West Virginia v. EPA: Implications for Climate Change and Beyond

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Key Points

- The U.S. Supreme Court's decision in *West Virginia v. EPA* limits the EPA's options for regulating greenhouse gas emissions, but the agency can still pursue emission reductions at individual power plants and other regulations that may result in indirect shifting of energy generation to lower-emitting sources.
- The Court's approval of the "major questions" doctrine signals a willingness to realign separation of powers in ways that restrict the administrative state. The Court's distrust of agency action, combined with its interest in reviving the nondelegation doctrine, is something for businesses to watch.
- Many litigants will rely on the major questions doctrine to challenge actions by federal agencies, but the argument won't always gain traction.

On the last day of its 2021 term, the U.S. Supreme Court issued a decision that has far-reaching implications for climate change and the administrative state. *West Virginia v. EPA* held that the Environmental Protection Agency (EPA) lacks authority under the Clean Air Act to impose emissions gaps by shifting electricity production from higher-emitting to lower-emitting producers. That so-called "generation shifting" approach, the Court said, represents a "major question" of extraordinary economic and political significance. The Court further explained — for the first time — that an administrative agency has no power to make decisions on such "major questions" unless Congress "clearly" gave it such authority. Finding no such clear statement in the relevant section of the Clean Air Act, the Court held that the EPA's carbon dioxide emissions efforts strayed too far.

The Court's decision has immediate ramifications for the executive branch's efforts to fight climate change, as the EPA will likely need to focus on emission reductions at individual plants rather than across the sector. And because the Court's reasoning applies to any major policymaking effort by a federal agency, lower courts are likely to face a host of major questions challenges to agency action. More fundamentally, the newly sanctioned major questions doctrine reflects a Supreme Court that is eager to realign separation of powers in ways that minimize the administrative state.

Implications for Climate Change Action

At issue in *West Virginia* was the Obama administration's Clean Power Plan (CPP), which sought to reduce greenhouse gas emissions from power plants using a three-pronged approach:

1. Reducing carbon emissions at existing power plants by improving the heat rate of existing coal-fired plants for more thermal efficiency;
2. Increasing electricity generation from natural gas plants (which have lower carbon emissions) and moving away from coal-fired power plants; and
3. Increasing renewable electricity generation (from sources such as wind and solar).

The second and third prongs constitute the "generation shifting" in question. At the time, the EPA argued that generation shifting was a key component of its fight against climate change because focusing solely on emissions from individual power plants would not achieve the desired emission reductions.

Now that the Supreme Court has rejected the generation shifting approach absent further authority from Congress, the EPA must find new ways to meet President Joe Biden's stated goal of reducing greenhouse gas emissions by 50% by 2030 and achieving a net-zero emission economy by 2050.

The EPA is scheduled to release new regulations for existing power plants in early 2023. What they will look like after *West Virginia* remains to be seen, but broadly speaking, the EPA can aim for reductions at the individual plant level while attempting to achieve generation shifting through indirect means. Specifically, the EPA can set individual greenhouse gas emission limitations as long as they are based on the best proven system of emission reduction available and the agency does not depend on generation shifting to achieve the mandated reductions.

Regulations could require existing fossil fuel plants to implement technologies such as carbon capture and sequestration (CCS) or the use of clean hydrogen. (See "Growing Opportunities in Clean Hydrogen.") New coal-fired plants are already required to use CCS, and some commentators have said the significant climate change investments included in the newly enacted Inflation Reduction Act may make imposing such a requirement on existing plants easier. The bill provides tax credits for companies that deploy technologies such as CCS and use clean hydrogen.

Such tax credits could increase the use of such technologies, further strengthening the argument that they are proven systems that help lower emissions. Moreover, because courts have generally required parts of the Clean Air Act to require a cost-benefit analysis to justify new regulations, making these technologies more affordable could help in that analysis and allow regulations that might otherwise have been declared arbitrary and capricious to be upheld.

The Inflation Reduction Act also amends the Clean Air Act to specifically refer to greenhouse gases as "air pollutants." Although *West Virginia v. EPA* did not overturn prior determinations by the EPA that greenhouse gases are subject to regulation under the Clean Air Act, such categorization arguably solidifies the EPA's authority to regulate greenhouse gases.

EPA may also attempt to achieve *de facto* generation shifting by imposing regulations on existing individual fossil fuel plants that make these plants too expensive to run, resulting in their closure and a shift to renewable energy. For example, the EPA potentially could pursue a number of environmental regulations for existing fossil fuel plants that would not directly reduce greenhouse gas emissions but would make fossil fuel power generation less competitive compared to renewable energy. Such regulations could include:

- stronger Mercury and Air Toxics Standards to reduce mercury, arsenic and other emissions from coal plants;
- more robust national standards for small particulate matter and ozone; and
- a so-called "Good Neighbor" rule that reduces nitrogen oxide and sulfur dioxide emissions across state boundaries.

If the EPA does pursue such regulations, they will likely be challenged on a number of bases, including the cost-benefit analysis question. If upheld, however, they could help achieve the generation shifting toward renewable energy that the CPP originally envisioned.

Implications for Agency Action and the Administrative State

West Virginia also has the potential to affect many major policy-making efforts by federal agencies. Within days of the Court's June 30, 2022, decision, litigants began citing the major questions doctrine as grounds for challenging other administrative actions. For example, the state of Texas relied on *West Virginia* to argue before the U.S. Court of Appeals for the Fifth Circuit that the Nuclear Regulatory Commission (NRC) lacks authority under the Atomic Energy Act of 1954 to issue a license for a private facility to store radioactive waste. The storage and disposal of nuclear fuel, Texas argued, is a major question, and the power to regulate it is not something that Congress clearly gave to the NRC.

Other litigants almost certainly will rely on *West Virginia* to challenge a host of agency actions. The Court's delineation of "major questions" — decisions of vast "economic and political significance," as stated in the *West Virginia* opinion — is capacious and indeterminate. Many litigants will be able to argue that a given agency action is politically divisive, affects the national economy, breaks from the agency's past practices or strays from what the *West Virginia* Court called the agency's "traditional lane." Lower courts may view this as an "I know it when I see it" test, leaving the validity of a given agency action to the eye of the beholding judge.

At the same time, the major questions doctrine isn't limitless. The Court emphasized that the doctrine is reserved for "extraordinary cases." Many agency decisions simply won't have nationwide economic and political significance, and Congress might well have clearly authorized those that do. So while "major questions" may come up a lot, it won't always gain traction.

But even if the major questions doctrine doesn't itself upend administrative law, the Court's decision in *West Virginia* has fundamental implications for separation of powers and the role of the administrative state. While the modern conservative

approach tends to favor judicial scrutiny of agency action, many conservatives — including Justice Antonin Scalia — favored deference to agencies of the elected executive branch over deference to unelected judges. And as Justice Elena Kagan explained in her dissent, "when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to call the shots." But the *West Virginia* majority unmistakably takes the modern approach: "Agencies have only those powers given to them by Congress," and courts decide which powers Congress has conferred. That standard makes sense from a Court that is skeptical of Congress' ability to delegate any lawmaking authority to another branch (the so-called "nondelegation doctrine").

In many ways, *West Virginia* was foreshadowed by the Court's 2019 decision in *Gundy v. United States*. Nominally about the Sex Offender Registration and Notification Act (SORNA), the core issue in *Gundy* was whether to resurrect the erstwhile nondelegation doctrine. While a narrow majority found no nondelegation problem with SORNA, four justices — Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito and Gorsuch — expressed a willingness to reinvigorate the doctrine. Justice Brett Kavanaugh didn't participate in *Gundy*, which was argued before his confirmation, but *West Virginia* demonstrates a majority that is eager to restrict lawmaking to the legislature.

The Court's distrust of agency action, combined with its interest in reviving nondelegation, is something for businesses to watch and may generate new opportunities for litigants to challenge government action.