Report from the *West Virginia v. EPA* Oral Argument

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I. Introduction

On September 27, 2016, the U.S. Court of Appeals for the District of Columbia Circuit sat en banc to hear oral argument in *West Virginia v. EPA*.[2] The outcome of the case, which will almost certainly be appealed to the Supreme Court, could determine the Obama administration's legacy on climate change action: federal regulation of greenhouse gas emissions from power plants.[3] Members of the public, including the author, began lining up before 7:00 AM seeking a seat in the courtroom or one of the two overflow rooms with live video feeds. Oral argument started promptly at 9:30 AM and continued with only a short break until 6:00 PM.

II. The Clean Power Plan Litigation

The rule at issue in *West Virginia v. EPA*, officially titled the "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" and commonly known as the Clean Power Plan ("CPP"), was finalized on October 23, 2015.[4] The first motions to stay the rule and petitions for review were filed the same day.[5] The D.C. Circuit (in a three-judge panel featuring Judges Henderson, Rogers, and Srinivasan) denied the motions to stay on January 21,

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2. West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015).

3. It is important to note that the November 9th election of a Republican President will likely guarantee the revision or complete revocation of many of President Obama's climate initiatives, including the EPA rule at issue in this case, regardless of the outcome of this litigation.

4. 80 Fed. Reg. 64,662 (October 23, 2015).

5. Petition for Review Filed by Arizona Corporate Commission, et al., *West Virginia v. EPA* (Oct. 23, 2015); Motion Filed by State of West Virginia, et al. for Stay, *West Virginia v. EPA* (Oct. 23, 2015).

2016 only to be overruled less than a month later by a 5-4 Supreme Court grant of stay.[6] The D.C. Circuit subsequently decided sua sponte to hear the case en banc.[7] With Chief Judge Merrick Garland voluntarily recusing himself from all cases pending the resolution of his Supreme Court nomination process, a ten judge panel, with Judge Karen Henderson as the presiding judge, was left to decide the case.

The key issue before the court was whether the Environmental Protection Agency ("EPA") had the statutory authority to regulate carbon-dioxide emissions from stationary sources by implementing the CPP. Petitioners—twenty-seven states, various trade and industry groups, and others—take the following core positions: that in reviewing this case the court should not give deference to the EPA interpretation of the statutory provisions at issue given the ambiguous nature of the statutory language and the transformational nature of the regulation; that EPA overstepped its statutory mandate by issuing the CPP as written; that the CPP unconstitutionally infringes on states' rights; and that EPA's final rule was not a "logical outgrowth" of its proposed rule.[8] Respondent EPA and supporting intervenors—including eighteen states, various advocacy organizations, and others—dispute West Virginia's interpretation and argue that the CPP is justified by the text of the Clean Air Act and relevant Supreme Court jurisprudence. EPA and intervenors also argue that the rule was a logical outgrowth of an extensive notice and comment period, and that the court should give deference to the agency in its decision.[9]

6. Per Curiam Order Filed that the Motions for Stay be Denied, *West Virginia v. EPA* (Jan. 21, 2016); Chamber of Commerce v. EPA, 136 S. Ct. 999 (2016).

7. En Banc Oral Argument Order, *West Virginia v. EPA* (May 16, 2016).

8. Opening Brief for Joint Petitioner on Core Legal Issues, *West Virginia v. EPA* (Feb. 19, 2016).

9. Many intervenors are environmental advocacy groups, though notably, a consortium of power companies representing 10% of national power production intervened in support of EPA. See, Respondent's Brief, West Virginia, et al. v. EPA, No. 15-1363 (D.C. Cir. Mar. 28, 2016); Brief for Intervenor, *West Virginia v. EPA* (Mar. 29, 2016).

III. The Clean Air Act and EPA Regulation of Carbon Dioxide as a Pollutant

The Clean Air Act ("CAA") was enacted in its modern form by Congress in 1970.[10] The Act's purpose is to "promote the public health and welfare" through the "prevention and control of air pollution."[11] The CAA has been amended twice, in 1977 and 1990, but this goal remains unchanged.

Two recent Supreme Court decisions have clarified that EPA's regulatory authority under the CAA extends to carbon dioxide emissions.[12] With *Massachusetts v. EPA* in 2007, the Court confirmed that "because greenhouse gases fit well within the Act's capacious definition of 'air pollutant,' EPA has statutory authority to regulate emission of such gases from new motor vehicles."[13] With *American Electric Power Company v. Connecticut* in 2011, the Court issued another decision confirming *Massachusetts* and specifically clarifying that "the Act speaks" not just to regulation of greenhouse gases from automobiles, but also to emissions of carbon dioxide from power plants.[14] In tandem, these cases confirm EPA's ability and responsibility to regulate carbon dioxide as an air pollutant under the CAA.

Following the guidance of the court in *AEP*, EPA issued the CPP under the authority of section 111(d) of the CAA ("Section 111(d)"), which governs standards of performance for existing stationary sources of air pollutants.[15] The CPP outlines EPA's determination that the "best system of emission reduction" for existing fossil-fuel power plants is a combination of: (1) improving efficiency at coal-powered plants; (2) substituting production from coal-powered plants to cleaner natural gas plants, and (3) substituting production from coal-powered plants to zero-emission renewable energy sources.

10. 42 U.S.C. §7401–7671q (2012). The CAA was first enacted in 1963, though the 1970 amendments created the regulatory framework that defines the CAA today.

11. *Id.* § 7401(b).

12. Massachusetts v. EPA (*Massachusetts*), 549 U.S. 497 (2007); Am. Elec. Power Co. v. Connecticut (*AEP*), 564 U.S. 410 (2011).

13. *Massachusetts*, 549 U.S. at 532.

14. *AEP*, 564 U.S. at 424 (internal quotations omitted).

15. 42 U.S.C. § 7411(d).

IV. STANDARD OF REVIEW

EPA argues that its interpretation of the term "best system of emission reduction" as used in the CAA should be analyzed under the deferential standard of review set out in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[16] Agency interpretation of statutory terms is traditionally governed by the two-step analysis set forth in *Chevron*. First, "the question is whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." In this case the agency interpretation does not receive judicial deference. However, if Congress has not directly spoken on the issue, *Chevron* calls for courts to apply a deferential second step inquiring whether the agency's interpretation "is based on a permissible construction of the statute."[17]

Petitioners in *West Virginia v. EPA* emphasized the Supreme Court's recent jurisprudence that in "extraordinary cases . . . there may be reason to hesitate" before applying the deferential standard of *Chevron*.[18] These "extraordinary cases" may exist "when an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," or when "agency decisions [have] vast economic and political significance."[19] At oral argument, petitioners used the language of EPA's brief (which contains language such as "the most important and urgent," "critically important," and "monumental threat" to describe the CPP and the climate change associated harms it seeks to correct) to urge the court that the CPP is exactly the type of "extraordinary case" that justifies analysis under a non-deferential standard of review.[20]

The discussion of the applicable standard of review was scheduled to take an hour and ten minutes at oral argument, but with an active, engaged panel, the litigants spent closer to

16. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

17. *Id.* at 843.

18. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting Brown & Williamson, 529 U.S. 120,159 (2000)).

19. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted) (quoting Brown & Williamson, 529 U.S. 120, 159 (2000)).

20. Respondent's Brief at 1, West Virginia, et al. v. EPA, No. 15-1363 (D.C. Cir. Mar. 28, 2016).

two hours on the issue. Judge Kavanaugh seemed particularly responsive to petitioners' argument, though he was not alone. Judges Tatel, Srinivasan, and Pillard appeared more skeptical of petitioners' arguments on this point. Both respondents and petitioners faced tough questioning from nearly the entire panel throughout this portion of the argument. The language of *American Electric Power* seems to point to *Chevron* as the appropriate standard of review, but, as with many of the issues in this contentious case, the overall leaning of the court was not immediately clear.[21]

V. BEST SYSTEM OF EMISSION REDUCTION UNDER SECTION 111(D)

Section 111(d) directs the EPA Administrator to set standards of performance for existing stationary sources of air pollutants.[22] At issue in *West Virginia v. EPA* is EPA's interpretation of the statutory term "standard of performance" and the definition of the statutory term "stationary source." The CAA defines a "standard of performance" as

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . [EPA] determines has been adequately demonstrated.[23]

Under Section 111(d), an established standard of performance is applicable to existing stationary sources, defined the include "any building, structure, facility, or installation which emits or may emit any air pollutant."[24] Petitioners argue that the CPP, which calls for "generation switching" from coal to cleaner energy sources and nationwide rate setting, does not apply a "standard of performance" to existing "stationary sources" because these ambitious goals are not "achievable" at individual existing sources.[25] Existing sources can only comply with the CPP by participating in a carbon credit trading system, building new facilities off-site, or

21. *AEP*, 564 U.S. at 424 (ruling that the CAA § 111 "speaks directly to the emissions of carbon dioxide").

22. 42 U.S.C. § 7411(d) (2012).

23. *Id.* § 7411(a)(1).

24. *Id.* § 7411(a)(3).

25. Opening Brief for Joint Petitioner on Core Legal Issues at 29–31, *West Virginia v. EPA* (Feb. 19, 2016).

totally shuttering existing plants—none of which, petitioners argue, are appropriate regulations of performance standards *at* a stationary source.

At oral argument, Peter Keisler of Sidley Austin LLP presented petitioners' views on this issue. He argued that a standard requiring scrubbers, solar panels, or another technological system to be placed *on-site* to reduce emissions or lower overall emissions rates at individual facilities is an appropriate "standard of performance" requirement for a "stationary source," whereas a standard that mandates construction of or rate-balancing with off-site lower emission energy sources oversteps EPA's regulatory power under Section 111(d).

Reading the bench was difficult on this issue. Several judges seemed swayed by a brief filed by a consortium of power companies (representing nearly 10% of U.S. energy production) intervening in support of the EPA interpretation of the best system of emission reduction. The brief states that the generation-shifting required by the CPP is "business-as-usual" for power companies and that all of the techniques the CPP calls for are "reasonable" and "consistent" with current industry practices.[26]

A brief moment of levity occurred during this portion of the argument when, after petitioners asserted that only individual emission sources, as opposed to the owners of sources, could be regulated, Judge Millett took the opportunity to point out that, in fact, regulating sources is inherently a regulation of the owners of those buildings due to the generally low responsiveness of inanimate objects.

VI. ADDITIONAL ISSUES

Petitioners raised a series of additional attacks on the CPP that were argued with aplomb, yet they struggled to find a sympathetic audience among the members of the bench. One of these lines of arguments involved a scrivener's error in the passage of the 1990 amendment of Section 111(d). The Senate and House passed similar but non-identical versions of the same amendment. The Law Revision Counsel codified the House version. There was some dispute about whether the

26. Brief for Intervenor at 23, *West Virginia v. EPA* (Mar. 29, 2016).

language of the Senate amendment should be considered. The House version more arguably precludes EPA from using Section 111(d) to regulate certain pollution sources regulated under other CAA provisions, although this text is ambiguous as well.[27] After roughly an hour spent in oral argument on this issue, the court seemed at a rough consensus that given the ambiguity between the Senate and House amendments and the ambiguity in the text of the House amendment itself, the agency's interpretation, though not necessarily correct, was at least reasonable.

Finally, petitioners disputed the rulemaking on constitutional grounds. In one of the most anticipated moments of the argument, famed constitutional scholar and President Obama's former law professor, Laurence Tribe, stood up to argue against his former student's landmark environmental action. Tribe, who was ostensibly prepared to address issues of state sovereignty, separation of powers, and the Tenth Amendment, ended up—in the words of Richard Lazarus and Jody Freeman, two of Tribe's colleagues at Harvard Law who were in attendance–"meander[ing] somewhat into other issues" without receiving much "traction" from the court.[28]

VI. OUTCOME

Although the D.C. Circuit's decision in *West Virginia v. EPA* will almost certainly be appealed, the circuit court's opinion would be decisive in the event of a Supreme Court split—a nontrivial possibility as long as the Supreme Court remains staffed with eight justices. The D.C. Circuit's reasoning could also be indicative of how the Supreme Court will view the case.

Judging from their questioning and behavior during oral argument, it seems likely that Judges Srinivasan, Millett, and Pillard will side with EPA, while Judge Kavanaugh will side with petitioners. Of the six remaining members of the bench, Judges Rogers, Tatel, and Griffith asked tough questions of both parties, though in this attendee's opinion, these judges

27. A Leg. History of the Clean Air Act Amends. of 1990 (Comm. Print 1993).

28. Interview by Monica Trauzzi with Richard Lazarus and Jody Freeman, Professors, Harvard Law School (Sept. 28, 2016), http://www.eenews.net/tv/videos/2166 [https://perma.cc/3XZT-6QTC].

seemed to slightly favor EPA's arguments.[29] In short, the dynamics of the courtroom were indicative of a judgment in favor of EPA. A partisan assessment of the panel, which was made up of four Republican appointees and six Democratic appointees (four of whom were appointed by the current administration), also supports a prediction of a pro-EPA majority outcome.

A decision from the D.C. Circuit will likely issue sometime between late December 2016 and January 2017. No matter the outcome of the case, the losing party (or both parties if there is a 5-5 tie) is sure to file for a grant of certiorari from the Supreme Court. The Court's next scheduled conference, traditionally the last opportunity for a certiorari petition to be granted and the case heard by the Court in the current term, is on January 19, 2017. Barring extraordinary circumstances, a D.C. Circuit opinion issued after January 19 or a decision by the Court not to take up the certiorari petition at the January 19th conference would mean Supreme Court arguments on the case wouldn't occur until the fall of 2017, with a decision issuing some months after the oral presentation.[30] Because the Supreme Court granted stay of the CPP "pending . . . disposition of the applicants' petition for a writ of certiorari," the practical effect of this timeline is that implementation of the CPP could begin no earlier than the end of 2017 regardless of the decision of the D.C. Circuit.[31]

29. No opinion can be offered on Judge Henderson, Judge Brown, who asked one question throughout the nearly seven-hour oral argument, or Judge Wilkins, who asked none.

30. In the off-chance a D.C. Circuit opinion was issued early enough for a cert petition to be filed and granted before the January 19th conference the Court could hear arguments sometime in the spring and issue an opinion in the summer or early fall.

31. Due to the incoming Trump administration's anticipated skepticism of climate change action, implementation of the CPP now appears unlikely. Drastic revision or complete revocation of the rule is likely, whether the D.C. Circuit remands to the agency, validates the rule, or, either sua sponte or upon petition from the new EPA administrator, declines to offer judgment until the EPA has had a chance to revise the rule. If the EPA decides not to follow through on the CPP and instead promotes either a dramatically different regulatory package or decides not to offer any new regulatory plan, environmental groups and some states will almost certainly challenge the agency decision. The main legal argument of these environmental groups will likely be based on a series of Supreme Court decisions that require agencies to offer a reasoned explanation when policies previously supported based on a final rulemaking are dramatically changed or eliminated due to a policy shift from a newly elected administration. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Organized Village of Kake v. U.S. Dep't of Agriculture, 795

F.3d 956 (2015); *see also* Keith Goldberg, *Trump Win Could Moot Cases Over Obama Climate Regs*, LAW360 (Nov. 9, 2016), http://www.law360.com/energy/articles/861201/trump-win-could-moot-cases-over-obama-climate-regs [https://perma.cc/RWZ5-ASCP].