

U.S. Climate Commitments in the Wake of *West Virginia v. EPA*

Introduction

On June 30, 2022, the U.S. Supreme Court released its opinion in *West Virginia v. Environmental Protection Agency (EPA)*. In a majority opinion written by Chief Justice Roberts, the Court ruled that Section 111(d) of the Clean Air Act does *not* authorize the EPA to enact regulations on the U.S. energy generation sector that prioritize certain types of power generation that emit less or no carbon, like wind and solar, over others that do, like coal. Closely watched by environmentalists, industry, and executive power experts, the case has potential ramifications for the scope of Executive Branch authority to curb carbon emissions in the power generation sector specifically and for executive agency authority pursuant to federal legislation more generally.

Background – the Clean Air Act

With a “goal . . . to ‘speed up, expand, and intensify the war against air pollution’ in all its forms,”¹ Congress gave the federal government authority over “[federal programs regarding air pollution control](#)” through the 1963 and 1970 Clean Air Acts and their associated amendments (the Clean Air Act). Subsequent federal litigation confirmed that this authority includes regulating greenhouse gases (GHGs) from certain sources and recognized that scientific studies have connected these gases with global climate change.

For example, in the landmark 2007 case of [Massachusetts v. EPA](#), the Court confirmed that the Clean Air Act gives the EPA authority to regulate greenhouse gases from cars, holding that these GHGs fall within the Act’s definition of “air pollutants.”² In so doing, the Court recognized that the Intergovernmental Panel on Climate Change (IPCC)³ and other

expert entities had concluded there was a connection between greenhouse gas emissions and global climate change.

In 2014, the Court ruled 7-2 in [Utility Air Regulatory Group v. EPA](#) that the Clean Air Act authorizes the EPA to regulate GHGs from new and modified power plants that have to get permits for their air pollutants, and may require certain sources to use the best technology available to limit their GHG levels. By a 5-4 split, however, [the Court also concluded](#) the EPA had exceeded its authority in trying to change certain GHG emissions thresholds under the Act. The Court cautioned that while the EPA has the authority to regulate GHGs in some contexts, it does not necessarily have the authority to regulate all forms of GHGs in all contexts.

“Clean Power Plan” Litigation and *West Virginia v. EPA*

Recognizing the connections between GHGs and climate change, President Obama and the EPA [proposed the Clean Power Plan](#) (CPP) in 2014, which sought to use the Clean Air Act to lower U.S. power generation-carbon emissions by 32 percent from 2005 levels by 2030. Under Section 111 of the Clean Air Act,⁴ the EPA may define the “best system of emission reduction [(BSER)] (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements)” for certain pollutants produced by power plants that the Agency has determined to be “adequately demonstrated” for certain facilities.⁵ CPP was going to use the EPA’s BSER authority to encourage companies to install emissions controls at the plant level and, for existing plants, to shift the power generation sector away from coal to cleaner forms of energy. Before CPP could be put into effect, however, numerous state attorneys general and power generation companies challenged the policy in federal court. In February 2016, SCOTUS stayed CPP and sent the matter back to the lower courts.

While the case was pending, administrations changed. Under the Trump administration, the EPA concluded that Section 111 does not authorize the EPA to engage in emissions-regulation at the sector-level; rather, EPA standards needed to be limited to technical measures “inside the fence” of power plant facilities.⁶ The EPA, then headed by Andrew Wheeler, accordingly generated a new policy that hewed to this narrower interpretation of the statute. Litigation continued, and the U.S. Circuit Court of Appeals for the District of Columbia ultimately struck down the Trump EPA’s repeal of CPP.

Notwithstanding the Circuit’s ruling that opened the door to re-enlivening the CPP, the Biden administration stated that it did not have any intentions of doing so, especially because by 2019, the sector had already hit the emissions targets that CPP had aimed

for by 2030.⁷ Instead, it intended to engage in new rule making on the issue. That process, however, was put on hold pending the outcome of *West Virginia*.

In a 6-3 decision by Chief Justice Roberts, the Court ruled that the EPA did not have the authority under Section 111(d) of the Clean Air Act to enact rules that preferenced some types of power generation over others. The Court reached that conclusion drawing upon what had been referred to by the Trump administration and some lower courts as the “major questions doctrine.” This was the first time a Supreme Court majority directly applied the doctrine, but Roberts explained that there are “‘extraordinary cases’ . . . in which the ‘history and the 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.’”⁸ Under the doctrine, where such “economic and political” questions are raised, “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”⁹ The majority concluded that the Section 111(d) language at issue was insufficiently precise to rise to “clear congressional authorization” and rebut the presumption that Congress did not delegate such power.¹⁰

The majority left open multiple key questions with implications for future executive regulation, including specifics on what constitutes a “major question” of “economic and political significance” and what kind of language Congress needs to use “to empower an agency to make a radical or fundamental change to a statutory scheme” or otherwise “make clear” its delegation of major policy to the Executive.¹¹

In a meticulously cited dissent, Justice Kagan strongly disagreed with the majority’s reasoning and the Court’s inaugural application of the major questions doctrine, particularly to an EPA action directly connected with Executive Branch efforts to address the threats posed by climate change. Bookending the dissent emphasizing the threats and high stakes posed by climate change, Kagan opened her dissent by stating, “[c]limate change’s causes and dangers are no longer subject to serious doubt. Modern science is ‘unequivocal that human influence’—in particular, the emission of greenhouse gases like carbon dioxide—‘has warmed the atmosphere, ocean and land.’”¹²

After walking through the evolution of Section 111 and subsequent efforts of the EPA—as the agency with experts on climate science and environmental regulation—to regulate GHGs in the face of climate change, Kagan concluded: “Congress . . . broadly authorized EPA in Section 111 to select the ‘best system of emission reduction’ for power plants. The ‘best system’ full stop – no ifs, ands, or buts of any kind relevant here.”¹³ She ended

the dissent with a final word of caution, stating that today, “[t]he Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening.”¹⁴

Implications

Climate scientists have [warned](#) in the strongest terms that failure to keep average the global temperature rise to 1.5C or less above pre-industrial levels may have catastrophic global physical, political, and economic consequences, and achieving that goal requires significant GHG reductions. The United States is the second largest carbon emitter in the world and 25 percent of the country’s GHG emissions are from fossil-fuel based power-generation, making reduction of U.S. power generation GHGs crucial to United States’ overall efforts to reduce its national GHG footprint.¹⁵

To that end, in April 2021, the United States pledged, as a party to the 2015 Paris Agreement, to reduce its GHG emissions by 50 percent by 2030, compared to its 2005 levels. The Biden administration has also set a goal for the U.S. power sector to be “100% carbon-pollution free”¹⁶ by 2035 and “net zero”¹⁷ nationwide by 2050. Expert have concluded that a 50 percent reduction is possible, but only through policy actions across all sectors of the economy and society.¹⁸

Against this backdrop, climate policy experts watched the *West Virginia v. EPA* litigation closely, concerned for its implications for GHG reduction. Contrary to early media coverage of the decision, the Court’s opinion is not a blanket prohibition on President Biden and the EPA from taking actions to curb carbon emissions. While the Court’s interpretation of the Clean Air Act will make it harder for this administration or any future president to regulate power generation emissions at the power sector-level, the ruling also did not abrogate the core holdings of *Massachusetts v. EPA* or *Utility Air*. Those decisions affirmed that the Clean Air Act gives the EPA authority to regulate GHG emissions in many ways, including regulating carbon emissions in plants that require permits. The Court also expressed comfort with “technology-based” approaches to regulation, including the EPA setting emissions “cap[s] based on the application of particular controls” that “regulated sources” could install.¹⁹ [Many experts](#) also agree that following *West Virginia*, the EPA can continue regulating at the plant-level in other ways under the Act, including increasing incentives for carbon capture use.

The president also retains numerous other avenues for policy and action to curb emissions, including executive orders, public emergency declarations,²⁰ international agreements, and federal legislation. Indeed, President Biden had already issued multiple

executive orders²¹ on climate security issues prior to *West Virginia* and had sought congressional support and funding for transformative climate policy programs.

To public surprise, congressional discussions of a potential climate bill got new life after *West Virginia*. In late July, congressional leaders announced the Inflation Reduction Act (IRA), which contained the most ambitious climate security spending package in U.S. history. By August 12, 2022, both houses of Congress had passed it. Using more carrots than sticks, the IRA contains a host of specific congressional authorizations for tax and other monetary incentives to encourage the private sector, the power generation industry, and individuals to reduce carbon footprints and shift to clean energy. It further authorizes the Department of Energy to loan [billions](#) to the private sector to advance clean energy programs. The IRA also seeks to increase domestic capacity to produce clean energy technology, such as large batteries, by encouraging companies to source and develop the earth minerals necessary for those batteries from North America or U.S. trading partners. The IRA builds on Congress' 2021 bipartisan infrastructure bill, which also had [significant funding](#) for green investments. With the 2022 United Nations Climate Change Conference fast approaching, the IRA may show the international community that the infrastructure legislation was not a one-off and give hope that the United States can meet its GHG reduction targets, notwithstanding *West Virginia*.

Conclusion

The *West Virginia* decision has sparked significant debate. While some [praise](#) the decision as an “overdue check” on the expansion of federal administrative authority, others caution that its reasoning undermines congressional intentions by [curtailing the EPA's](#) ability to take action to address climate change and will inhibit the ability of the EPA and other executive agencies to apply their subject-matter expertise pursuant to congressional legislation and congressional and executive policy [on other matters](#). There has also been concern that without broad executive authority to take energy regulatory action, the United States may not be able to meet its obligations under the Paris Climate Agreement and continue to work with international partners to promote climate adaptation and resilience.

West Virginia, however, does leave room for the EPA to take some significant emissions actions, and Congress' subsequent passage of the IRA brings cause for cautious optimism that the United States can make domestic changes necessary to meet its climate goals and help build momentum globally for increased GHG reductions in line with its international agreement obligations.

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¹ *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) (quoting H.R. Rep. No. 91-1146, p. 1 (1970)).

² Justice Stevens, writing for the [majority](#), expended significant space walking readers through the history of the U.S. Clean Air Act and the parallel progression of climate change science and expertise internationally, including connections with the development of the IPCC (Intergovernmental Panel on Climate Change) and the UNFCCC (the United Nations Framework on Climate Change). *See generally Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 505-510 (2007).

³ The [IPCC is an intergovernmental body](#) of the United Nations responsible for “assessing the science related to climate change” that “prepares comprehensive Assessment Reports about the state of scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place.”

⁴ [42 U.S.C. § 7411](#) is more commonly known as “Section 111” of the Clean Air Act, and it is referred to as such herein.

⁵ 42 U.S.C. §§7411(a)(1).

⁶ *See West Virginia*, 142 S. Ct. at 2632 (Kagan, J., dissenting) (*citing* 84 Fed. Reg. 32523-32529) [hereinafter Kagan Dissent].

⁷ *Id.* at 2628.

⁸ *West Virginia*, 142 S. Ct. at 2608 (citation omitted).

⁹ *Id.* at 2609 (citation omitted).

¹⁰ *Id.* at 2614.

¹¹ *See, e.g., id.* at 2608-09.

¹² Kagan Dissent at 2626 (quoting Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021)).

¹³ *Id.* at 2628.

¹⁴ *Id.* at 2644.

¹⁵ *Id.* at 2627.

¹⁶ WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN SETS 2030 GREENHOUSE GAS POLLUTION REDUCTION TARGET AIMED AT CREATING GOOD-PAYING UNION JOBS AND SECURING U.S. LEADERSHIP ON CLEAN ENERGY TECHNOLOGIES (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

¹⁷ As [defined by the United Nations](#), “net zero” means “cutting greenhouse gas emissions to as close to zero as possible, with any remaining emissions re-absorbed from the atmosphere.”

¹⁸ *See, e.g., Fact Sheet: How can the U.S. achieve 50-52% emissions reduction by 2030—and what will it mean for people and the economy?*, UNIVERSITY OF MARYLAND, SCHOOL OF PUBLIC POLICY, CENTER FOR GLOBAL SUSTAINABILITY (Apr. 22, 2021), <https://cgs.umd.edu/research-impact/publications/fact-sheet-how-can-us-achieve-50-52-emissions-reduction-2030-and-what>; Samantha Gross, *Barriers to achieving US climate goals are more political than technical*, BROOKINGS INSTITUTE (May 10, 2021),

<https://www.brookings.edu/blog/planetpolicy/2021/05/10/barriers-to-achieving-us-climate-goals-are-more-political-than-technical/>.

¹⁹ *West Virginia*, 142 S. Ct. at 2610.

²⁰ For a detailed discussion of climate change as a public emergency and potential federal emergency authorities available, see Mark Nevitt, *Is Climate Change a National Emergency?*, 55 U.C. DAVIS L. REV. 591 (2021), <https://lawreview.law.ucdavis.edu/issues/55/2/articles/nevitt.html>.

²¹ See, e.g., WHITE HOUSE, EXECUTIVE ORDER ON TACKLING THE CLIMATE CRISIS AT HOME AND ABROAD (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.