How the Supreme Court's EPA Ruling Complicates Climate Action and What Companies Can Do
Sam Gandhi, Justin Savage, and Simone Jones
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Sam Gandhi:
The Supreme Court has dealt a body blow to climate action. West Virginia v. EPA clips the EPA's ability to regulate greenhouse gas emissions. As state and local governments find ways to fill the void, shareholders are demanding that corporate America respond. How seismic is the ruling? Will it do more to save the planet, and how does this affect the impact of the climate provisions of the recent Inflation Reduction Act of 2022? We'll find out in today's podcast.

Simone Jones:
We're not going to just see decisions that impact EPA. Were going to see, I think, a broad application of the doctrine.

Justin Savage:
This case, West Virginia v. EPA, could be a door opener if the Republicans retake the White House to deregulate, in certain spheres, that meet the test of an extraordinary assertion of regulatory authority.

Simone Jones:
While there will be challenges, while this case will undoubtedly present roadblocks, the market is moving toward clean energy regardless. I mean, that's just a fact.

Sam Gandhi:
From the international law firm Sidley Austin, this is *The Sidley Podcast*, where we tackle cutting-edges using the law and put them in perspective for businesspeople today. I'm Sam Gandhi.

Hello, and welcome to this edition of *The Sidley Podcast*, Episode 28. Today, we speak with two of Sidley's thought leaders on environmental matters, Justin Savage and Simone Jones, about the recent Supreme Court ruling, West Virginia v. EPA, which will have significant implications

for the environment, the Biden Administration, and business in general. Justin is a partner in the firm's Washington, DC office, global co-leader of its environmental practice, and co-leader of Sidley's Automotive and Mobility sector team. He focuses on high-stakes environmental health and safety litigation and strategic counseling, including government enforcement actions, internal investigations, and rule-making changes.

Simone is an environmental partner in the firm's Washington, DC and Chicago offices. She represents clients in the chemical, automotive, and refining sector and environmental and toxic tort litigation. This work encompasses emerging contaminate matters involving PFAS and other substances. She also represents clients in internal and criminal investigations. Justin and Simone, great to have you both on the podcast.

Simone Jones:
Thank you. Happy to be here.

Justin Savage:
Happy to be here, Sam.

Sam Gandhi:
In June, the Supreme Court of the United States issued a monumental ruling in West Virginia v. EPA. It essentially limits the Environmental Protection Agency from making certain broad, regulatory decisions to control greenhouse emissions from power plants under the authority of the Clean Air Act. It clips the agency's policymaking power, and in doing so, the court arguably complicated the Biden Administration's plans to conquer climate change and inspired questions and concerns across industries, not just in the environmental sector. So, Justin, before we get into the impact of the decision, overall, what did the case hold?

Justin Savage:
Thanks, Sam. So, the case held that in "extraordinary cases" of vast political and economic significance, where an agency makes an unheralded use of its authority, the agency must be able to point to a "clear statement" from Congress. This is a market shift in administrative law. I think the court would say it's a clarification. Why is it important both at a holding level and a legal principle level?

So, at a holding level, going back to the Obama Administration, there was a rule called The Clean Power Plan, and it said that, under the Clean Air Act, you have to have the "best system of emission reductions," and so, what the Obama Administration did is it said, for natural gas and coal-fired power plants, the best system of emission reductions is what's called generation shifting. Meaning the emission limits achieved at a coal plant and a natural gas plant have to account for more renewables, so winds, solar, etc.

This is also called the beyond-the-fenceline approach. What the court said, in this case, was that EPA could not do that. That, traditionally, EPA had regulated within the fenceline of power plants by requiring pollution controls and other measures, and that unless Congress spoke clearly to allow EPA to go beyond the fenceline, it could not. This is a market shift because, since the '80s, there's been a case called Chevron.

And the Chevron case said that unless Congress clearly spoke to an issue, an agency could construe its authority to allow an action if it was a "permissible construction of the statute." Now, Chevron is not even cited in the Supreme Court's majority opinion in this West Virginia v. EPA case that we've been talking about, but the court essentially flipped deference in this case and said, in these extraordinary cases, we're not going to see whether there's a permissible way.

A clever lawyer and a regulator might read a statute to authorize a regulation. Instead, Congress has to clearly speak to it. So, it has implications, not just for the utility sector, where the case was decided, but also more broadly in administrative law for those extraordinary cases, which I think we'll talk about, has yet to be determined.

Sam Gandhi:
Simone, how does this case impact what we customarily have interpreted as American administrative law?

Simone Jones:
I think that there are two primary issues where we can see the case is going to impact administrative law. What is the future applicability of Chevron? As Justin mentioned, the court didn't explicitly reference Chevron in its opinion, but it's expected that there are going to be some implications

there. The Chevron case, as Justin mentioned, has long since been a case or a source of controversy.

You have some folks that are proponents of the Chevron doctrine, because it helps to delineate the Constitution's separation of powers. You also have, obviously, folks who endorse the principles underlying the Chevron case, and so, I think that, as a result of the West Virginia case, which doesn't reference Chevron, but sort of calls into question the applicability, you're going to see plaintiffs or litigants argue Chevron there.

I think another one is just going to be the major questions doctrine in the West Virginia case. The Supreme Court, for the first time I think, sort of explicitly invoked that particular doctrine, and just to sort of level set what I mean when I say the major questions doctrine, this requires that Congress speak, and to do so clearly, when it's going to authorize agency action in certain extraordinary cases, those that Justin mentioned, before you can strike down an agency rule.

So, I think what we're going to see going forward is that the major questions doctrine is likely going to take more of a front and center role, and it's going to be applied in rule makings. I don't think they're necessarily going to be limited just to environmental regulations, but I think that we're going to see that particular doctrine applied on a broader basis.

Sam Gandhi:
Simone, let me follow up on one thing. Is only the EPA affected by this ruling?

Simone Jones:
Thanks, Sam, and I think that's a good point, and no, I wouldn't say that EPA is only going to be impacted by this ruling, in part, because the doctrine shifts the power to take complex regulatory policy to courts and away from expert agencies. So, we're not going to just see decisions that impact EPA.

We're going to see, I think, a broad application of the doctrine, and I think that just the West Virginia decision, it's also going to invite, along those same lines, challenges to broad regulations that are imposed by other regulators. I think we're going to see some immigration challenges and sort

of application there, and I think we'll also see some challenges in the security space.

Sam Gandhi:
The court specifically did not mention Chevron, which means they also didn't overrule Chevron. So, what do you think about that in terms of what the future is for Chevron?

Justin Savage:
One view is of limited duration. Meaning that Chevron, at some point, could be overruled, but I think, even today, it's fair to say that the scope of Chevron has been crimped or clipped. Meaning for those categories of extraordinary cases that, as Simone indicated, fall within the major questions doctrine, no longer will agencies receive deference automatically under ambiguous statutes. Instead, there needs to be a clear statement.

So, it's clear that the Chevron doctrine has been clipped a bit, and then the other question is just whether it survives, and I think animating both West Virginia v. EPA and this broader push against Chevron is the sense, among some folks, legal scholars, and some of the business community, that the administrative state has grown too much, both in terms of scope and depth of regulation.

Sam Gandhi:
Justin, let me bring you back to that environmental sector, and beyond the limits the ruling places on expert agencies, what can the agencies still regulate in the climate space, especially with the new climate provisions of the Inflation Reduction Act?

Justin Savage:
That's a great question, Sam, and it's one a lot of clients have been asking. So, the day the decision came out, and the following days, we've gotten a lot of questions about that. First, agencies can still regulate climate. There are existing regulations on the books today that I don't think would be susceptible to this challenge.

So, an example would be, in the utility sector, there are CO2 reduction measures targeting inside the fenceline of power plants. I think it would be difficult to mount a challenge to those under West Virginia v. EPA, because

that's the kind of traditional regulation that EPA has had. I think, second, there are other EPA regulations in the transportation sector that existing ones I think would be difficult to challenge.

But there may be some challenges going forward, particularly as we look at a potential ban in the internal combustion engine. So, that kind of challenge could have serious legs, but the existing regulations on the book, it may be more difficult, and then, third, there are a set of climate change considerations built into federal review of major infrastructure and energy projects under the National Environmental Policy Act, or NEPA.

And I think there may be some challenges that come out of West Virginia v. EPA, but given the breadth of that statute, those may be more difficult. So, I think it's fair to say, and we've told our clients that this does not mean that EPA or other agencies cannot touch climate change, and you mentioned, finally, the Inflation Reduction Act. That's multi hundreds of pages. We've taken a preliminary look.

I think if you look at the bulk of that, it directs federal agencies to do some things and not to do some things, and I think, there, it would be difficult to argue that West Virginia v. EPA renders some of those specific provisions invalid as the agencies move to administer them, because the whole point of West Virginia v. EPA is Congress should speak directly on issues of vast economic and political significance, and here, they're doing exactly that with the Inflation Reduction Act.

Sam Gandhi:
In the future, could litigants argue that the EPA failed to do something that the legislation told them that they needed to do? For instance, if the Trump Administration had directed the EPA to not enforce certain rules, is that still within executive discretion, or does the case basically say that, look, what's good for one side is always good for the other.

Justin Savage:
That is a great point. So, for the Inflation Reduction Act specifically, it applies not just to EPA, but other agencies, and if Congress directs it and EPA does not move forward, there's a mechanism under the Administrative Procedure Act to sue EPA or their statutes to compel the agency to act. I don't think West Virginia v. EPA does anything to get rid of that.

However, outside of the Inflation Reduction Act, you could see this case, West Virginia v. EPA, providing a more robust basis to attempt to deregulate under other federal environmental statutes. The Trump Administration tried to do that. The win-loss record of EPA on that score was unprecedented. It was very low. EPA lost a lot of regulations that they attempted to deregulate.

They won some, but if you look at the studies that are out there, it was I think a 50 to 60% win rate. Generally, they're up in the 80s or 90s. So, this case, West Virginia v. EPA could be a door opener if the Republicans retake the White House to deregulate, in certain spheres, that meet the test of an extraordinary assertion of regulatory authority.

Sam Gandhi:
You're listening to *The Sidley Podcast*, and we've been speaking with Sidley thought leaders Justin Savage and Simone Jones about the recent SCOTUS ruling on the EPA and the potential impact of that ruling on federal agencies' power to affect climate action. So, in his formal response to the ruling, President Biden described it as another devastating decision that aims to take our country backwards, and he said that it risked damaging our nation's ability to keep our air clean and combat climate change, and so, Simone, what's the potential real-world impact in the near and long term of this decision on environmental regulation?

Simone Jones:
So, in terms of climate action, I think the West Virginia case, notwithstanding the uncertainty that's out there in terms of what's next. I think, at bottom, it's going to complicate President Biden's efforts to reach its climate targets. You'll recall that President Biden ran on a platform of climate change, and since he's taken office, he's been consistent with his climate change initiatives there.

But I think the West Virginia case is going to complicate this administration's efforts to meet his climate targets, because the case limits EPA's ability to enact nationwide and systemic changes to cut America's carbon emissions. Just to recap, some of President Biden's goals relative to climate change include a 50% cut in economy-wide greenhouse gas emissions by 2030 and also fully decarbonize the electricity sector by the year 2035.

So, the administration did meet with success, using reconciliation to push through the Inflation Reduction Act, which has a very strong climate change focus. The bill represents the largest investment in energy and climate programs, certainly in U.S. history, and it sets the first methane fee that penalizes fossil fuel companies for excess emissions of the powerful climate pollutants. Another substantial part of the funding helps disadvantaged communities with monitoring and cleaning up pollution and building their resilience to climate impact.

And there, when I reference those disadvantaged communities, I'm referencing environmental justice communities. Like climate change, environmental justice has been a focal point for the Biden Administration, something that was part of his platform on which he ran, and something that has been consistently a part of his efforts and communications while in the White House. So, obviously, that's a big win for those communities and that's consistent with his approach to date.

Having said that, while there will be challenges, while this case will, undoubtedly, present roadblocks, the market is moving toward clean energy regardless. I mean, that's just a fact, and so, it's going to do that regardless of the court's decision in the West Virginia case. So, those efforts throughout the business community will continue, so I don't think that it's going to impede those efforts. It just may serve as a roadblock, the case.

Sam Gandhi:
Justin, let me follow up on that question with you. In your view, how's this going to play out going forward in the courts?

Justin Savage:
The short answer is to be determined. There's three schools of thought. The first school of thought, I'll call the maximalist view, and if you read the concurrence in West Virginia, essentially, says we don't want, this is by Gorsuch and Thomas, agencies mucking about in climate change and other major economic and political decisions. It's up to Congress. I think that view is going to be difficult, but I don't think it's going to prevail in the courts.

And I'll say there's the strong view of the decision of major questions, which is that extraordinary cases that trigger major questions should be broadly defined. It should not be limited to a subset of issues, such as those that were present in West Virginia v. EPA. And then the modest view, the third school of thought, is it's very rare to have EPA regulate on such a broad front as it did in The Clean Power Plan. It was a very ambitious regulation, but I think if you were going to bet, I can pretty safely rule out the maximalist view, that agencies can't act at all.

And it's going to be a battle between whether it's the strong form or the more modest view, and the factors that the court signaled that it would consider are fairly broad. They're factors like is an agency intruding into an area of traditional state authority? Are they trying to act in an area where Congress has repeatedly failed to act? And there's a lot of, obviously, failure to pass legislation these days. And then of these legacy provisions, as was the case in West Virginia v. EPA, of older statutes enacted in the '70s that are being reinterpreted. So, those factors, you know, unfortunately, don't give us much concrete guidance.

But I think thinking about these three schools of thoughts, maximalist, strong, and modest, really gives you an analytical framework to think about this as we go forward, and it's going to be decided in the lower courts I think for several years before it goes back up to the Supreme Court.

Sam Gandhi:
Simone, in terms of the efforts to combat climate change, it's not just at the federal level. We're seeing states and even local authorities try to enact legislation to combat climate change. In terms of this case, does that affect any local or state government efforts?

Simone Jones:
No. The West Virginia case does nothing to impact the state's authority to limit and regulate greenhouse gas emissions. Nothing there has changed as a result of the West Virginia case. In fact, there are a number of states that've passed landmark clean energy bills, and I'll just give you one example. In Rhode Island, its governor just signed a bill committing the state to achieving 100% clean energy by 2033. So, it's not likely that the West Virginia case is going to do anything to impact that.

With the addition of Rhode Island, 21 states have now set 100% clean energy goals through the state legislature or the governor's office, and that's in addition to the District of Columbia and Puerto Rico. Cities are also taking the lead in addressing climate action. So, it's not just the states. We're seeing it on a citywide basis, as well. For example, Los Angeles, which has typically been pretty progressive when it comes to climate change, is closing city-owned coal and fossil fuel power plants, and the city of Houston down in Texas is powering municipal facilities with clean and renewable energy.

Sam Gandhi:
We're also seeing a lot of shareholder activism around climate issues, including votes against directors for a lack of credible climate action plans of a business. Justin, what does a decision mean for environmental, social, and governance issues for public companies?

Justin Savage:
I don't think it, as of right now, carries terrible significance for those types of actions, particularly environmental, social governance (ESG), and sustainability efforts. Remember, this case dealt with a federal agency to hear EPA's authority to regulate carbon emissions from the power sector. Just as Simone explained, for state and local governments, it does not impede their authority, absent a federal hook. Similarly, I'd say the same is true for ESG efforts.

I think the one exception, because there is that federal hook, is the SEC's push to regulate a climate risk disclosure rule. It is fair to say that the major questions doctrine articulated in West Virginia v. EPA will appear in that litigation. I think how it plays out will depend on the administrative record before the SEC, what the SEC decides to do, and how litigants frame that challenge, but unless there's that federal hook, you're going to, I think, continue to see consideration of ESG.

And if you think about it, ESG really, in the last four years, including back into the Trump Administration, has grown exponentially, and the Trump Administration was all about deregulation. So, I don't think there is a corollary between efforts to curb federal agencies' authority and what the private markets do, and as Simone explained, what state and local

governments do, absent that kind of federal hook that would allow West Virginia v. EPA's major questions doctrine to come into play.

Sam Gandhi:
As we wrap up the podcast here, I want to ask you both about what you're hearing from clients regarding the ruling. Let me start with Simone.

Simone Jones:
What we're hearing from clients is just the impact that the West Virginia case will have on industries beyond power plants. You'll recall that the West Virginia case was decided and the facts there, it was an existing power plant, and so the issues was the attempts to regulate greenhouse gas emissions there. So, clients are wondering how far will the West Virginia case be stretched beyond the power plant context? I think, also, our clients, and just clients, generally, I'm sure, tend to favor certainty.

So, the West Virginia case, although notwithstanding everything that we've said today, it has created some uncertainty in the market relative to climate change, and I just think our clients are asking us what that uncertainty means, how it will impact their specific businesses, and just what are the expectations as they're doing their parts to meet the administration's climate change goals?

Justin Savage:
We have some clients that have, I'll call them, upside or opportunities with federal climate change regulations, be it through credit markets, incentives, or programs, and those clients want to know, does this decision forego or prohibit any federal climate change regulation? And I think the answer is no, it's going to depend, as we discussed. And then we have other clients who feel as if their industries or sectors have been subject to regulatory overreach at the federal level, and they want to understand is there a basis to push back, either in court or informally.

And I think, more broadly, if you think about this, the U.S. right now is about 30% of carbon emissions globally. So, as you think about this decision, it only affects the U.S., and I think we're going to see, in the coming decades, other tools that are used to address climate, and those include trade. So, if you look at some of our EU colleagues, like Nic Lockhart, who are working

on Carbon Border Adjustments Measures, or CBAM, trade measures in the EU that will impose a tariff based on the carbon intensity of products.

I think that is a mechanism that you're going to continue to see explored, because unlike the 1970's Air Cleaner Act, had issue in West Virginia v. EPA where a lot of industrial activity was in the U.S.. It's now a global economy with global trade, and so, there's going to be exploration of private market solutions, like ESG, and then I think, increasingly, trade.

Sam Gandhi:
We've been speaking with Sidney thought leaders Justin Savage and Simone Jones about the Supreme Court's recent ruling involving the EPA and how it could impact climate action by the government and the business community. Simone and Justin, thanks. This has been a great, informative look at the new ruling. Thanks for sharing your insights on the podcast.

Simone Jones:
Thanks, Sam, for having me today. Really enjoyed it.

Justin Savage:
Yeah, thanks, Sam, for having us.

Sam Gandhi:
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