

In *West Virginia v. EPA*, struck down Obama's Clean Power Plan. The Court's opinions opinion announced new limits on government actions in what it termed "extraordinary cases." This has become known as the major question doctrine. It tells judges to be skeptical when the government leverage some vague or obscure law to support a dramatic, unprecedented action. Dramatic, unprecedented actions are Trump' stock in trade. The major question doctrine could be a major roadblock.

In his opinion in the *West Virginia* case, Chief Justice Roberts relied on the following factors to justify applying the major question doctrine:

- ***Stark departure from past practice and regulatory norms.*** The agency's interpretation of the statute was "not only unprecedented; it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation' into an entirely different kind." Moreover, EPA had relied on an obscure and little-used portion of the statute.
- ***Breadth of the claimed authority.*** Under EPA's view of the statute, Roberts says, "Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy." Congress needs to say so clearly if that's what it intends.
- ***Lack of relevant expertise.*** EPA lacked expertise on running the electricity system.
- ***Congressional consideration and rejection.*** Congress considered and rejected multiple efforts to create a cap-and-trade scheme for carbon.

As an example of how the major question doctrine could block Trump, consider Schedule F. Schedule F is a tool Trump has said he plans to use to use as soon as he takes office to "remove rogue bureaucrats," and he promises to use that tool "very aggressively." It could strip as many as fifty thousand workers of their Civil Service status.

Schedule F has many of the earmarks of a major question:

- An obscure, vague statutory provision,
- Unprecedented use of the provision,
- A radical departure from past practice, and
- Political controversy and a significant economic impact (potentially layoffs for 50,000 workers).

It seems unlikely that Congress would have wanted to delegate a decision of such consequence to the executive branch, especially since the whole purpose of the Civil Service Act is to limit politicization of the bureaucracy. As Justice Scalia once said, Congress does

not hide elephants in mouseholes — and § 7511(b)(2) is as much a mousehole as you could find in the U.S. Code.

I don't want to oversell the utility of the major question doctrine in blocking Trump. The scope of the doctrine is very unclear, leaving lower courts all over the map in how they interpret it. And a conservative Supreme Court could well find reasons to apply it to liberal actions but not conservative ones. But because the doctrine is designed to prevent quantum leaps in government policy, it just might be what we need in the Trump era.

Note: After posting this, I learned about a [memo](#) at Governing for Impact discussing this strategy that is worth a read.