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The Future of Federal Agency Rulemakings After *West Virginia v. Environmental Protection Agency*

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The US Supreme Court's 6-3 decision in *West Virginia v. EPA*, 597 US ___ (2022), narrowly defined the scope of the Environmental Protection Agency's (EPA) statutory authority to regulate greenhouse gas emissions from coal-fired power plants under Section 111(d) of the Clean Air Act. The decision, however, has several more implications for EPA's and other federal agencies' rulemakings going forward. The decision:

- Forecloses EPA from employing forced generation shifting in future rulemakings. Generation shifting is a regulatory measure that requires a shift in energy production away from fossil-fuel-fired power sources towards lower-emitting energy sources. The Court held that, under the Clean Air Act, Congress did not delegate to EPA the authority to dictate “how much coal-based generation there should be over the coming decades.”
- Solidifies the “major questions” doctrine's importance in courts' review of new rules. The doctrine requires a clear statement from Congress when an agency claims authority to make decisions of vast economic and political importance. If agencies claim such authority in future rulemakings, courts now have clear, guiding precedent to review agency overreach with “skepticism.”
- Clarifies that judicial review of an agency's final rule may be available in pending legal challenges, despite an agency's attempt to moot the challenge by guaranteeing it has no intention to enforce the rule. The Court held review is available unless it is “absolutely clear” that the alleged wrongful behavior (*i.e.*, agency statutory overreach) could not reasonably be expected to recur. This could be key precedent when legal challenges spill over after a change in administrations.

EPA's Rules, Litigation History, and the Supreme Court's Decision

Obama's Clean Power Plan (CPP), adopted by EPA in October 2015,[1] was the first rule to use generation shifting as a pollution control measure. In the CPP, EPA determined that the “best system of emissions reduction,” or BSER, for existing plants was a combination of three types of pollution-control measures, two of which involved substituting higher-emitting energy sources for preferred cleaner energy.[2] The CPP then set greenhouse gas emissions limits so strict that an operator of a coal-fired power plant would have to reduce its own production of electricity, build or

invest in new or existing natural gas plants, wind farms, or solar installations, or purchase emission allowances or credits as part of a cap-and-trade regime in order to meet the strict limits.[3]

Thus, for the first time, the emission guidelines EPA established were not premised on measures applicable to and achievable by a particular individual facility, plant, or unit. The guidelines were based on the operation of "measures wholly outside a particular source."[4]

The CPP was immediately subject to a petition for review in the D.C. Circuit Court of Appeals and motions to stay the rule.[5] After the D.C. Circuit denied the petitioners' request for a stay, the Supreme Court granted a stay on February 9, 2016.[6] This was the first, and to date only, time that the Supreme Court stayed an agency rule still under review by a lower court.

Following a change in administrations, Trump's Affordable Clean Energy Rule (ACE Rule), adopted by EPA in 2019, repealed the CPP on the basis that it went beyond the scope of EPA's statutory authority under Section 111(d).[7] The ACE Rule was also subject to swift legal challenges.[8] On January 19, 2021, the D.C. Circuit held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a BSER under Section 111(d).[9] The circuit court invalidated the ACE Rule and EPA's repeal of the CPP.

After the next change in administrations, President Biden's EPA moved the D.C. Circuit to partially stay the issuance of its mandate as it pertained to the CPP.[10] The agency did so to ensure that the CPP would not immediately go back into effect. EPA believed that such a result would not make sense while it was in the process of promulgating a new Section 111(d) rule.[11]

Numerous petitioners, including West Virginia and other states, filed petitions for certiorari review seeking to defend the repeal of the CPP and obtain reversal of the circuit court's decision.[12] In its June 30 decision, the Supreme Court agreed with Trump's EPA as to the proper scope of EPA's authority under Section 111(d), reversing the D.C. Circuit Court's decision.[13]

Forced Generation Shifting is Now Off Limits to EPA

The *West Virginia v. EPA* decision held that Section 111(d) of the Clean Air Act does not authorize EPA to require forced generation shifting as BSER for existing power plants.[14]

As explained by the Court, in devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated."[15] EPA must then quantify "the degree of emission limitation achievable" if that BSER were applied to the regulated source.[16] The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111.[17]

The issue before the Court, therefore, was “whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the 'best system of emission reduction' within the meaning of Section 111.”[18]

The Court held that, while “[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day' . . . it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d).”[19] It reasoned, under the “major questions” doctrine, that “[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”[20]

In other words, EPA's decision to employ generation shifting was a major question, requiring clear delegation from Congress, because forced generation shifting dictates “how much coal-based generation there should be over the coming decades.”[21] Because the language of Section 111(d), setting forth EPA's obligation to determine the “best system of emission reduction,” did not contain clear delegation to regulate the entire power grid as a “system,” EPA's CPP was invalid.[22]

The Court also ruled that a single, prior example of EPA relying on a cap-and-trade program to reduce emissions—a program that the EPA argued exemplified controls that did not apply to an existing regulated source—did not support EPA's broad reading of “system.”[23] Specifically, the Court observed that in the Section 111(d) Mercury Rule,[24] EPA set the emissions limit—the “cap”—based on the use of technologies that could be installed to a source.[25] By contrast, it explained that there is no control that a coal plant could deploy to attain the limits established by the CPP.[26] Therefore, the Mercury Rule's cap-and-trade program does not provide precedent for the CPP.[27] And just because a cap-and-trade program can be used to reduce emissions does not mean that it is the kind of “system of emission reduction” contemplated by Section 111.[28]

The Court declined, however, to rule on the arguments advanced by petitioners that Section 111(d) limits EPA's regulatory authority to impose only measures that can be employed “inside the fenceline” of existing sources.”[29] The Court indicated it had “no occasion to decide whether the statutory phrase '[best] system of emission reduction' refers exclusively to measures that improve pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER.”[30] Nonetheless, it explained that the Court's analysis was based on the fact that EPA has acted “consistent with such a limitation for the first four decades of the statute's existence.”[31]

As a result of the Court's ruling, EPA has clear precedent to overcome in changing course in future rulemakings if it intends to use control measures that are not applied directly to existing sources. Further, any EPA rulemaking that intends to use generation shifting as a control measure may be held invalid.

This includes EPA's proposed Federal Implementation Plan Addressing

Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard,[32] a rule that addresses twenty-six states' obligations under the Clean Air Act's Good Neighbor Provision. That proposed rule identifies generation shifting as an available control measure for power plants to reduce NOx emissions.[33] EPA will have to reconsider its use of generation shifting to ensure the rule complies with the *West Virginia v. EPA* decision, and any rule that does require forced generation shifting will face legal challenges.

Agency Overreach Will Be Viewed with "Skepticism"

The *West Virginia v. EPA* decision solidifies the "major questions" doctrine's role in striking down agency overreach.

It has always been bedrock administrative law that "an agency literally has no power to act . . . unless and until Congress confers power upon it[.]"[34] However, the Court's decision appears to follow a new analytic approach when reviewing an agency's claim of extraordinary power to regulate issues of national importance. Its approach asks first: does the agency action implicate a major question? and, second, if it does, then where in the agency's statute is such power conferred?[35]

Specifically, here, the Court focused first on the extraordinary result of the CPP's interpretation of Section 111(d)—forced generation shifting away from coal-fired sources—rather than the precise language used in Section 111(d).[36] As such, its *starts* with "skepticism towards EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach" and *then shifts the burden* to the EPA, under the "major questions" doctrine, to advance its support for the CPP.[37] This is different than traditional statutory text analyses that typically begins, first and foremost, with a review of the agency's organic statute—the statute enacted by Congress that creates an administrative agency and defines its authorities and responsibilities.[38]

Justice Elena Kagan's dissent criticizes the majority's approach as "announc[ing] the arrival of the 'major questions doctrine,' which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules."[39] She, instead, advocates for applying the "ordinary method" of "statutory interpretation."[40]

Whatever you call this new method of analyzing claims of agency overreach, the fact remains that litigants can and will rely on the *West Virginia v. EPA* decision to advocate for a greater level of skepticism when challenged rules purport to impose requirements that impact broad industry sectors and/or the Nation's economy.

Pending Agency Rulemakings Don't Necessarily Moot a Legal Challenge

EPA argued before the Supreme Court that no petitioner has Article III standing to seek the Court's review.[41] Article III requires that "an actual controversy persist throughout all stages of litigation."[42]

EPA's main point was that "agency and judicial actions subsequent to the court's entry of judgment have eliminated any possibility of injury."[43] Specifically, after the D.C. Circuit's decision, EPA informed the circuit court that EPA does not intend to enforce the CPP because it has decided to promulgate a new Section 111(d) rule.[44] In addition, on EPA's request, the circuit court stayed the part of its judgment that vacated the repeal of the CPP, pending that new rulemaking.[45] According to EPA, these actions "mooted the prior dispute as to the CPP Repeal Rule's legality."[46]

The Court was not convinced, explaining that the doctrine of mootness, not standing, dictated whether these intervening circumstances deprived petitioners of a personal stake in the outcome of the appeal.[47] And only EPA's voluntary conduct—representations that it has no intention of enforcing the CPP—could support mootness.[48] But the problem was that EPA never represented that, if the appeal was resolved in its favor, it would not "reimpose emission limits predicated on generation shifting."[49] Indeed, EPA defended the legality of that approach as BSER.[50] As a result, because it was *not* "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur," the Court could not deem the appeal moot.[51]

This holding could potentially have broader implications in judicial challenges to federal rulemakings. It is not uncommon for legal challenges to rulemakings to span several years and, thus, spill over to subsequent administrations. It is also not uncommon for outgoing administrations to issue new rules—known as "midnight rules"—at the end of their terms.[52] Just because the subsequent administration may voluntarily repeal and replace a rule, does not mean that litigants should be deprived of the opportunity for a court to weigh in on their challenges to the prior rule—particularly if an existing judicial decision addressing the prior rule implicates questions of the agency's statutory authority to regulate in the first instance.

EPA plans to issue a new, proposed Section 111(d) rule for existing fossil fuel-fired plants in the Spring of 2023.[53] That means that a final rule would not be adopted until sometime in 2024. It is possible that any legal challenges to that rule will remain pending into the next presidential term, potentially creating a similar scenario encountered here by the Court. The *West Virginia v. EPA* decision provides solid precedent for the next court to exercise jurisdiction over a rulemaking challenge, even in the face of an agency's attempt to moot that challenge.

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Emily Schilling and Tina Van Bockern represented an electric utility responding in support of the petitioners in *West Virginia v. EPA*.

[1]Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).
[2]Slip Op. at 7-8.
[3]*Id.* at 8.
[4]Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to

Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,526 (July 8, 2019).
[5]*See, e.g., West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015) (lead case).
[6]*West Virginia v. EPA*, 577 U.S. 1126 (2016).
[7]Slip Op. at 11.
[8]*Id.* at 12-13.
[9]*Id.* at 13; *American Lung Assn. v. EPA*, 985 F. 3d 914, 995 (D.C. Cir. 2021).
[10]Slip Op. at 13.
[11]*Id.*
[12]*Id.*
[13]*Id.* at 31.
[14]*Id.* at 25-26.
[15]*Id.* at 16 (quoting 42 U. S. C. §7411(a)(1)).
[16]*Id.*
[17]*Id.*
[18]*Id.*
[19]*Id.* at 31 (quoting *New York v. United States*, 505 U. S. 144, 187 (1992)).
[20]*Id.*
[21]*Id.* at 25.
[22]*See id.* at 31.
[23]*Id.* at 21-22.
[24]Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Final Rule, 70 Fed. Reg. 28,606 (May 18, 2005)
[25]Slip Op. at 21.
[26]*Id.* at 21-22.
[27]*Id.* at 22.
[28]*Id.* at 29.
[29]*See id.* at 30-31.
[30]*Id.* at 30 (emphasis in original).
[31]*Id.* at 30-31.
[32]87 Fed. Reg. 20,036 (April 6, 2022).
[33]87 Fed. Reg. at 20,077.
[34]*La. Pub. Serv. Comm'n. v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986); *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("EPA has discretion to act only within the statutory limits set by Congress[.]").
[35]Slip Op. at 28; *see also* Dissent at 15.
[36]*See* Slip Op. at 28-29.
[37]*Id.* at 28.
[38]Dissent at 14-15.
[39]*Id.* at 15.
[40]*Id.* at 14.
[41]Slip Op. at 14.
[42]*Id.* (quoting *Hollingsworth v. Perry*, 570 U. S. 693, 705 (2013)).
[43]*Id.* (internal quotes and ellipses omitted).
[44]*Id.* at 15.
[45]*Id.*
[46]*Id.*
[47]*Id.*

[48]*Id.*
[49]*Id.* at 16.
[50]*Id.*
[51]*Id.* at 15-16.
[52]Ari Cuenin, *Mooting the Night Away: Postinauguration Midnight-Rule Changes and Vacatur for Mootness*, 60 Duke L.J. 453, 480 (2010); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party.").
[53]*See* Emission Guidelines for Greenhouse Gas Emissions From Fossil Fuel-Fired Existing Electric Generating Units, RIN: 2060-AV10, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=2060-AV10.
