PRIMER

The Major Questions Doctrine: Guidance for Policymakers

November 2022

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I. Introduction

The Supreme Court's decision last June in *West Virginia v. EPA* , which announced the official arrival of the "major questions doctrine" (MQD), has profound implications for agency regulators. For the past few decades, agency officials and their counsel have grown accustomed to an environment in which the legality of any given executive action is determined by closely analyzing the text of the agency's authorizing statute. Under this framework, if the legal meaning of a statute is ambiguous, the agency could count on a healthy dose of judicial deference to the agency's reasonable interpretation—predicated on the theory that executive branch officials are accountable to a nationally-elected president. In the wake of *West Virginia,* that deferential regime has now fallen out of favor for a certain class of regulations. In these "major questions" cases, the court will instead require an unusually explicit statement from Congress authorizing the challenged action.

The MQD poses a real obstacle to progressive policy making, but the worst possible response would be for federal agencies to back down in the face of it. With that in mind, the purpose of this memo is to help agency officials adapt to this new era in federal rulemaking—without suggesting that the safest course is to abandon the millions of workers, families, and communities who benefit from federal protections.

To improve the likelihood of withstanding judicial review in the face of the MQD, agency policy makers can help themselves (a) by laying the groundwork for keeping their regulations out of the "major question" category and (b) by strengthening their arguments that the statutes on which they rely give exceedingly clear authority for whatever rule they are proposing. This memo offers some suggestions for how to do that.

II. Background

While the Court has used some version of the MQD as far back as 2000, the doctrine has taken a sharp turn in just the past couple years. Originally, the doctrine operated as a modest carve-out from the prevailing framework for statutory interpretation. In a series of cases through 2015,[1] the Court invoked what would come to be known as the MQD only when the agency's proffered interpretation both wreaked havoc on the internal logic of a statute and struck other discordant chords—for example because it took the agency outside of its core area of expertise[2] or it flew in the face of a series of related statutory enactments.[3] And even then, the MQD, as opposed to traditional statutory construction inquiries, rarely took center stage in the Court's legal analysis.[4]

Starting in 2021, however, the Supreme Court began deploying a more aggressive form of the MQD, culminating in *West Virginia v. EPA.*[5] That case laid out a disruptive, if difficult to parse, legal test that might ultimately subject broad swathes of agency policy making to heightened judicial scrutiny.

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[1] *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Gonzales v. Oregon, 546 U.S. 243 (2006); Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302 (2014); and King v. Burwell, 576 U.S. 473 (2015)

[2] *See, e.g.,* Gonzales v. Oregon, 546 U.S. 243 (2006).

[3] *See, e.g.,* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[4] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting) ("And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.").

[5] *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022); and W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

In the majority opinion, Chief Justice John Roberts articulated a two-step test for resolving these "major questions" cases. First, a court will assess whether a given exercise of regulatory power poses a major question, by assessing "the history and breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion."[6] If a court finds in the affirmative, an agency regulation will only survive if the government can point to "clear congressional authorization" for its interpretation, which requires "something more than a merely plausible textual basis."[7]

Much remains uncertain about how the MQD test will operate in practice, given its relatively subjective criteria. While lower courts have begun to hear increasing numbers of MQD challenges to agency action, it is still too soon to draw conclusions from their application of the doctrine. It also remains unclear the extent to which Justice Gorsuch's concurrence will influence the MQD's development. His opinion, in theory, holds no formal legal weight, given that it represents the position of only two justices. In practice, however, the clarity of his articulation of the MQD legal test may prove influential.[8] And Gorsuch's view of the doctrine would seem to depart from Roberts's majority opinion in meaningful ways.[9]

What is clear is that the MQD marks a dramatic judicial intrusion into the policy making process, an area once thought to properly belong under the purview of the two democratically elected branches of the federal government.

III. Guidance for Policymakers

Agency officials, however, cannot simply wait for further clarity or wish away misguided doctrinal developments. They must resolve pressing policy questions today. Below, we present some initial guidance for executive branch policymakers wondering how *West Virginia v. EPA* and the MQD might impact upcoming rulemakings. The MQD's emergence will impact at least three different aspects of the regulatory process, which we address in turn below: (A) planning regulatory agendas; (B) writing and reviewing formal rulemaking documents; and (C) related communications strategies. The doctrine remains too nebulous to guarantee that following the below guidelines will safeguard a rule from an MQD challenge; however, we hope what follows will offer some useful factors to consider during the rulemaking process.

Mapping a regulatory agenda

Per the *West Virginia* decision, a court deciding whether a new agency regulation poses a major question will focus on what might be called administrative history. The reviewing court will consider the agency's history of rulemaking under whatever statutory provisions it cites as legislative authority. Enhanced judicial skepticism about regulatory novelty will put a premium on how thoughtfully an agency maps out and communicates its regulatory agenda.

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[6] West Virginia at 2608 (internal citations omitted).
[7] *Id.* at 2609 (internal citations omitted).
[8] For example, lower courts and the Supreme Court itself have employed Justice Jackson's tripartite framework for presidential power from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* because of its analytical usefulness. 343 U.S. 579 (1952); *see generally* Igor Kirman, *Standing Apart to Be A Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083 (1995). Indeed, shortly before publication, a federal district court judge in the Northern District of Texas vacated the Biden administration's student debt relief plan in part based on Justice Gorsuch's concurrence in West Virginia. Brown v. U.S. Dep't of Education, No. 4:22-cv-0908-P (Nov. 11, 2022) (available here).
[9] For example, Gorsuch seems to imply that political controversy alone might warrant subjecting a regulation to the MQD's heightened standards.

How agencies might do this depends on whether they are using newly granted statutory authority; moving forward in a new way under an older statute; or more generally communicating their understanding of what their statutes do and do not empower them to do.

When Congress grants agencies new regulatory authority, agencies should exercise that authority maximally.

In several of its recent MQD decisions, the Court has placed significant weight on an agency's past practice, including whether an agency has previously relied on the statutory provision at issue. In *West Virginia*, the majority opinion made much of the fact that EPA had used Section 111(d) only a handful of times since its enactment in 1970, referring to it as a "little-used backwater."[10] Quoting Justice Frankfurter, the Court noted that "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."[11] Justice Gorsuch, although writing only for two justices in concurrence, noted that "[a] 'contemporaneous' and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency."[12]

As a result, policymakers implementing new statutes should understand that their short-term regulatory decisions may carry exaggerated implications over the long run. In the moment, political considerations may weigh in favor of pursuing a less-controversial, moderated course—but as Justice Gorsuch suggests in *West Virginia*, near-contemporaneous interpretations by an agency may hold a special precedential value under the MQD. Preserving the broadest range of agency authority in the future, therefore, might require adopting a maximal interpretation from the get-go (or at least explicitly preserving the argument that a given interpretation does not represent the extent of delegated authority under the statute).

For example, in *NFIB*, the per curiam opinion justified its decision striking down OSHA's Covid-19 vaccine-or-test policy by explaining that it "is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."[13] In fact, at one point some workplace experts had pushed OSHA to adopt a standard for influenza vaccination. While it's impossible to say for sure, had the agency previously issued a flu vaccination policy, the Covid-19 regime may have stood on firmer precedential ground.

When using an older statute in a new way, agencies should consider sequencing regulatory actions such that uses of "novel" authority are not politically or economically significant.

In *West Virginia,* the majority seems to hold that, in order to constitute a major question, agency action must involve both a novel use of statutory authority (assessed by the "breadth" and "history" of the authority asserted) *and* be economically or politically significant.[14] It might therefore behoove agencies considering multiple regulations under the same statute to sequence regulations such that the first uses of a novel or rarely used authority are politically and economically modest; these "insignificant" regulations can subsequently provide a precedential foundation for more ambitious regulations. In theory at least, no single regulation would be both novel *and* significant.

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[10] W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2592 (2022)
[11] *Id.* at 2610 (citing FTC v. Bunte Brothers, Inc., 312 U. S. 349, 352 (1941)).
[12] *Id.* at 2623. (Gorsuch, J., concurring).
[13] NFIB at 666.
[14] W. Virginia at 2608.

For example, the Federal Trade Commission (FTC) is reportedly considering engaging in "unfair methods of competition" rulemaking for the first time in several years.[15] To decrease the likelihood of triggering MQD, the agency may want to promulgate a less economically significant regulation before turning to more ambitious endeavors.

Agencies should think carefully before stating that the agency lacks the authority to act.

There might be several reasons why an agency, even during progressive administrations, would be tempted to disavow its own authority to act. However, policymakers should be aware that doing so could hamstring future attempts to regulate.

Sometimes, when faced with a political or policy dilemma concerning an agency's regulatory agenda, agency officials may be tempted to raise doubts about their legal authority to ease external pressure. For example, during the Obama administration, advocates asked the Department of Health and Human Services ("HHS") to create a pregnancy special enrollment period ("SEP") on the federal exchanges pursuant to statutory and regulatory authority under the Affordable Care Act ("ACA").[16] In 2015, HHS published the Notice of Benefit and Payment Parameters declining to establish a pregnancy SEP, but noting that under 45 C.F.R. § 155.420(d)(9) the agency retained the ability to provide for additional SEPs in "exceptional circumstances" and that it would "continue to exercise that authority through sub regulatory guidance."[17] Subsequently, advocates, including many of the administration's allies in Congress, continued to push HHS to adopt a pregnancy SEP. In a later letter to Congress, HHS claimed that it "[did] not have the legal authority to establish pregnancy as an exceptional circumstance."[18]

Given HHS's broad authority to establish new SEPs under the statute and existing regulations, it seems likely this decision was motivated by political, rather than legal considerations. At the time, the administration's effort to roll out the ACA faced heavy scrutiny, and federal officials were negotiating with insurers — who likely would have claimed that such a SEP would result in adverse selection and higher premiums — to offer coverage. Officials likely calculated that the easiest way to thread a tricky political needle was to disclaim any legal authority to create a pregnancy SEP. While an understandable instinct, such short-term solutions, even if not *per se* fatal, are unhelpful in the long-term.

Disavowals of legal authority can also occur when seeking new legislation. There will be frequent occasions in the life of any administration when agencies might push Congress to enact clearer statutory authority to pursue public interest ends. If there is already a plausible argument that existing authority could do the trick, the agency should think twice before stating that a new statute is necessary. Of course, any intimation that the agency could pursue its ends without a new statute might weaken the incentive for wobbly legislators to support new ambitious legislation. But if Congress never enacts the legislation that the agency seeks, the agency's representation that it *needed* a new law to legitimate going forward could frustrate efforts to deploy existing authority.

Under the Administrative Procedure Act (APA), a change in agency position requires only that the agency: (1) explicitly recognize it is enacting a change in policy rather than ignoring rules "already on the books" and (2)

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[15] *See e.g.* David Michaels, *FTC Considers Restricting the Use of Noncompete Clauses by Companies*, Wall Street J, https://www.wsj.com/articles/ftc-considers-restricting-the-use-of-noncompete-clauses-by-companies-11654747203 (June 9, 2022).
[16] See 42 U.S.C. § 18031(c)(6); 45 C.F.R. § 155.420(d)(9).
[17] 80 Fed. Reg. 10750, 10798 (Feb. 27, 2015). "Furthermore, a State may establish additional special enrollment periods to supplement those described in this section as long as they are more consumer protective than those contained in this section and otherwise comply with applicable laws and regulations."
[18] Letter from Sylvia Burwell, Secretary of U.S. Department of Health and Human Services (Apr. 10, 2015) (available at: https://www.kff.org/wp-content/uploads/sites/3/2015/10/041015-hhs-letter-to-congress-on-maternity-care.pdf).

demonstrate that there are good reasons for implementing the new policy.[19] However, because *West Virginia* suggests that an agency's past regulatory practice may factor into a MQD analysis, policymakers should understand that disclaiming agency authority post-*West Virginia* may tie the hands of future agency decision-makers more significantly than in the past.

Writing and reviewing formal rulemaking documents

The rulemaking record has always played an important role in the viability of regulatory initiatives, especially as the rate of litigation has increased. But the MQD makes the content of agency rulemaking documents all the more important. Going forward, agencies must clearly articulate a legal theory, grounded in statutory text, that supports their regulations.

The Administration should consider restructuring how it conducts legal review of important regulations.

The complex dialogue between agencies (each of which has its own, idiosyncratic internal rulemaking process), the Office of Information and Regulatory Affairs (OIRA), and the Department of Justice (DOJ) can create problems. Wary of boxing in DOJ down the line, an agency might opt to keep discussion of its legal authority in the rule's preamble vague; a shortage of staff at OIRA and the Office of Management and Budget (OMB) can make it difficult to promptly and thoroughly vet the legal justification for every important regulation; and DOJ may only have the opportunity to review a regulation for a brief window of time before it lands in the Federal Register. As a result, sometimes rulemaking documents fail to clearly articulate a legal theory or to respond to likely challenges. Other times, the number of "cooks in the kitchen" can result in a rambling justification, which makes it easier for a regulation's opponents to mischaracterize an otherwise well-justified rule.

One potential solution, especially for high-profile rules or administration priorities, could be for the White House to detail a team of regulatory law and policy experts, perhaps some combination of DOJ career lawyers and political appointees, to OMB to expedite legal reviews and sharpen legal analysis from the get-go. This "fly team" could add vital capacity earlier in the rulemaking process, thereby facilitating quicker and more effective collaboration between government stakeholders. It could be integrated into the agency's early policy deliberations, so that legal considerations can be aired before a policy course is set; this would not only provide for more legally secure rules, but it would also empower agencies to maintain more control over the fate of their regulations. And it would reduce the frequency of last-minute red flags by DOJ or OMB lawyers.

Policy makers should analogize to past regulations.

While much about how courts will apply the MQD remains hazy, it seems likely that they will treat new or novel exercises of longstanding authority with extreme skepticism. Therefore, analogizing current rules to past regulatory efforts will strengthen the case for upholding them. As noted above, Justice Gorsuch stated clearly in his concurring opinion in *West Virginia* that an agency's past interpretation of the relevant statute differing from its current interpretation would be a "telling clue" that there is no clear congressional authorization for the authority asserted. While the majority did not state this as clearly, Chief Justice Roberts points to the "history and breadth" of the authority asserted as one factor in determining whether a rule poses a major question. In ruling against the CPP, he put weight on the fact that EPA had not previously adopted similar regulations. In *NFIB v. OSHA*, the *per curiam* opinion also relied on the purported novelty of the vaccine-or-test mandate, finding:

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[19] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

> it telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach (citing *Free Enterprise Fund*).[20]

To protect against similar claims of "novelty," agencies should attempt to show that any new regulatory effort is similar to past exercises of agency authority. This could be done in various ways. Depending on the rule at issue, the agency might compare the regulatory mechanism used to show that the agency has regulated in this precise manner before. In other instances, it might be beneficial to demonstrate that the rule at issue is focused on the same legislative purpose as other rules promulgated under the same delegation of authority. Policymakers might also consider comparing the regulatory *effects* of new rules to the effects of previous regulations in order to show that the agency has used the same statutory authority in ways that have the same or greater economic significance. For example, if the Department of Labor is issuing a regulation that would affect 1 million workers, in the preamble it could point to a past regulation issued under the same statutory authority that affected 2 million workers.

Agencies should include strong legal justifications in Notices of Proposed Rulemaking preambles.

The Administrative Procedure Act ("APA") generally requires that agencies, before issuing a rule, publish a notice of proposed rulemaking ("NPRM") in the Federal Register. Among other things, the NPRM must include: a "reference to the legal authority under which the rule is proposed."[21] Historically, this requirement has been relatively straightforward and infrequently litigated, except in rare cases where an NPRM fails entirely to specify the statute(s) under which the agency claims authority to act.[22] As these cases and others confirm, agencies need to identify their legal authority with particularity,[23] but not necessarily in detail—a single sentence asserting authority under statutory sections can suffice.[24] However, in the current environment, it is advisable for agencies to include more than just a statutory cite. Instead, NPRMs should include well-thought-out legal justifications. Clearly articulating a legal justification will have the benefit of eliciting counterarguments early, therefore giving the agency the opportunity to respond to them in the final rule.

If a rule involves a major question, the Court has stated that the agency must identify a "clear congressional authorization for the power it claims," which goes beyond "a merely plausible textual basis." Agencies should therefore both cite specific statutory language, and clearly articulate why this statutory language authorizes the agency's action. When possible, the agency should also articulate how the regulation furthers the statutory purpose.

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[20] NFIB at 666.
[21] 5 U.S.C. § 553(b).
[22] *See, e.g.*, Glob. Van Lines, Inc. v. ICC, 714 F.2d 1290, 1298 (5th Cir. 1983); Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 900 (D.C. Cir. 1978).
[23] *See* Glob. Van Lines, 714 F.2d at 1298.
[24] *See* Nat'l Tour Brokers Ass'n, 591 F.2d at 900; *see also* Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor, 745 F.3d 653, 676 (3d Cir. 2014) (agency adequately referenced legal basis for proposed rule by citing a specific regulation and, in other sections of the NPRM, citing statutory basis); United States v. Stevenson, 676 F.3d 557, 563 (6th Cir.2012) (explaining that "[t]he APA does not require that the proposed rule cite the relevant legal authority in a certain location").

Agencies should be careful to avoid a new Chevron trap

Given the deference owed to agency interpretations under the *Chevron* regime,[25] agency lawyers may be tempted in final rule documents or litigation to characterize a statutory provision as "ambiguous." However, given the ways in which statutory ambiguity or vagueness may provide fodder for a major questions doctrine challenge, doing so may now subject the rule to *more* judicial scrutiny, not less. As a result, it's probably best for agencies to simply outline what they think is the best articulation of the scope of agency authority, without trying to overtly claim *Chevron* deference.

To the extent possible, agencies should avoid relying solely on their general rulemaking authority.

Congress can provide agencies the authority to regulate through the agency's organic statute or through additional specific statutes. An organic statute may grant the agency general authority to issue rules and regulations in order to fulfill the broad societal aims identified by Congress as necessitating the creation of the agency.[26]

Both steps of the Court's test in *West Virginia v. EPA* counsel against relying solely on general rulemaking authority. In evaluating whether the issue at hand poses a major question, the Court looks to the history and breadth of the authority that the agency has asserted. If the regulation is found to involve a major question, the Court says that it will then look for a "clear congressional authorization" for the power that the agency claims. Moreover, the Court held that a "plausible textual basis" will not suffice. Taken together, this suggests that relying on a grant of general rulemaking authority will likely not be enough to support an agency's action. The only exception might be if an agency has repeatedly exercised its general rulemaking authority in a similar way. However, even then, it seems unlikely that a general grant of rulemaking authority would have the "crystalline clarity," as Lisa Heizerling recently put it, that the Court says is necessary if the rule at issue involves a major question.[27]

Agencies should consider including an analysis of people and/or entities not affected by the rule.

The first question in a MQD analysis concerns whether the regulation at issue raises a "major question," which is assessed in part by examining the "economic and political significance of that assertion." While the Court is not entirely clear about what constitutes "economic and political significance," agencies should think about creative ways to demonstrate that new rules are not sufficiently economically or politically significant to

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[25] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984).

[26] *See, e.g.,* the Department of Housing and Urban Development's general rulemaking authority, at 42 U.S.C. § 3535(d): "The Secretary may delegate any of his functions, powers, and duties to such officers and employees of the Department as he may designate, may authorize such successive re-delegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as *may be necessary to carry out his functions, powers, and duties*." (Emphasis added.)

[27] Lisa Heinzerling, "The Supreme Court is making America Ungovernable," The Atlantic (2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ (last visited Sep 23, 2022). In the past, courts have been relatively receptive to the idea that general grants of rulemaking authority were intended to empower agencies to make substantive rules and not merely procedural or housekeeping rules. See, e.g., American Hospital Association v. NLRB, 499 U.S. 606 (1991) (upholding rules defining bargaining units for hospital employees); National Petroleum Refiners Association v. FTC, 482 F.2d 672, *cert. den.*, 415 U.S. 951 (1974) (upholding FTC Trade Regulation Rules defining "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce"); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1972) (affirming the authority of the FDA to make binding rules that define "prescription drugs"). It is not clear whether the current Court would regard the regulations upheld in these cases as presenting "major questions." If so, they might have accepted challengers' arguments that general grants of rulemaking authority were not intended to authorize quasi-legislative rulemaking. For example, a general grant of authority to an agency "to promulgate regulations for the efficient enforcement of this Act," might not be regarded as clear enough delegation of authority to adopt binding, substantive rules.

implicate a major question. One potential way of doing this is by drawing attention to the population that is *not* affected by a rule.[28]

Related communications strategies

Especially in the *West Virginia* concurrence, but arguably in the majority opinion as well, it appears that the MQD test has effectively made an administration's communications strategy part of the rulemaking record. This of course includes documents the agency publishes in the Federal Register as part of the APA's rulemaking process. Less intuitively, however, post-*West Virginia* it also includes informal communications including press statements, White House or agency fact sheets, and remarks from the President, cabinet members, and prominent administration staffers.[29]

As a result, policymakers — whether in the Executive Branch of Congress — should tread carefully when making remarks about regulations. And advocates and policymakers alike should understand the potential risks of highlighting the significance of a proposed action.[30] An administration that was seeking to minimize the risk of a MQD challenge to a major executive action should probably avoid using terms like: "whole of government approach," "novel," "unprecedented," "sweeping," "broad," "vague" and other synonyms. And it should not imply or infer that it is resorting to executive action only because Congress has refused to act on the issue.[31]

Instead, it should always emphasize that an agency is duly acting within clear statutory guidelines, articulate a limiting principle, and try to characterize the action as routine, or the natural analog to a history of agency practice. For example, an agency might speak of a regulatory initiative as "an important step, clearly authorized by existing law, towards achieving the administration's overall commitment" to a larger policy goal. Encasing communications about specific regulatory initiatives in puffery about an administration's more general aims runs little risk of making the agency's specific regulatory justification appear contrived, so long as the agency's legal analysis carefully links its regulation to the specific authorities conferred on the agency by statute.

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[28] Of course, agencies will need to be careful about not undermining the rationale behind the rule.

[29] The concurrence even cites an informal statement made by President Obama: "It seems that [Congress's failure to cap-and-trade legislation] has frustrated the Executive Branch and led it to attempt its own regulatory solution in the [Clean Power Plan]. *See* 985 F. 3d, at 998, n. 20 (President stating that " 'if Congress won't act soon . . . I will' "). In his concurrence in *NFIB v. OSHA*, Gorsuch cited a tweet by White House Chief of Staff Ron Klain: "It seems, too, that the agency pursued its regulatory initiative only as a legislative 'work-around.'" NFIB at 668 (citing *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 n.13 (CA5 2021) ("On September 9, 2021, White House Chief of Staff Ron Klain retweeted MSNBC anchor Stephanie Ruhle's tweet that stated, "OSHA doing this vaxx mandate as an emergency workplace safety rule *is the ultimate work-around for the Federal govt to require vaccinations*." *See, e.g.*, Pet'rs Burnett Specialists, Choice Staffing, LLC, and Staff Force Inc.'s Reply Brief at 4 (emphasis added).").

[30] Given the vagueness of the MQD, it seems perfectly reasonable to conclude that the political costs of attempting to downplay a regulation's impact are not worth the potential upside (i.e., the chance a given agency communication is determinative). Still, policymakers should at least make these calculations in a clear-eyed manner, and not needlessly jeopardize their rules when possible.

[31] While it may be effective political rhetoric, White House messaging like President Obama's "We Can't Wait" and "I've got a pen and a phone" campaigns may raise red flags in the courts. See Tamara Keith, Wielding A Pen And A Phone, Obama Goes It Alone, NPR, https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone (January 20, 2014); The Obama White House Archives, We Can't Wait, https://obamawhitehouse.archives.gov/economy/jobs/we-cant-wait (accessed: September 2, 2022).


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