Insight

Major Questions Doctrine and the Impact on Biden's Technology Priorities

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Executive Summary

- The Supreme Court recently held in *West Virginia v. EPA* that reviewing courts will not defer to executive branch agencies when making new policies of "major economic and political significance" without clear, congressionally granted authority.
- The decision may prevent the Federal Communications Commission and Federal Trade Commission from issuing significant rulemakings on issues such as network neutrality, unfair methods of competition, and privacy.
- Thus, if the executive branch wants to issue rulemakings with major economic or political significance, it must rely on Congress to pass laws granting it such authority.

Introduction

The Supreme Court's recent decision in *West Virginia v. Environmental Protection Agency* will likely have wide-ranging implications for executive agencies' ability to issue rulemakings of "major economic and political significance," a standard established by the legal theory known more commonly as the "major questions doctrine." The Court determined in its decision that the Environmental Protection Agency's (EPA) exceeded its authority under the Clean Air Act to issue rules never contemplated by Congress. While the case specifically considered the actions of the EPA, the Court's decision outlined a general standard for agencies' ability to issue rulemakings on major questions.

Though this case involved only one executive branch agency, it is likely to have much broader implications for future agency rulemaking. In *West Virginia*, one key factor in the Court's consideration was the major questions doctrine, which holds that when an agency makes sweeping actions of major national significance, those actions must be supported by clear statutory authorization from Congress.

The strengthening of the major questions doctrine will likely impact many Biden Administration initiatives in the technology sector. For example, both the Federal Communications Commission (FCC) and Federal Trade Commission (FTC) could expand their existing authorities to pursue policy goals such as net neutrality, antitrust regulations, and new privacy protections. The Court's decision may restrict the agencies' ability to issue such sweeping rulemakings without appropriate congressional action.

This insight considers the broader implications of the Court's decision in *West Virginia v. EPA*, particularly focusing on its potential impact on future policy initiatives from the FCC and the FTC, including new regulations regarding net neutrality and anti-competitive business practices.

Major Questions Doctrine After *West Virginia v. EPA*

West Virginia v. EPA strengthens the major question doctrine, limiting the deference agencies receive from reviewing courts when issuing rules with major economic and political significance. When a statute is ambiguous, an expert agency to which the statute grants authority generally receives deference from the courts in interpreting that ambiguity and issuing rules to comply with the statute. Provided the agency considers all the arguments in the record, judges will generally not curtail the agency's authority.

The *West Virginia* case dealt with ambiguous statutory language that courts would normally defer to the expert agency to interpret. The Clean Air Act grants states the authority to set rules governing existing power plants but allows the EPA to decide the amount of pollution reduction that must be ultimately achieved and the best system of emission reduction that should be used to meet those goals. In implementing the statute, the EPA determined that the best measures for reaching these goals were not only to reduce emissions from traditional coal-fired power stations, but also to shift production away from coal to both renewables and natural gas alternatives.

The Court didn't defer to the agency as would normally be the case—that is, allowing the agency to interpret the ambiguous statute. Instead, it relied on the major questions doctrine, which holds that lower courts should be skeptical of uses of agency rulemaking that present "extraordinary cases" of "economic and political significance," and thus courts should not immediately assume Congress meant to grant the agency authority to take broad action. In *West Virginia*, the Court ruled that the EPA had the authority to look at specific emission reduction technologies to limit the emissions of power sources but determined that the agency's plan went beyond the authority delegated by Congress by dictating that energy production shift away from fossil fuels to renewable, cleaner sources. As a result, the EPA received no deference, and its rule was struck down.

FCC Net Neutrality Rules and Broadband Regulation

An expansion of the major questions doctrine could jeopardize recent efforts to grant the FCC more authority over the internet. In 2015, the FCC tried to assert more authority over broadband by classifying it as a telecommunications service, a designation designed for voice telephony, to allow the FCC to impose network neutrality regulations designed to prevent unfair discrimination by internet service providers (ISPs). Because the Communications Act's definition of telecommunications services doesn't specify any specific technology and instead focuses on the capability and offerings of the service, good arguments can be made for and against designating broadband as a telecommunications service. This ambiguity has resulted in courts largely deferring to the FCC's preferred classification—both in 2015 when the agency classified broadband as a telecommunications service to enact a net neutrality standard and in 2017 when the FCC reversed course.

The FCC will likely quickly revise the classification if Democrats obtain a majority at the agency to issue new net neutrality rules. Before the *West Virginia* decision, the FCC's authority to classify broadband as a telecommunications service was not in major doubt. Yet even in 2015, then-Judge Kavanaugh questioned the FCC's authority to regulate broadband by imposing net neutrality rules. As he explained, net neutrality rules dealt with a question of major economic and political importance, and in imposing the rules, the FCC would fundamentally transform the internet by prohibiting ISPs from choosing the content they want to transmit.

West Virginia casts doubt on whether the FCC can classify broadband as a telecommunications service or impose network neutrality rules. First, Congress never explicitly intended to grant the FCC broad authority over the internet, as broadband was barely around when the most recent revisions to the FCC's governing statute

were made in 1996. What's more, treating broadband as a utility will undoubtedly have significant economic impacts. Even if the FCC can classify broadband as a telecommunications service, Justice Kavanaugh may see the issue of network neutrality as a major question Congress should answer, and not an issue for agency interpretation.

At the same time, *West Virginia* doesn't absolutely bar or a predetermine a future judicial outcome on other agency rulemakings. First, the major questions doctrine is somewhat amorphous and the judgment on whether any specific regulation will have a major economic or political impact can vary significantly among courts and judges. Second, previous decisions from the Court seemingly imply Congress did grant the FCC the authority to regulate broadband, though the *West Virginia* decision may change that analysis. Ultimately, however, the decision likely dampens the ability of the FCC to expand its authority over broadband.

FTC Expansion of Competition Rulemaking Authority

West Virginia v. EPA may also impact the ability of the FTC to issue unfair methods of competition (UMC) rules. This authority is already fiercely debated among scholars, and courts, too, will likely struggle to find congressional intent to grant the FTC rulemaking authority, as the agency has not attempted to create such rules in the past and was largely tasked with enforcement through case-by-case adjudication.

The FTC protects consumers from unfair methods of competition under authority granted by the Sherman Act's restrictions on illegal monopolization. Courts have long reviewed agency enforcement actions under the rule of reason to determine whether the practices in question were anticompetitive. Some scholars, however, have suggested that the FTC has rulemaking authority to issue proscriptive rules, defining the practices that are anticompetitive or whose harms justify antitrust scrutiny.

Before *West Virginia*, a court may have deferred to the FTC's interpretation of the statute. Congress did grant the FTC general rulemaking authority, and later imposed strict processes on rulemakings in response to previous FTC overreaches intended to regulate only unfair or deceptive acts or practices (UDAP), but not UMC. At the same time, other scholars argue the rulemaking authority is not a general grant of broad authority over unfair methods of competition, and Congress clearly never intended to grant the FTC such broad discretion to outlaw any practice the agency wishes.

If the FTC attempts to impose UMC rules, the major questions doctrine will almost certainly impact the courts' review. Antitrust law has been generally enforced reactively and on a case-by-case basis, especially as the courts have abandoned a per se analysis in favor of examining the competitive effects of practices before determining whether they violate the law. Changing competition policy by writing proscriptive rules of per se illegal conduct will have major economic impacts on businesses and competition, generally. That said, if these rules are narrowly tailored and present a relatively small change, a court may forgo the major question analysis in favor of traditional agency deference analysis.

FTC Privacy Rules

The FTC could also attempt to go through more stringent procedures in order to issue UDAP rulemakings to create new privacy regulations. Depending on how far the rules go, the courts' interpretation of the major questions doctrine could also prevent agency action here.

Congress granted the FTC rulemaking authority over UDAP. Yet with this grant, Congress imposed strict

procedural requirements to restrict this authority. The FTC has largely relied on its UDAP authority to protect consumer privacy, and many suspect that the agency may soon use this authority to tackle more proscriptive privacy rules in order to ban specific practices and allow for civil penalty authority upon violation.

Nevertheless, there are reasons to suspect that Congress' grant of UDAP rulemaking authority to the FTC may still raise major legal questions. UDAP rulemaking procedures were largely a check on the agency's power, not an expansion. Thus, if the FTC uses its authority to create new privacy rules, courts may find that these rulemakings possess such economic and political significance that the agency is acting outside of its proper purview and requires explicit congressional approval before proceeding. Further, as with UMC rulemaking, Congress intended for the FTC to protect consumers through case-by-case adjudication, not proscriptive rulemakings. As a result, reviewing courts may find that expanding UDAP in order to establish new privacy rules first requires that Congress pass legislation granting such authority. Because Congress didn't explicitly grant this authority over data protection and privacy, the FTC might not receive deference from the courts.

At the same time, the rulemaking procedures for UDAP are strict in order to curb this expansive authority. Thus, while it is likely that Congress intended to limit the FTC's authority, it also allowed for the agency to use this limited authority where appropriate. As with most questions of administrative law, the outcome of any case will likely depend on the specific facts before the court and how far the agency is trying to go with new rules.

What Does This Mean Moving Forward?

The decision in *West Virginia* does not foreclose all agency action, but certainly makes it more difficult for executive agencies to issue expansive rulemakings without congressional action. For example, many have long advocated for Congress to pass a law outlining net neutrality protections without subjecting broadband providers to the full gambit of Title II utility-style regulations. While Congress has to-date largely relied on the FCC to regulate broadband, it may now need to step in if it wants to develop robust network neutrality rules.

Likewise, the White House has largely relied on the FTC to shift toward the New Brandeis school of competition policy, which generally looks beyond consumer welfare to issues such as labor rights. If Congress finds that monopoly power in a market is harming employees, then it can and should act. But Congress must itself do so, and not delegate the task to the FTC without any explicit guidance or structure.