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Supreme Court takes up challenge to Obama and the EPA

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By Warren Richey, Staff writer / February 23, 2014

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For the second time in two months, the US Supreme Court is taking up a case examining whether the Obama administration by-passed Congress in an effort to unilaterally advance its political and policy objectives.

The US Supreme Court will hear arguments on the Obama administration possibly bypassing Congress on the regulation of greenhouse gas emissions.

At issue in Monday's oral argument is whether the Environmental Protection Agency usurped legislative power reserved to Congress when EPA officials wrote broad new rules regulating the emission of greenhouse gases under the Clean Air Act.

Last month, the high court heard argument in a case testing whether President Obama acted properly when he ignored pro forma sessions of the Senate, declared Congress to be in recess, and then used his recess appointment power to unilaterally appoint three members to the National Labor Relations Board despite Senate objections to his nominees.

President Obama and his administration have also been criticized for postponing statutory requirements and deadlines in the healthcare reform law, the Affordable Care Act, and in exercising "prosecutorial discretion" to selectively enforce US immigration laws.

The legal challenges at the Supreme Court aren't about the administration's political priorities; rather they are about the mechanisms the administration has chosen to achieve its priorities and whether those mechanisms comply with constitutional and statutory limits on executive power.

The Clean Air Act was passed in 1970 to reduce and regulate the amount of air pollution from factories and cars. It sought to reduce the release of harmful pollutants like carbon monoxide from car exhaust and sulfur dioxide from fossil-fuel power plants.

In more recent years, environmentalists concerned about global warming pushed to expand the scope of the Clean Air Act to address the release of greenhouse gases that they say are contributing to potentially catastrophic global warming.

The EPA under President Bush resisted these efforts, insisting that the scientific data about global warming was inconclusive. Environmentalists sued to force EPA to take action, and in 2007 the Supreme Court ruled 5 to 4 that greenhouse gases could be regulated under the Clean Air Act if the EPA determined that they posed a danger to human health or welfare.

After President Obama's election in 2008, his administration jettisoned the old EPA position and moved aggressively to expand the scope of the Clean Air Act to regulate the release of greenhouse gases.

It took this action in phases. The first phase involved using the Clean Air Act to limit greenhouse gas releases from new cars and light trucks.

It is what happened next that forms the basis for the legal challenge now before the high court. After establishing the so-called Tailpipe Rule limiting greenhouse gases from new motor vehicles, the EPA adopted an expansive interpretation of the Clean Air Act to increase its regulatory authority over a wider range of greenhouses gas emitters such as factories and power plants.

Predictably, business and industry groups and some states objected to this expansion of federal power, arguing that Congress did not intend for the Clean Air Act to be used to regulate greenhouse gases.

Such an expensive and potentially economically-disruptive broadening of federal regulatory authority would require clear authorization from Congress, they argued.

The EPA disagreed. Under the agency's reading of the Clean Air Act, once greenhouse gases are regulated in one part of the Clean Air Act (such as for cars and light trucks), the law requires that greenhouse gases be regulated under other parts of the statute as well.

But there is a problem with this approach. When Congress wrote the Clean Air Act it established thresholds for regulated pollutants to ensure that the EPA concentrated its pollution-fighting efforts on major sources of harmful emissions. Congress determined that the EPA could only regulate those facilities emitting more than 100 tons per year of certain pollutants. In some cases Congress raised the threshold to 250 tons per year.

These thresholds work fine for toxic substances like carbon monoxide from car tailpipes or sulfur dioxide from smokestacks.

The problem with these thresholds when applied to a greenhouse gas (like carbon dioxide) is that greenhouse gases are emitted at much higher volumes than traditional air pollutants. One hundred tons per year of sulfur dioxide is the rough equivalent of 100,000 tons per year of carbon dioxide, experts say.

If the EPA followed the 100-ton and 250-ton limits set by Congress in the Clean Air Act, air pollution regulations of greenhouse gas emissions would extend well beyond the largest factories and power plants that are now targeted for regulation.

At those levels most large buildings in the United States, including hospitals, churches, medium-sized businesses, and even some big homes would require an operating permit from the EPA.

The burden wouldn't just fall on property and business owners. The government, too, would face hardship administering such a sprawling regulatory regime.

Instead of issuing 280 preventative permits per year, the EPA would have to issue 81,000, according to estimates. Under another section of the Clean Air Act, the EPA's workload would rise from 14,700 permits a year to 6.1 million permits.

The effort would require an army of bureaucrats and would cost state and federal regulators billions of dollars in new administrative expenses.

Recognizing the absurdity of following the existing 100-ton and 250-ton thresholds set by Congress, the EPA decided to set its own threshold. It established a new limit for greenhouse gases at 100,000 tons per year.

An array of business and industry groups sued, seeking to block the new regulations.

Critics argued that the agency wasn't enforcing the law, it was rewriting it. It is up to elected representatives in Congress to set such limits, they said. If existing limits in the statute don't work, the EPA should ask Congress to revise the thresholds in the Clean Air Act.

The Obama administration defended its expansive interpretation of the Clean Air Act, insisting that the EPA had broad discretion to recalibrate the thresholds to facilitate an effective regulation of greenhouse gases.

A federal appeals court agreed with the EPA and upheld the administration's position. Now the case is before the high court.

The key question before the court is whether the Obama EPA overstepped its authority when it sought to expand greenhouse gas regulations to a wide range of sources of such emissions.

Lawyers challenging the EPA's regulations say the agency is misreading the Clean Air Act, ignoring key limits written into the law by Congress, and violating the Constitution's checks and balances.

“This case involves perhaps the most audacious seizure of pure legislative power over domestic economic matters attempted by the Executive Branch since [President Truman’s failed effort to take over the steel mills],” Shannon Goessling wrote in a brief on behalf of the Southeastern Legal Foundation.

“This action is an unabashed assault on the foundational structure of the Constitution,” Ms. Goessling said.

Solicitor General Donald Verrilli defends the administration’s regulatory approach. EPA officials acted within the parameters of the Clean Air Act when they created the new regulations, he said in his brief.

The agency was acting prudently by deciding to phase-in the threshold for greenhouse gases by applying the new regulations to only the largest emitters, he said. He noted that “absurd results” would have ensued if the EPA had applied and enforced the lower 100-ton and 250-ton thresholds for greenhouse gases.

“Although the Congress that enacted the CAA [Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming, Congress drafted the CAA in broad terms to confer the flexibility necessary to forestall obsolescence,” the solicitor general wrote.

The CAA may not be perfectly tailored to dealing with greenhouse gases, Mr. Verrilli conceded, but the EPA’s approach is the best way to implement Congress’s goal of protecting public health and welfare from the effects of air pollution, including adverse effects on weather and climate.

Those challenging the new regulations say that by writing its own thresholds for greenhouse gases the Obama administration is reserving for itself the power to decide when to expand its regulatory authority deeper into the US economy, to smaller businesses, hospitals, churches, and even homes.

Those decisions and judgments should be made by the legislature, not the regulatory agency empowered to enforce those same regulations, critics argue.

The case is comprised of six different legal challenges consolidated for high court review. The lead case is Utility Air Regulatory Group v. EPA (12-1146).

A decision is expected by late June.