Lawyer Insights

The Burden on Agencies to Confirm Congressionally Delegated Authority in the Wake of West Virginia v. Environmental Protection Agency

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West Virginia v. Environmental Protection Agency may be the most significant Administrative law case since the Supreme Court decided *Chevron U.S.A., Inc. v. NRDC* in 1984. However, the impact of the case is still being hotly debated by commenters, academics, and practitioners, particularly since the majority opinion did not expressly address the *Chevron* doctrine of judicial deference to administrative agencies and how it relates to the "major questions doctrine." This dichotomy has left many wondering how *West Virginia* will actually affect judicial review of future rulemaking efforts and some commentators even suggesting it may not ultimately change the trajectory of administrative law as much as has been claimed. What is not debatable is Congress's failure to substantially update environmental (and other) laws in the 38 years between *Chevron* and *West Virginia*, which puts growing pressure on executive branch agencies to interpret decades-old authority. Given that, no objective appraisal of *West Virginia* could ignore that it erodes agencies' options to fill gaps in ways that a muscular application of *Chevron* would otherwise tolerate. By no means does *West Virginia* end deference altogether, but its posts a legal speed limit that agencies exceed at the peril of a court finding a violation.

As a former government attorney, I view the burdens of *West Virginia* falling disproportionately on the agency lawyer who is often called on to balance the political client's deeply felt policy goals against the need to run the gauntlet of sometimes hostile reviewing courts. The major questions doctrine brings an entirely new, and in some cases insurmountable, challenge to craft legal rationales to support novel policy approaches. This new paradigm—at least when a major question is presented—thrusts a heighted legal burden squarely on the administrative agency in a way that was previously unknown at the height of the era of *Chevron* deference.

Because agencies have no inherent authority to establish laws in the form of regulations, they need a specific delegation from Congress, which exercises legislative power under the Constitution. While Congress may delegate its authority to administrative agencies, Supreme Court precedent has required that Congress provide "intelligible principles" in the statutory delegation because it reflects a shift in constitutional authority from the legislative branch to the executive branch. In other words, the "non-delegation doctrine" requires a congressional delegation to be limited and not open-ended to preserve the separation of powers. Thus, Congress is prohibited from granting broad, general rulemaking authority, and agencies should issue rules consistent with a particular, limited congressional grant of authority. The Court in *West Virginia* grounds the major questions doctrine in the separation of powers, holding that the congressional delegation for agency rulemaking authority should be very clear, specific, and not left to the agencies to interpret in matters with extraordinary economic and political significance. Therefore, the decision's second burden shift is to Congress, by requiring more legislative rigor when Congress wishes

to give an agency the power to decide "major questions." Courts have historically granted *Chevron* deference to an agency interpreting ambiguous provisions in statutes it administers, on the theory that agencies have greater expertise than courts in the particular field of regulation. If the statute at issue was ambiguous, under *Chevron* a court needed to find merely that the agency's interpretation was reasonable. That presumption has now been flipped when the matter involves a "major question," and post *West Virginia* an agency must now prove that the statute plainly authorizes the rulemaking. Instead of receiving deference whenever their statutory authority was ambiguous, the agencies now bear the burden of proving that they do have sufficient, clear, congressional authorization.

This shift will require agency counsel to revert to traditional tools of statutory construction if there is a chance that the major questions doctrine will be invoked. Justice Gorsuch highlighted several factors that courts should consider when determining whether there is sufficient congressional authorization for an agency's action, including the statutory text and any vagueness, the age of the statute, Congress's initial intent, the context of the statutory scheme, the scope of the rule's impacts, and prior interpretations by the agency. In addition to these factors, courts may also be skeptical of an alleged grant of authority when Congress has "conspicuously and repeatedly declined to enact" similar requirements. For example, the fact that Congress had entertained and rejected cap-and-trade legislation for greenhouse gases that failed was cited in the opinion as some evidence that the Clean Air Act did not include this authority under Section 111(d), the sole basis for the Clean Power Plan rulemaking. The Court also noted that the Environmental Protection Agency (EPA) had not interpreted 111(d) in this manner historically. So, it could be compelling if an agency has a systematic and unbroken method of implementing a delegation.

Going forward, when agencies need to address new problems without the benefit of recent, timely statutory enactments, agencies are going to need to spend extra time and effort explaining why the existing authority clearly allows for the proposed action. As a result, we may see agencies take time to explain and justify the congressional authority for their rulemakings with more specificity, even for more routine rulemakings. For example, in the recently Proposed Reconsideration of Fugitive Emissions Rule, EPA went to extraordinary lengths in its preamble statements to address the extent to which Congress had or had not delegated rulemaking authority under statutory language originally enacted four decades ago and how the agency had been interpreting it over the years.

The justification for any particular rulemaking is likely to vary with the scope of authority being conferred by Congress and associated economic and political significance, and more justification may be needed by an agency attempting to establish rules under older, yet still-effective, statutory language, and even more so if the rulemaking might involve what could be claimed as a "major question." If the matter is of significant importance and the statutory language for the delegation is limited, and not explicit, then a court may find the agency's congressional authority insufficient to support a major new policy. This is what Justice Scalia pithily referred to in hitman v. American Trucking Associations, as hiding elephants in mouse holes, something Congress does not do.

The risk for agencies is real, even though the test for what constitutes a major question is not completely defined. Opponents of federal rules are wasting no time, as the new doctrine is being used frequently and expansively to question agencies' authority from Congress. For example, days after West Virginia was decided the State of Texas deployed a major questions doctrine argument to support its ongoing case challenging the Nuclear Regulatory Commission (NRC) decision to license the storage of the radioactive waste near the border between Texas and New Mexico. Texas argued that NRC lacks authority to license

a facility under the Atomic Energy Act of 1954, claiming that Congress never clearly gave the NRC the power to regulate the storage and disposal of nuclear fuel.

The extent to which the agencies' efforts to identify and justify the delegated congressional authority will be sufficient to fend off regulatory challenges has yet to be determined—but there is no doubt that the agencies have a new burden to bear, at least until Congress begins to address issues of national importance on a more timely basis.

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