Major Lingering Questions from West Virginia v. EPA

By: Rachel Kitze Collins & Laura Matson

Rachel Kitze Collins is a Partner at Lockridge Grindal Nauen PLLP, where she practices in the firm's environmental, business, political, and employment law groups. She is also a Council Member and former Chair of the MSBA's Environment, Natural Resources and Energy Law Section, and an Adjunct Professor at the University of Minnesota Law School, where she coaches the Environmental Moot Court Competition Team.

Laura Matson is an Associate Attorney at Lockridge Grindal Nauen PLLP, where she practices in the firm's environmental, political, business, antitrust, and complex litigation groups. Laura is a 2014 graduate of the University of Minnesota Law School and holds a PhD from the University of Minnesota's department of Geography, Environment and Society. She currently serves as Secretary of the MSBA's Environment, Natural Resources and Energy Law Section.

In a year of landmark opinions from the new 6-3 conservative majority on the United States Supreme Court, the decision in West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587 (2022), was another upheaval in the realm of agency and environmental law.

The case began in 2015 as a challenge to the Obama-era Clean Power Plan ("CPP"), which sought to force existing coal-fired power plants to shift energy production to lower-emitting natural gas-fired plants, wind, or solar, in order to reduce carbon dioxide emissions that contribute to climate change. Shortly after the rule was promulgated, the Supreme Court issued a stay which prevented the rule from taking effect. The D.C. Circuit heard argument on the merits of the CPP en banc, but before it had the chance to issue a decision, Trump won the presidential election and his EPA asked the Court to stay the litigation until it could review the rule. In 2019, the Trump EPA repealed the CPP and replaced it with its own plan. The D.C. Circuit subsequently vacated the Trump EPA's repeal of the CPP and remanded to the agency. See Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021).

The day after the D.C. Circuit's opinion was released, President Biden was sworn into office. Biden's EPA requested—and the D.C. Circuit granted—a stay of the opinion so it could assess whether the EPA wanted to reinstate the CPP or come up with something different. Yet the Supreme Court granted certiorari on the merits of the D.C. Circuit's decision vacating the repeal of the CPP, heard argument in February 2022, and issued its opinion on June 30, 2022.

Procedural Oddities

The first notable thing about this decision is that the Supreme Court granted certiorari and reached the merits of the case. The government argued that the case was moot because the EPA decided not to revive the CPP and would instead start the rulemaking process over again. Although courts have historically been more lenient where the government has decided that it does not intend to enforce a rule, the Court rejected the mootness argument on the basis that voluntary cessation of conduct does not moot a case. The government can now expect to be subject to the same strict mootness standards as any private party. Nonetheless, the Court's mootness analysis has been the

subject of criticism, including from Justice Kagan, whose dissent lambasts the majority's decision to reach the merits: "Because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering." 142 S. Ct. at 2628 (Kagan Dissent).

The Major Questions Doctrine

For the first time in the Court's history, the majority explicitly relied on the so-called major questions doctrine to hold that an agency had exceeded the scope of its statutory authority in issuing a rule. According to the Court, the major questions doctrine is implicated when there are "extraordinary cases … in which the history and breadth of the authority that the agency has asserted and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer such authority." 142 S. Ct. at 2608. With respect to the CPP, the Court held that EPA had exceeded its statutory authority under the Clean Air Act by attempting to regulate "outside the fence line." In other words, rather than requiring emission reductions at the level of an individual power plant (inside the fence line), the EPA sought to force a shift toward cleaner energy generation industry-wide by setting state-level reduction targets and allowing states to use cap and trade-type programs to reduce emissions from coal. According to the majority, this went too far. The Court found that this proposal amounted to a substantial re-structuring of the American energy market and therefore constituted a "major question" for which clear statutory authorization was required—authorization that the Court did not find in the Clean Air Act.

Implications and Questions

At first blush, the decision may appear to have limited impact because it invalidates a rule that was not in operation. However, this case has serious implications for agency action related to climate change mitigation and beyond. First and foremost, this decision places considerable restraints on the ability of the EPA to force emission reductions from existing power plants. The EPA included industry-wide caps in the CPP specifically because efficiency improvements at individual power plants would have been insufficient to attain the necessary emission reductions. By eliminating EPA's authority to create and implement an industry-wide solution, the Court left the EPA with few options to substantially reduce emissions without congressional action.

More broadly, this decision continues the Court's recent trend of chipping away at agency deference doctrines. Of primary concern were the potential impacts to the Chevron doctrine, which provides that when a legislative delegation to an agency is implicit rather than explicit, a court may not substitute its own statutory interpretation for the agency's reasonable interpretation. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). Although the decision stopped short of overturning Chevron, the major questions doctrine as construed here empowers the Court to sidestep deference altogether. Courts now have considerable discretion to decide whether an agency action is too significant or far-reaching to be entitled to deference, and if it is, the court may require explicit congressional authorization to allow the action in question. Further, the opinion does not provide much clarity with regard to the scope of the doctrine, leaving many lingering questions about what type of agency action is going to trigger its application. Nevertheless, it is a hot topic—a recent analysis by Bloomberg found that

the number of federal court filings that mentioned the major questions doctrine increased nine-fold from 2020 to 2021. The 2022 numbers, while lower than 2021, are still significantly higher than in prior years.[1]

At least one case in the upcoming term will potentially present the Court with an opportunity to flesh out the bounds of the major questions doctrine. On December 1, 2022, the Court granted a petition for certiorari in the case challenging President Biden's decision to forgive up to $20,000 in student loans for certain borrowers. The fundamental issue in the case is whether the debt relief program exceeds the Secretary of Education's authority under the Heroes Act of 2003, which allows the secretary to waive regulations related to student loans during times of war or national emergency. Opponents of the plan will likely argue that the $400 billion dollar cost of cancelling this debt is a significant action that calls for application of the major questions doctrine.

Finally, Justice Gorsuch's concurrence, which pays homage to the so-called non-delegation doctrine, may foreshadow additional limits on agency discretion. This doctrine posits that the legislature cannot delegate aspects of lawmaking to the executive branch or its agencies. Should Justice Gorsuch's concurrence signal the Court's interest in reviving the non-delegation doctrine in future cases, and should the Court continue to expand the scope of the major questions doctrine, it may become increasingly difficult to develop rules and legislation that do not cross the lines being drawn by the current Supreme Court. Unfortunately, these doctrines will fall hardest on agency actions intended to create novel solutions to significant problems, such as climate change, that Congress has been unable or unwilling to address for far too long. And the consequences may be dire.

---

[1] https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-is-this-the-calm-before-2023s-major-questions-storm