FOCUS: ENVIRONMENTAL LAW

Uncertainty of the Administrative State After *West Virginia v. EPA*

Michael H. Sahn, John L. Parker, and Christopher R. DeNicola

The United States Supreme Court held this summer, in *West Virginia v. EPA*, that a series of Environmental Protection Agency "EPA" regulations promulgated pursuant to the Clean Power Plan "CPP" extended beyond the authority that Congress delegated to the EPA.[1]

The West Virginia decision may change the landscape for administrative regulations on the federal and state levels. In its decision, the Court invoked the previously little-used "major questions" doctrine, which restricts administrative agencies from exceeding their statutory authority by requiring a clear statement of congressional authorization in "extraordinary cases of economic and political significance."[2]

The *West Virginia* decision brings into the spotlight the scope of authority for rule-making by administrative agencies. People have questioned the bounds of administrative agency authority since the beginning of their existence. Administrative agencies are an arm of the Executive branch of the U.S. Government, charged with implementing and enforcing laws set forth by Congress.

For the most part, challenges to regulations promulgated by administrative agencies are heard initially by appointed judges in administrative courts. This structure allows administrative officials to have significant autonomy in carrying out their roles. Therefore, when the agencies find congressional authority in vague and ambiguous statutes, it raises the question of whether Congress actually intended to authorize the agency in the manner it alleges.

The "Bouncing Ball" of Agency Authority

Starting with the decision in *Chevron v. National Resources Defense Council*, broad delegations of authority by Congress to administrative agencies were permitted.[3] Ever since, courts have applied the "*Chevron* deference" doctrine when reviewing challenges to the authority of administrative agencies.[4] Accordingly, courts defer to an administrative agency's interpretation of a congressional statute delegating authority to the agency when the statute is vague or ambiguous, as long as the agency's interpretation is permissible.[5] Now, after the *West Virginia* decision, it appears that the *Chevron* deference doctrine may be replaced by the "major questions" doctrine.

As background to the *West Virginia* case, in 2015, under the Obama Administration, the EPA promulgated the CPP, setting forth strict regulations intended to reduce carbon emissions with an ultimate goal to reduce coal usage in America by 11% by 2030.[6] The EPA cited Section 111(d) of the Clean Air Act of 1970 ("CAA") as the legal authority for the plan.[7] Prior to the CPP, this section was rarely cited.[8] Under Section 111(d), the states set rules governing existing coal plants to comply with emission limits set by the EPA.[9]

However, pursuant to the CPP, the EPA created emission limits for existing power plants by determining the "best system of emission reduction" (BSER), and required the states to enforce compliance with these limits.[10] The BSER for coal plants involved several steps for existing coal plants to achieve the CPP emission limits. One step included "generation shifting" rules that were aimed at shifting existing coal plants from coal generated energy to natural gas and renewable energy.[11] For compliance with the "generation shifting" rules, the CPP required a plant to either reduce its current production of electricity, invest in new energy, or purchase emission allowances or credits.[12]

On the day the CPP went into effect, 27 states along with several private parties petitioned the D.C. Circuit to review the regulation. Most of these states had Republican majorities in their governance. In 2016, the Supreme Court stayed the CPP from taking effect after the D.C. Circuit denied such relief.

Eventually, in 2019, under the Trump Administration, the EPA repealed the CPP on its own, concluding that the promulgation of this "generation shifting" rule exceeded the agency's authority under Section 111(d).[13] The EPA cited the major questions doctrine in coming to this conclusion. Similar to when the CPP was promulgated, many states with Democratic governance along with several private parties petitioned the D.C. Circuit to review the CPP's repeal. Other states such as West Virginia intervened with other private parties to defend the EPA's decision.

The D.C. Circuit ultimately vacated the repeal and reinstated the CPP, holding that its "generation shifting" rule was an authorized "system of emission reduction" under Section 111.[14] The Court further held that the major questions doctrine did not apply.[15] In response, the EPA made a motion to stay the vacatur. This was unopposed and granted. Finally, West Virginia and its co-parties petitioned the Supreme Court for certiorari to review the reinstatement, which the Court granted.

Supreme Court Takes a Narrow View

In other words, the CPP had a "bouncing ball" history by the time it finally got to the Supreme Court on the merits. After review, the Supreme Court reversed the D.C. Circuit in a 6-3 decision written by Chief Justice John Roberts.[16] The Court held that when administrative agencies promulgate rules with significant economic and political consequences (specifically, in this case, the "generation shifting" rules), Congress must have specifically authorized the action.[17] Chief Justice Roberts wrote "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body," and that administrative authority to regulate cannot be found in "the vague language of a long-extant, but rarely used, statute."[18]

The "generation shifting" rules were significantly more restrictive than previous EPA emission regulations, the Court noted, stemming from an Obama Administration-led "aggressive transformation in the domestic energy industry."[19] The Court determined that the emission limits were so aggressive that "no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation."[20] Accordingly, the Supreme Court applied the major questions doctrine, holding that no clear statement of authorization from Congress existed to allow the EPA to implement the "generation shifting" rules.[21]

The Supreme Court stated that although it may not have applied the major questions doctrine in previous decisions, the Court consistently referenced its existence and the principles behind it.[22] In extraordinary circumstances when agencies make unheralded use of their authority, the major questions doctrine acts as a form of checks and balances.[23] In these situations, the agency may not act unless a clear statement from Congress expressly authorizes them to do so.

The *West Virginia* decision creates long term ramifications for administrative agencies. One result of this decision is that it creates an ambiguity in determining which doctrine to apply when reviewing administrative authority challenges. Instead of deferring to the administrative agency in these situations pursuant to *Chevron*, courts may first determine whether a proposed regulation constitutes a "major question" and if so, whether the delegating statute in question expresses a clear statement authorizing the agency to promulgate the regulation. If the regulation invokes a "major question" with potentially significant, economic, or political consequences, the alleged authority must be expressly delegated by Congress to the administrative agency. This is a drastic deviation from the *Chevron* framework.

Another potential ramification of the *West Virginia* decision is the effect it may have on the environment. The *West Virginia* decision presents a step backwards for the EPA's ability to regulate carbon emissions from existing power plants. However, the decision does not strip the EPA of its authority to write future rules in this sector. Even though the generation shifting rules were struck down, the CAA still authorizes and requires the EPA to regulate greenhouse gas pollution from the power sector. Further, the EPA can be sued for not doing so.

The issue for the EPA moving forward will be the scrutiny that the *West Virginia* ruling places on how it crafts under existing federal law, and how it will determine if additional authority is required for specific regulatory programs and programmatic goals. The EPA will

be required to craft its rules and regulations carefully because any challenge to their authority may be subject to judicial scrutiny under the scope of the major questions doctrine. If the EPA's rules and regulations on climate continue to be struck down by the court as too extensive, this could create a significant halt to climate change reform.

In her dissent, Justice Elena Kagan cited the Supreme Court's decision in *Massachusetts v. EPA* several times for the proposition that the majority opinion curtails the authority to set emission standards granted therein.[24] In *Massachusetts*, the Court held that the EPA can issue emission standards for greenhouse gases under the Clean Air Act's broad definition of "air pollutants."[25] Justice Kagan wrote that Congress knew "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. So [Section 111] enables EPA to base emission limits for existing sources on the 'best system'."[26]

Implications of the Decision

Although the *West Virginia* decision does not overrule *Massachusetts*, it does prohibit the EPA from requiring states to regulate coal plants within their borders based on the emission standards in the CPP. It does not strike down the EPA's authority to set emission standards, but it will affect how rules promulgated pursuant to the emission standards are construed moving forward.

If the courts continue to follow in the framework set out by the *West Virginia* decision and apply the major questions doctrine in their reasoning, the decision is likely to restrict the executive branch's ability to use other departments and regulators such as the Treasury Department, the Securities and Exchange Commission and the Federal Energy Regulatory Commission to not only address climate change, but other administrative initiatives as well. President Biden expressed concerns about the decision by referring to it as "a devastating decision that aims to take our country backwards."[27]

The *West Virginia* decision may also have ramifications on the state level. The decision creates a framework that state high courts could potentially follow. If the state high courts read the major questions doctrine into their own case law, then the state administrative agencies could be subject to significant authority restrictions as well. A likely result will be a fundamental difference in state to state policies. Historically conservative states will likely follow suit and begin to apply the major questions doctrine, while historically liberal states will continue to implement deference to the agencies similar to *Chevron*.

Whether administrative agencies should have far-reaching authority to regulate or whether they should be guided by express delegation from Congress, the ultimate answer still remains unclear after the *West Virginia* decision.

1. *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).
2. *Id.* at 2608-10.
3. *Chevron v. NRDC*, 467 U.S. 837 (1984).
4. "How the Supreme Court created agency deference," Interactive Constitution (June 25, 2021), available at https://bit.ly/3BJMryd.
5. *Chevron*, 467 U.S. at 843.
6. *West Virginia*, 142 S.Ct. at 2602–04.
7. *Id.* at 2602.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 2603.
12. *Id.*
13. *Id.* at 2604.
14. *Id.* at 2605.
15. *Id.*
16. *Id.* at 2587.
17. *Id.* at 2608-09.
18. *Id.* at 2610, 2616
19. *Id.* at 2604.
20. *Id.*
21. Id. at 2615–16.
22. Editorial Board, *The Supreme Court Restores a Constitutional Climate*, The Wall Street Journal (June 30, 2022), available at https://on.wsj.com/3QocoHH.
23. *Id.*
24. *West Virginia*, 142 S.Ct. at 2626.
25. *Massachusetts v. EPA*, 549 U.S. 497 (2007).
26. *West Virginia*, 142 S.Ct. at 2632.
27. "Statement by President Joe Biden on Supreme Court Ruling on *West Virginia v. EPA*," The White House (June 30, 2022), available at https://bit.ly/3w6im8D.

Michael H. Sahn is the managing member of Uniondale law firm Sahn Ward Braff Koblenz PLLC, where he concentrates on zoning and land-use planning, real estate law and transactions, and corporate, municipal, and environmental law. He also represents the firm's clients in civil litigation and appeals.

John L. Parker is a Partner at Sahn Ward Braff Koblenz PLLC. He leads the firm's Environmental, Energy and Resources Law Group which provides legal services to clients on environmental remediation and brownfield cleanup matters, energy law and siting issues, and environmental compliance matters.

Christopher R. DeNicola is an associate of Uniondale law firm Sahn Ward Braff Koblenz PLLC, where he concentrates on zoning, land-use planning, municipal law, and commercial litigation in both New York City and Long Island.