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THE CURRENT: What does the Supreme Court's EPA ruling mean for climate regulation?

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PITA: You're listening to The Current, part of the Brookings Podcast Network. I'm your host, Adrianna Pita.

In a 6-3 ruling on the case of West Virginia vs the Environmental Protection Agency, the Supreme Court greatly curtailed the power of the EPA to regulate carbon dioxide emissions from existing power plants, in a decision that hobbles federal government's ability to combat climate change and has broader implications for federal regulatory power across the board.

With us today to discuss this case is Barry Rabe, nonresident senior fellow in Governance Studies at Brookings and J. Ira and Nicki Harris Family Professor of Public Policy and the Arthur Thurnau Professor of Environmental Policy at the University of Michigan. Barry, thanks so much for talking to us today.

RABE: Adrianna, thank you for inviting me to join you.

PITA: I'm hoping you can start us off with a little bit of background on the case. It was considered somewhat unusual for the court to take this up at all, given that the regulation that they were examining had already been rolled back by the Trump administration. What can you tell us about this?

RABE: Well that's right, there really is history here. I would actually take us back 15 years to 2007, where in another case brought by a different state – in that case not West Virginia, the case yesterday, but Massachusetts – Massachusetts versus EPA, the Supreme Court narrowly decided that EPA, the Environmental Protection Agency, did have powers under the Clean Air Act last passed in 1990, to begin to address climate change greenhouse gases, most notably carbon dioxide. That decision didn't say exactly how EPA would do that and we've had kind of fits and starts in different presidencies since that time, and in different sections of the economy, actually different sections of the Clean Air Act.

What comes into play with the new decision is the electricity sector is in play here, and this actually goes back to things that were launched in the second term of the Barack Obama presidency, really after reelection, to try to use those Clean Air Act powers, section 111 D, which has not been widely used, and apply them to electricity generation and try to achieve a major shift in reduction of carbon emissions that would come from the fuels that we would use to produce electricity.

The Clean Power Plan that the Obama administration launched after multiple years of effort never really got fully launched. It was stayed, an unusual act to kind of freeze it, by the Supreme Court before the all-important 2016 election. And it was put into holding. It was never formally dealt with and then of course we had a change of power and the Trump administration shifted gears on this. It replaced, in effect, the Clean Power Plan with an alternative, a much more modest alternative. And we've had this sort

of back and forth every time a president acts, a coalition of states who oppose that president bring legal challenges.

We heard yesterday was after all of this back and forth, no one anticipated that the Clean Power Plan was going to be brought back to life. But the court weighed in pretty decisively, that six-three vote that you mentioned, on powers that the court concluded EPA did not have under that original Clean Power Plan. That was really the main focal point for yesterday, but potentially with much broader ramifications. It means in effect, it's not stripping away EPA power to engage on climate but raises lots and lots of uncertainties, because that very approach that the Obama administration took is clearly off the table in the eyes of the majority of the court.

PITA: Yeah, can you dig into that a little bit more? What was their reasoning? What was their decisioning for putting this curtailment in place?

RABE: So in this case the main opinion was written by the Chief Justice John Roberts and he argues that the approach was too sweeping. He reads the statute as allowing for alterations or regulations that go specifically to help each power plant might operate, what technology or abatement technology might be used. One phrase that uses a lot is "generation shifting." This goal of the former Clean Power Plan to move us away from heavy reliance on coal and fossil fuels toward renewables, sort of put that into a narrow regulatory decision, according to the chief justice and others, was far too sweeping beyond what they saw the statute allowing.

There was also a lot of discussion of a very specific policy tool that the Clean Power Plan was pursuing. Not the only option, but it was clearly endorsing the idea of a tool, known as emissions trading or cap and trade, which had been used in some other previous areas. But the chief justice goes on at some length to say, and I quote, "At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme or a set of cap-and-trade schemes for carbon which Congress had consistently rejected" before that time and he didn't see that as being within the orbit of that particular arena. That becomes a major focal point in terms of just simply the breadth, and what the Court did was sort of dial that back or, in effect, take that off the table for things that EPA could try to do, while not being terribly clear about what the options would be for EPA if it wanted to revisit this. And clearly EPA is going to try and do something now going forward.

PITA: So what powers have been left then given this ruling now? What can, whether it's EPA itself still do, what sort of options might be available for executive action? The Biden administration came in with some really ambitious goals for reducing carbon emissions by the end of the decade, so what's left for them to try and do that?

RABE: That's right, and so, first and foremost, this does not reverse the Massachusetts case. It does not formally go into other areas where the administration has been pursuing administrative actions: vehicle emissions, the so-called California waiver, a big push in trying to reduce methane releases at the point of production of oil and gas. It's possible that the court might revisit it but does not directly go at this.

And, interestingly, this is one area, the power sector, where the where the Biden administration has not gone forward yet with a proposal or a plan. Administrator Michael Regan yesterday, said repeatedly that we're disappointed in the decision but we're going forward. We still don't know – we didn't know before the case; we don't know now – what that is going to look like and what that is going to entail. There's lots of speculation in the aftermath of the decision, how they might try to scale this back or impose different kinds of technology requirements. Would they link it to other pieces and provisions? We don't know.

And, of course, one huge challenge for the Biden administration is you don't just snap your fingers and instantly produce a new technology, a new regulation, and a design, much less get approval for this. We know that the pattern has been whenever a president, whether it's Obama, Trump, or Biden, moves on climate under the Clean Air Act, there is litigation usually led by states with attorneys general opposite the party of the president. So there's only so much time left in this term of the Biden presidency, assuming that there is another one or a successor friendly to Mr. Biden who is elected in 2024. So the clock is really ticking here.

Now, of course, the Biden administration has also been playing the legislative path or hoping to play the legislative path and, of course, that has already stalled. There were great hopes early in this Congress, the 117th Congress, that among other things, you would have major new investments, tax credits and subsidies for clean energy, purchase of electric vehicles, but also, at least initially, a clean energy standard that was designed in a way to try to work with the challenges of passing legislation in the Senate. That would have gone some way to reduce potentially substantially power sector emissions through legislation, through Congress, the old-fashioned way. That has stalled and it's not at all clear that we're going to see significant output.

So there's a there's a really tricky juggling act at this point for the Biden the administration. The clock is already ticking toward 2024, there's only so much that can be done either on the executive action path, which is challenging, or the legislative path which is thus far been very, very challenging as well.

PITA: What can you tell us about anything on the congressional side? There was a bigger push, as you said earlier in this Congress. Have they sort of started regrouping and trying to come up with some of these new avenues?

RABE: Again, you have to go back to the outset, where the bar was set so high, the expectations were so high. The thought that this might be a historic moment, much like 2009 and 2010, the last window where there was Democratic Party control of the branches of government, the elective branches of government and expectations that major climate legislation would follow whether or not you could get a bipartisan kind of buy-in. Thus far, that has not materialized. We've seen some advances through the big infrastructure package that was passed last year, where there are some subsidies and incentives for clean energy, monies that will be provided over a number of years. But the really big items: earlier, the clean energy standard that we mentioned, the idea of large investments over a prolonged period of time, those have not been approved. I do think what the Supreme Court decision does is underscore the real challenges facing Congress if there is going to be significant federal action on climate in the next year or two. It's all in the congressional orbit where we're seeing the goal is to continue negotiations and discussions, certainly in the Senate, a fairly large package passed in the House.

But elections are coming up, we have a packed agenda for Congress, including reaction to some of the other Supreme Court decisions, wide range of other issues. Can Congress really kind of pull together and create a coalition to pass any portion of this? That's not at all clear at this point and it does raise the possibility that the combination of this court decision and legislative inaction could lead this to be a very unproductive period after all the initial hope and promise.

PITA: On environmental issues, as on others where federal action has been stymied by a lot of this congressional dysfunction or inaction, the states have sometimes stepped in, and in some cases, as with the vehicle emission standards that you mentioned, sometimes, a large enough or influential enough state or groups of states can kind of set national standards for things, even though it's not technically a national policy. Where is there any avenue for state action on these sorts of the power plant regulation issues?

RABE: Sure, so one of the ironies of the Clean Power Plan is it never went into operation, but the emission reduction achievements, the actual emission reduction achievements by firms, by states is already greater than what the original plan was proposing. Not entirely a matter of public policy, but a combination of forces and factors and new technologies beginning to emerge. That said, while clearly the eyes begin to turn back toward states the likelihood or capacity that there would ever be a coordinated bottom-up movement on climate is quite unlikely.

We have seen some very innovative and far-reaching steps taken on climate change, including power sector, really over the last 20 years. In the northeast, you have the regional greenhouse gas initiative which has been expanding, a cap-and-trade program a little bit like the one we were discussing earlier that had been thought of federally, many states that have set rather bold targets to transition to clean energy sources. That said, states are deeply divided on this, and just as Massachusetts, one of those early actor states, brought the early Supreme Court case, it was West Virginia and a coalition of other states that brought the case that led to the final demise of the Clean Power Plan.

So states are very divided on this. Some of this very kind of partisan cleavages we see on climate change in Washington and Congress are also true in a great many state legislative bodies, so I think one can always look to states for innovation in playing some significant role, but to assume that there's going to be this bottom-up negotiation that can manage especially the kinds of emission reduction pledges that President Biden promised by the end of this decade, or that our other major global trading partners are looking to the United States to produce, having made a fairly bold commitment to 2030, it's pretty hard to see how between now and then states just dramatically transform and move forward in a more coordinated way.

So, a significant player, but also be mindful of the really deep divides that remain between states on this issue, reflected in litigation, reflected in policy. Even their willingness to take on issues like, for example, methane emissions, where we've seen a few states – Colorado, New Mexico, oil-producing states – begin to aggressively develop their own policies and programs to try to bring those emissions down of another very important and intensive short-term climate pollutant, a great many other states have just really not begun to move on this at all. And we're already expecting in the coming months a new Biden initiative further interpretation of the very Clean Air Act we've been talking about for methane, in part because so many states have just not been willing to move on this one.

PITA: Alright. Well, Barry, thanks very much for explaining that this latest decision to us and we'll look forward to talking to you again in future, hopefully we'll hopefully see some further action on it.

RABE: I look forward to that. Thank you so much.