standard, the Court implicitly rejected the proposition that prior acts of discrimination sufficient to invoke the attention of the DOJ under Section 5 are sufficient justification for DOJ to mandate race-based apportionment plans.

The *Miller* standard is distinct from a series of previous cases concerning the implementation of Section 5.[121] However, in *Miller* the Court placed significant reliance on its holding in a more recent apportionment case, *Shaw v. Reno*.[122] In *Shaw*, the Court held that a plaintiff may state a claim under the Equal Protection Clause by alleging that a state redistricting plan was drawn for the sole purpose of separating voters on the basis of race.[123] In *Miller*, Justice Kennedy extended the *Shaw* standard to require strict scrutiny where race is the predominant factor in the construction of voting districts.[124]

The distinction between the *Shaw* and *Miller* standards, while subtle, is important. Any apportionment plan may or may not have been draw for the sole purpose of separating voters on the basis of race—to determine this requires inquiry into the intent of the enacting legislature on a case by case basis. However, under the anti-retrogression principle, race will necessarily be the predominant factor of any re-apportionment plan enacted by the DOJ under Section 5. Consequently, any re-apportionment plan enacted under Section 5 will be subject to strict scrutiny.[125] Under *Miller*, state compliance with Section 5 is an insufficiently compelling reason for a re-apportionment plan to survive strict scrutiny.[126] As such, it is unclear how or whether the DOJ will be able to continue to administer Section 5.

Additionally, the Court in *Miller* signaled its willingness to undertake a less deferential review of re-apportionment plans formulated under Section 5. According to Justice Kennedy, the DOJ's reliance on the anti-retrogression principle has made judicial deference inappropriate in this context.[127]

Finality of Actions Taken by the Immigration and Naturalization Service

The process by which Immigration and Naturalization Service (INS) actions become final under the Immigration and Nationality Act (INA)[128] was analyzed by the Court in *Stone v. Immigration and Naturalization Service*.[129] In the course of its opinion, the Court distinguished administrative procedures which may be permissibly implemented by the INS from those available to other similarly situated agencies.

Respondent brought his claim under Section 106(a)(1), part of a series of amendments made by Congress to the INA in 1990 in an attempt to streamline the procedures by which the INS processed disputes brought before its Administrative Law Judges.[130] In particular, Congress was concerned with the filing of superfluous administrative appeals and motions.[131] Toward this end, Congress took

several steps to reduce or eliminate abuses, including: (1) instructing the Attorney General to establish a ceiling on the number of reconsideration and reopening motions that an alien can file; (2) reducing the time for seeking judicial review of a final deportation order; and (3) implementing a provision designed to consolidate petitions for agency reconsideration of deportation orders with petitions for judicial review of those orders.[132]

Section 106(a)(1) requires that "a petition for review of a final deportation order may be filed not later than 90 days after the date of the issuance of the...order."[133] Petitioner in *Stone* was ordered deported by an Administrative Law Judge in 1988, an order affirmed by the Board of Immigration Appeals in 1991.[134] Petitioner filed a motion to reconsider his deportation order which was denied seventeen months later.[135] Within 90 days of the denial, he petitioned the Court of Appeals of the Sixth Circuit for review.[136] The Court of Appeals dismissed, contending that petitioner's statutory appeal period had run out.[137] The Supreme Court granted certiorari to resolve an inter-circuit conflict on this issue.[138]

Petitioner argued that his petition seeking review of both the deportation order and the denial of reconsideration were timely because the petition was filed within 90 days of the reconsideration denial.[139] At least facially, there was precedential support for petitioner's claim. In *ICC v. Locomotive Engineers*,[140] the Court identified a rule applicable to agencies under both the Hobbs Act[141] and the Administrative Procedure Act[142] by which the timely filing of a motion to reconsider rendered the underlying order non-final for purposes of judicial review.[143] Additionally, Congress explicitly made the Hobbs Act applicable to the INA.[144]

However, Justice Kennedy, writing for the majority in *Stone*, affirmed the Sixth Circuit Court of Appeals' decision. He contended that Congress, through the amendments, departed from the traditional procedures for judicial review of agency orders.[145] While the Hobbs Act and the APA have general application to agencies, Justice Kennedy read Section 106 to be an explicit exception for the INS in the limited circumstances of this case.[146] Specifically, he held that the 90-day period for petition for review (as opposed to the Hobbs Act's 60 days) and the review/reconsideration consolidation provision removed the controversy in *Stone* from the domain of the Hobbs Act by creating a procedure distinct from that which governs most agencies.[147] Under Justice Kennedy's analysis, the consolidation provision keeps active and pending the underlying order, meaning that in *Stone*, petitioner's motion for review was filed after the filing period had expired (it should have been filed with the reconsideration order, not after seventeen months had passed).[148] Consequently, where its activities concern deportation orders, INS is not governed by the procedures detailed in *Locomotive Engineers*.[149]

Term Limits on Public Service

U.S. Term Limits, Inc. v. Thornton[150] is a case with broad policy implications for both private citizens and public officials seeking to limit the terms of persons democratically elected to serve the public. The case is of particular interest given the recent attempts by both federal and state legislatures to regulate their members' terms of service.

In *Thornton*, the Court addressed a challenge to an amendment to the constitution of Arkansas limiting general elections for the United States Congress to candidates who have served less than three terms in the House of Representative or less than two terms in the Senate.[151] Justice Stevens, writing for the majority, held that states may not adopt independent qualifications for congressional service without violating the axiom of representative democracy manifest in the United States Constitution: the right of the people, not the states, to choose their representatives.[152] Justice Stevens cautioned against permitting individual states to articulate dissimilar qualifications for their representatives, fearing that this practice would disrupt the synchronous relationship between the national government and the people of the United States.[153]

In an earlier case, *Powell v. McCormack*,[154] the Court held that the power granted to each House in Art. I, § 5, to judge the "Qualifications of its Own Members" does not include the discretion to impose participatory qualifications other than those set forth in Article I, § 2, cl. 2, and Article I, § 3, cl. 3 of the Constitution.[155] In *Powell*, the Court relied on the legislative history of those clauses to declare that the Framers intended the qualifications for participation in elections to be fixed, exclusive, and unalterable by Congress.[156]

In *Thornton*, petitioners argued that the materials cited in *Powell* were inapplicable to the instant controversy.[157] Rather, they suggested that the relevant constitutional standards, contained in the Tenth Amendment principle of reserved powers,[158] imply state discretion to impose such qualifications.[159] Petitioners also noted that at the time of the Constitutional Convention, many states supported term limits in at least some circumstances.[160]

But the Court found petitioners' argument unconvincing. Justice Stevens argued that the Tenth Amendment only

reserved to the states those rights which existed prior to, or did not arise out of, the Federal Government.[161] No state right to set qualifications for public service existed before the Constitution was ratified, and no state limited the term of service of its Federal representatives.[162]

Petitioners also argued that the Arkansas amendment was constitutional under Article I because it was not an election qualification.[163] Petitioners pointed to the fact that certain senators and representatives, prohibited from having their names appear on the ballot, would still have the opportunity to run as write-in candidates.[164] As such, petitioners contended that the amendment fell short of a legally impermissible bar to service.[165] The Court rejected this construction of Article I, holding that constitutional rights may not be denied, either directly or indirectly.[166]

Finally, petitioners contended that the Arkansas initiative was a permissible exercise of the state power to regulate "Times, Places and Manner of Holding Elections," under Article I.[167] Again, the Court rejected petitioners' constitutional interpretation. Article I grants states authority to regulate election procedures to promote sound and uniform process, not to exclude classes of candidates from federal office.[168] Time, place, and manner restrictions imposed by states are constitutional for regulating election procedures, not imposing any substantive qualifications on a class of potential candidates.[169] Such restrictions are unconstitutional where, as here, candidates are denied access to the ballot for reasons exterior to the electoral process.[170]

Administration of Federal Desegregation Decrees

In *Missouri v. Jenkins*,[171] the Court held that judicial evaluation of school desegregation orders should turn on whether the constitutional violator has "complied in good faith with the desegregation decree...and whether the vestiges of past discrimination have been eliminated to the extent practicable."[172] Commensurate with this standard, the Court prohibited federal judges from including constitutionally compliant school districts in efforts to desegregate constitutionally defective district(s).[173] In so doing, the Court scaled back the discretion allowed federal judges charged with the administration of federal desegregation decrees.

In *Jenkins*, the State of Missouri challenged a Federal District Court judge's authority to implement certain remedies pursuant to a school desegregation order.[174] In dispute were the District Court's orders requiring (1) salary increases for instructional and non-instructional staff within the Kansas City, Missouri, School District (KCMSD); and (2) continued state funding of remedial education programs within the KCMSD.[175] Rather than attempting to remove the racial identity of given schools within the KCMSD, which was 68.3 percent black, the District Court sought to attract students from predominantly white suburban school districts (SSDs).[176] Both the lower courts that heard the *Jenkins* dispute prior to the Supreme Court found the SSDs in compliance with the Constitution, and as such could discern no justification for including them in the District Court's desegregation program.[177]

In resolving the dispute in *Jenkins*, Chief Justice Rehnquist relied on a previous Supreme Court case, *Milliken v. Bradely*.[178] The *Milliken* court articulated a three-part blueprint for a permissible desegregation decree: (1) the remedy must be germane to the condition which violates the Constitution; (2) the remedy must be restorative, seeking only to put the victims of the prohibited conduct in the position they would have occupied minus such conduct; and (3) the interests of state and local authorities in managing their own affairs must be a factor in the calculus of the court devising the remedy.[179]

Based on the *Milliken* standard, the *Jenkins* court held that the District Court's desegregation program was outside its remedial authority. Chief Justice Rehnquist criticized the District Court's inclusion of SSDs in its remedial plan for the KCMSD, characterizing this practice as the implementation of an interdistrict remedy for an intradistrict violation.[180] According to the Chief Justice, in the absence of an interdistrict violation causing an interdistrict effect, an interdistrict remedy is not needed.[181] Furthermore, the Chief Justice declared that demographic changes and external factors beyond the control of the state that affect minority student achievement are explicitly impermissible considerations in the remedial scheme.[182] Thus, after *Jenkins*, a federal judge may not attempt to attract non-minority students from outside a predominantly minority school district to moderate the effects of segregation.[183] Rather, a judge must tailor his or her desegregation decrees specifically to the offending conditions in the district.

A factor that received increased attention in *Jenkins*, and which promises to militate against district court desegregation orders in the future, was local control. According to Chief Justice Rehnquist, Supreme Court precedent requires that significant weight be placed on the local autonomy of school districts.[184] Consequently, district courts assigned the administration of desegregation decrees must seek to restore state and local authorities to the control of school systems, once "the reduction in achievement by minority students attributable to prior *de jure* segregation has been

remedied to the extent practicable."[185] Reliance on this factor could signal increased hostility in the Supreme Court toward Federal court attempts to administer desegregation orders.

Many cases from the past year involved controversies in which significant legal issues converged with contemporary challenges in public administration. With a reform-minded Congress and the upcoming Presidential election, the forthcoming months promise to see this trend continue. ✯

Notes

[1]115 S. Ct. 2097 (1995).

[2]*Id.* at 2117.

[3]*Id.*

[4]Surface Transportation and Uniform Relocation Assistance Act, 23 U.S.C § 106(c)(1) (1987).

[5]*Id.* at 2103.

[6]*Id. See* Small Business Act, 15 U.S.C. § 637 (1953).

[7]*Id.* at 2102.

[8]*Id.* at 2101.

[9]*See Adarand Constructors Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992), *affirmed, Adarand Constructors Inc. v. Pena*, 16 F.3d 1537 (3rd Cir. 1994), *certiorari granted*, 115 S. Ct. 41 (1994).

[10]*Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097, 2101 (1995).

[11]*Id.* at 2108-10. Compare *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Congress due deference in implementing affirmative action programs) with *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (state and federal affirmative action programs are to be treated the same).

[12]488 U.S. 469 (1989). The standard consisted of three general prongs. First: any racial or ethnicity based classification must undergo strict judicial scrutiny. Second: government classifications are subject to strict scrutiny regardless of the race of those burdened or benefitted by a particular classification. Third: judicial analysis of governmentally implemented racial classifications will be the same whether such preferences originate in the Federal (subject to the 14th Amendment) or state (subject to the Fifth Amendment) government.

[13]*Adarand*, 115 S. Ct. at 2111.

[14]*Id.* at 2118.

[15]497 U.S. 547 (1990).

[16]*Adarand*, 115 S. Ct. at 2112.

[17]*Id.*

[18]*Id.*

[19]*Id.* at 2113.

[20]115 S. Ct. 2407 (1995).

[21]Endangered Species Act, 16 U.S.C. § 1531 (1988 ed. and Supp. V).

[22]*See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[23]*Babbitt*, 115 S. Ct. at 2409.

[24]*Id.* at 2410.

[25]*Id.*

[26]*See Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 806 F. Supp. 279 (D.D.C. 1992), *opinion modified, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 17 F.3d 1463 (D.C. Cir. 1994), *certiorari granted*, 115 S. Ct. 714 (1995).

[27]*Babbitt*, 115 S. Ct. at 2414.

[28]*Id.* at 2412.

[29]*Id.* at 2416.

[30]*See* Linda Cohen and Matthew Spitzer, *Solving the Chevron Puzzle*, 57 Law and Contemp. Prob. 65 (1994).

[31]*Chevron*, 467 U.S. at 844.

[32]*See* William N. Eskridge, Jr., and Phillip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* 862 (2nd ed. 1995).

[33]44 F.3d 437 (7th Cir. 1994), *certiorari granted*, 115 S. Ct. 2572 (1995).

[34]*Id.* at 445.

[35]*Id.* at 441.

[36]*Id.* at 440.

[37]*Id.*

[38]*See United Transportation Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992).

[39]*Atchison*, 44 F.3d at 439.

[40]*Id.* at 441.

[41]*Id.* at 442.

[42]*Id. See also* Administrative Procedure Act, 5 U.S.C. § 553 (1946).

[43]*Id. See also* 5 U.S.C. §§ 553(d)(2), (e).

[44]*Id.*

[45]*Id.*

[46]*Id.* at 445.

[47]*Id.* at 447.

[48]115 S. Ct. 1278 (1995).

[49] *Id.* at 1285. *See also* Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c) (1927).

[50] *Id.* at 1282-3.

[51] *Id.* at 1282.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 1283, 1286-7. The Director asserted that the decision (1) interfered with her ability to protect the public's interest in both the adequate compensation of claimants and correct adjudications, and (2) impaired her ability to fulfill her enforcement responsibilities under the LHWCA.

[55] *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Company*, 8 F.3d 175 (4th Cir. 1993), *certiorari granted*, 115 S. Ct. 41 (1994).

[56] *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Company*, 115 S. Ct. 1278, 1283 (1995).

[57] *Id.* at 1286.

[58] *Id.* at 1283-4.

[59] *Id.* at 1286. *See also* 33 U.S.C. 939(c).

[60] *Id.*

[61] *Id.* at 1287.

[62] *Id.*

[63] *Id.* at 1286.

[64] *Id.*

[65] Expedited Funds Availability Act, 12 U.S.C. § 4001 (1987).

[66] 30 F.3d 64 (7th Cir. 1994), *certiorari granted*, 115 S. Ct. 2607 (1995).

[67] *Id.* at 65.

[68] *Id.* at 64.

[69] *See First Illinois Bank and Trust v. Midwest Bank and Trust*, 1993 WL 338941 (N.D. Ill. 1993).

[70] *First Illinois Bank*, 30 F.3d at 65.

[71] *Id.* at 65.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] 115 S. Ct. 961 (1995).

[81] *Id.* at 974-5.

[82] *Id.* at 963-4.

[83] *Id.* at 964.

[84] *Id.* at 970.

[85] *Id.* at 971.

[86] *See Lebron v. National Railroad Passenger Corporation*, 811 F. Supp. 993 (S.D.N.Y. 1993).

[87] *See Lebron v. National Railroad Passenger Corporation*, 12 F.3d 388 (2nd Cir. 1993), *certiorari granted*, 114 S. Ct. 2018 (1994).

[88] *Lebron*, 115 S. Ct. at 971.

[89] *Id.*

[90] *Id.*

[91] 9 Wheat. 904 (1824). *See also* U.S. Const. amend. XI.

[92] 9 Wheat at 907.

[93] *Id.* at 974. *See also Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (the Supreme Court declares Conrail a non-governmental entity).

[94] 44 F.3d 876 (10th Cir. 1995).

[95] *Id.* at 877.

[96] *Id.* at 878.

[97] *Id.*

[98] *Id.* at 883.

[99] *Id.*

[100] *Id.*

[101] 427 U.S. 347 (1976).

[102] 445 U.S. 507 (1980).

[103] *Umbehr*, 44 F.3d at 883.

[104] 497 U.S. 62 (1990).

[105] *Umbehr*, 44 F.3d at 882.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] Voting Rights Act § 5, 42 U.S.C. § 1973(c) (1965).

[110] *Miller v. Johnson*, 115 S. Ct. 2475, 2483 (1995).

[111] *Id.*

[112] *Id.* at 2484.

[113] *Id.*

[114] *Id.* at 2485.

[115] *Id.*

[116] *Id.*

[117] *See Miller v. Johnson*, 864 F. Supp. 1354 (S.D.Ga. 1994), *probable jurisdiction noted*, 115 S. Ct. 713 (1995).

[118] *Miller*, 115 S. Ct. at 2482.

[119] *Id.* at 2488.

[120] *Id.* at 2490. Permissible evidence that a legislature has subordinated traditional districting principles may include the proposed district's shape and demographics.

[121] *See Thornburgh v. Gingles*, 478 U.S. 30 (1986) (cognizance of racially polarized voting may inform design of re-apportionment plans); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (DOJ has broad discretion to utilize racial criteria in its remedial apportionment plans); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (states do not have limitless discretion over municipal corporations).

[122] 113 S. Ct. 2816 (1993).

[123] *Miller*, 115 S. Ct. at 2486.

[124] *Id.*

[125] *Id.* at 2490.

[126] *Id.*

[127] *Id.* at 2492-3.

[128] Immigration and Nationality Act § 106, 8 U.S.C. § 1105 (1952).

[129] 115 S. Ct. 1537 (1995).

[130] *Id.* at 1545-6. *See also* 8 U.S.C. § 1105.

[131] *Id.*

[132] *Id.* at 1546-7.

[133] *Id.* at 1542.

[134] *Id.*

[135] *Id.* at 1541.

[136] *Id.*

[137] *See Stone v. Immigration and Naturalization Service*, 13 F.3d 934 (6th Cir. 1994), *certiorari granted*, 114 S. Ct. 2098 (1994).

[138] *Stone*, 115 S. Ct. at 1541.

[139] *Id.* at 1542.

[140] 482 U.S. 270 (1987).

[141] Hobbs Act, 28 U.S.C. § 2341 (1966).

[142] Administrative Procedure Act, 5 U.S.C. § 704 (1946).

[143] *Stone*, 115 S. Ct. at 1543.

[144] *Id.*

[145] *Id.* at 1545.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] 115 S. Ct. 1842 (1995).

[151] *Id.* at 1845.

[152] *Id.*

[153] *Id.* at 1864.

[154] *Powell v. McCormack*, 395 U.S. 486 (1969).

[155] *Thornton*, 115 S. Ct. at 1847-8. Article I, § 2, cl. 2, and Article I, § 3, cl. 3 Article I, § 2 states that: "No person shall be a Representative who shall not have attained to the Age of twenty five years and been seven years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Article I, § 3 states that: "No person shall be a Senator who shall not have attained to the Age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

[156] *Thornton*, 115 S. Ct. at 1849.

[157] *Id.* at 1852.

[158] U.S. Const. amend. X.

[159] *Id.*

[160] *Id.* at 1865-6.

[161] *Id.* at 1854.

[162] *Id.* at 1866.

[163] *Id.* at 1867.

[164] *Id.*

[165] *Id.*

[166] *Id. See also Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (constitutional rights may not be indirectly denied).

[167] *Thornton*, 115 S. Ct.at 1869.

[168] *Id.*

[169] *Id.* at 1870.

[170] *Id.*

[171] 115 S. Ct. 2038 (1995).

[172] *Id.* at 2049.

[173] *Id.* at 2055.

[174] *Id.* at 2045.

[175] *Id.* at 2042.

[176] *Id.* at 2050.

[177] *See Missouri v. Jenkins*, 1991 WL 538841 (W.D.Mo. 1991), 11

F.3d 755 (8th Cir. 1994), *certiorari granted*, 115 S. Ct. 41 (1994).

[178]433 U.S. 267 (1974).

[179]*Jenkins*, 115 S. Ct. at 2049.

[180]*Id.* at 2050.

[181]*Id.* at 2047.

[182]*Id.* at 2056.

[183]*Id.* at 2051-2.

[184]*Id.* at 2054.

[185]*Id.*