The Supreme Court's Clean-Power Power Grab

LISA HEINZERLING*

In 2015, the Environmental Protection Agency ("EPA") issued a final rule—the so-called "Clean Power Plan"—establishing emissions guidelines for states to follow in regulating carbon dioxide from existing power plants.[1] Many parties challenged the final rule in the D.C. Circuit, the only federal circuit court with jurisdiction to review such rules.[2] Some of the challengers asked the D.C. Circuit to stay the rule pending the court's review, but the D.C. Circuit declined to do so, explaining that the challengers had not met the strict requirements for such relief.[3] The challengers then moved on to the Supreme Court, filing five separate applications to stay EPA's rule pending judicial review in the D.C. Circuit.[4] The applicants for a stay did not file, or indicate they intended to file, petitions for certiorari, and they did not challenge the D.C. Circuit's decision denying a stay. Instead, they challenged the Clean Power Plan itself and asked that it be stayed pending initial judicial review of the rule in the D.C. Circuit. The Court's orders granting the stay ran directly to EPA's rule, not to any judicial decision.

In staying EPA's Clean Power Plan, the Supreme Court for the first time stopped a nationally applicable agency regulation prior to an initial decision on the merits of the rule in a lower court. Equally notable, it appears that the Court

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* Justice William J. Brennan, Jr. Professor of Law, Georgetown University Law Center. I am very grateful to Jake Friedman for excellent research assistance and to Irving Gornstein and David Vladeck for helpful comments. Any errors are, of course, my own.

1. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Clean Power Plan].

2. Clean Air Act, 42 U.S.C. § 7607(b) (2014).

3. Order Denying the Motions for Stay, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/order_denying_stay.pdf.

4. Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, West Virginia v. EPA, No. 15A773 (U.S. Jan. 26, 2016) [hereinafter Application by 29 States], http://www.scotusblog.com/wp-content/uploads/2016/01/15A773-application.pdf; Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review, Basin Elec. Power Coop. v. EPA, No. 15A776 (U.S. Jan. 27, 2016) [hereinafter Application of Utilities], http://www.scotusblog.com/wp-content/uploads/2016/01/15A776-utilities-stay-appliciation.pdf; Application of Business Associations for Immediate Stay of Final Agency Action Pending Appellate Review, Chamber of Commerce v. EPA, No. 15A787 (U.S. Jan. 27, 2016) [hereinafter Application of Business Associations], http://www.ago.wv.gov/publicresources/epa/Documents/2.pdf; Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review, Murray Energy Corp. v. EPA, No. 15A778 (U.S. Jan. 27, 2016) [hereinafter Coal Industry Application], http://www.ago.wv.gov/publicresources/epa/Documents/3.pdf; Application by the State of North Dakota for Immediate Stay of Final Agency Action Pending Appellate Review, North Dakota v. EPA, No. 15A793 (U.S. Jan. 29, 2016) [hereinafter Application by North Dakota], https://www.edf.org/sites/default/files/content/2016.01.29_north_dakota_scotus_stay_application.pdf.

may have used its general equitable authority, not to respond to a potentially erroneous decision from an inferior court, but to directly order the federal executive branch to stand down. In granting the stay, the Court likely doubled down on a set of highly problematic interpretive principles it has embraced in recent terms and accepted a disquietingly broad view of the nature of the harm justifying a stay. The Court declined to follow any of the readily available and more deliberative procedural pathways to a decision of this consequence. The five Justices who voted for the stay declined even to explain their decision, offering instead only five terse, identically worded orders in response to five differently argued applications for a stay.[5] Having aggressively inserted themselves into one of the most intense legal and political battles of the day, the Justices then sidled away, leaving advocates, the public, and the lower court that is now reviewing the merits of EPA's rule to guess at the basis for, and even the scope of, the Court's order.

The Supreme Court had better choices than this. It could have, most simply, declined to grant the stay on the merits. It could have, as it has done in every other case it has faced involving a challenge to an agency rule, waited for an initial decision on the merits of the rule in a lower court before entering the fray. It could have treated the applications for a stay as petitions for certiorari and granted review on the question of whether the D.C. Circuit had erred in declining to stay the Clean Power Plan. At the very least, it could have followed a more careful and illuminating process in acting on the stay. By far the soundest option was to decline to grant the stay. But any one of the other alternatives would have been an improvement on the Court's unprecedented and precipitous action.

There are at least ten ways in which the Supreme Court's decision and process on the applications to stay the Clean Power Plan reflected bad choices:

1. *Doubling down on the power canons*. In deciding to grant a stay of the Clean Power Plan, the Supreme Court may have relied heavily on a recent and controversial interpretive canon that disfavors expansions of regulatory authority. Chief among the factors relevant to ruling on an application for a stay are the likelihood that a majority of the Justices will eventually reverse the decision to stay and the likelihood that irreparable harm will occur if no stay is granted.[6] On the likelihood of reversal, the Court has required a "fair prospect that a majority

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5. *See, e.g.*, *infra* text at notes 37-40 (noting applicants' differing arguments as to jurisdictional basis for stay).

6. *See, e.g.*, Rostker v. Goldberg, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980). As I argue in text *infra* notes 34–66, the jurisdictional basis for the Court's orders stopping the Clean Power Plan is unclear. The exact standard for calling a halt to EPA's rule differed depending on the jurisdictional hook the Court used, but under any of the possible jurisdictional theories in play, the Court's assessment of the legal merits of EPA's rule would have been relevant. *See, e.g.*, *id.* (describing requirements for granting a stay of a three-judge district court injunction pending Supreme Court review on appeal); Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34–36 (1980) (describing requirements for writ of mandamus to lower court).

of the Court will conclude that the decision below was erroneous."[7] Although the five applications for a stay each made somewhat different legal arguments against the Clean Power Plan focusing on different features of the rule, all shared the central claim that EPA had misinterpreted the Clean Air Act in issuing the final rule. In deciding whether a majority of the Court was likely to eventually reject EPA's rule, the Justices must have identified for themselves the appropriate interpretive principles to bring to bear on the statutory provisions relevant to the case.[8] Recent cases suggest that the Justices voting for a stay may have leaned heavily on one of several newly minted, deeply problematic, judicially created interpretive principles in preliminarily finding a "fair prospect" that the Court will eventually reject the Clean Power Plan.

In three recent cases, the Court has embraced three new, normative principles of statutory interpretation. When an agency charged with administering a long-existing statute asserts regulatory authority it has not previously used, in a matter having large economic and political significance, its interpretation will be disfavored.[9] When an agency charged with administering a statute answers a question of large economic and political significance, one central to the statutory scheme, and the Court believes the agency is not an expert in the matter, the Court may ignore the agency's interpretation altogether.[10] And when an agency charged with administering a statute interprets an ambiguous provision to permit the agency not to consider costs before deciding to regulate, the court will likely find that the agency acted unreasonably.[11] With each of these new canons, the Court put Congress on (retroactive) notice that it must speak more clearly if it wants to give administrative agencies interpretive authority over certain kinds of decisions. In each case, the Court's seizure of power aligned with its basic antipathy to an active administrative state. I have called the new canons the "power

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7. *Rostker*, 448 U.S. at 1308; *see also* Maryland v. King, 133 S. Ct. 1, 2 (2012) (Roberts, Circuit Justice 2012). When a single justice acts as the designated "Circuit Justice" on a stay application from the circuit court to which he or she has been assigned, the justice must, in deciding whether there is a "fair prospect" of eventual reversal of the decision under review, try to predict how the other justices will view the merits of that decision, if it is eventually reviewed by the full Court. *See, e.g.*, *Rostker*, 448 U.S. at 1309 (Brennan, J., in chambers, noting that his task on reviewing an application for a stay was "not to determine my own view on the merits, but rather to determine the prospect of reversal by this Court as a whole"). When the full Court rules on a stay application, as it did with respect to the Clean Power Plan, some of this guesswork is eliminated; a five-justice majority on a stay means that five justices believe there is a "fair prospect" that their majority will hold when, and if, the decision below eventually comes to the Court on the merits.

8. As Justices Kennedy and Scalia emphasized in a recent case, irreparable injury alone will not justify a stay; the applicant for a stay must also show that the decision under review "was erroneous on the merits." Nken v. Holder, 556 U.S. 418, 438–39 (2009) (Kennedy, J., joined by Scalia, J., concurring).

9. Util. Air Regulatory Grp. v. EPA (*UARG*), 134 S. Ct. 2427, 2444 (2014). For an excellent critique of the Court's decision in *UARG*, see William W. Buzbee, *Anti-Regulatory Skewing and Political Choice in* UARG, 39 HARV. ENVTL. L. REV. 63 (2015).

10. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

11. Michigan v. EPA, 135 S. Ct. 2699, 2707–08 (2015).

canons."[12]

As I argue at length elsewhere, the power canons have no credible link to an assessment of likely congressional behavior or desires.[13] They are normative canons, not descriptive canons, and they explicitly or implicitly call upon contestable ideas about sound public policy. As such, they are the most dangerous kinds of interpretive canons from a democratic perspective—normative instructions running from unelected judges to the legislative and executive branches, untethered to any plausible constitutional foundation. Yet the Supreme Court has made essentially no effort to lay normative foundations for its new trio of canons. Thus, I argue at length elsewhere, borrowing from Professor Eskridge's normative framework for evaluating interpretive canons,[14] the power canons are not normatively justified: they disrupt the rule-of-law values of predictability and objectivity, threaten democratic values, and draw on no widely shared public values.[15] The power canons are a power grab.

There is good reason to believe that at least one of these problematic interpretive principles played a central role in the Supreme Court's decision to stay the Clean Power Plan. Five different applications for a stay of the Clean Power Plan were filed with the Court,[16] and all five were granted.[17] The submissions in support of a stay leaned heavily on the first canon, embraced in *UARG*,[18] which warns that an agency's new assertion of regulatory authority under a long-extant statute will be greeted with judicial skepticism. For example, the table of authorities of the application of West Virginia, Texas, and twenty-seven other states and state agencies indicates that references to *UARG* can be found "passim" in the document.[19] The states' application for a stay, and the applications from the utility industry, business associations, and coal companies, each opened by invoking the Court's decision in *UARG*.[20] Not only did the parties asking for a stay rest heavily on the Court's new interpretive principle, but the uncommon quickness of the Court's decision on the stay suggests that some convenient thumb on the scales—like an interpretive canon—may have helped speed the Court on its way.[21] Given the intricacy and complexity of the statutory and constitutional issues raised by the applications for a stay, it seems fair to surmise that the Court's decision to grant a stay was helped along by the

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12. *See* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (forthcoming 2017).

13. *Id.*

14. William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013).

15. *See* Heinzerling, *supra* note 12.

16. *See* sources cited *supra* note 4.

17. *See, e.g.*, Order Granting Stay, West Virginia v. EPA, No. 15A773, 2016 WL 502947 (U.S. Feb. 9, 2016).

18. *UARG,* 134 S. Ct. at 2444.

19. Application by 29 States, *supra* note 4, at iii–iv.

20. Application of Utilities, *supra* note 4, at 2; Application of Business Associations, *supra* note 4, at 2; Coal Industry Application, *supra* note 4, at 3.

21. The first application for a stay was filed on January 21, 2016 (Application of States), and the Court granted the stay on February 9, 2016.

simplifying expedient of *UARG*'s new and controversial interpretive principle.[22] More generally, the Court's trio of recent cases constraining agencies' interpretive discretion in high-stakes regulatory matters suggests that four members of the current Court are in an anti-regulatory frame of mind, one consistent with the decision to stay the Clean Power Plan.

All of this is to say that there is a strong basis for condemning, on the merits, the Court's grant of a stay of the Clean Power Plan. In finding a "fair prospect" that EPA's rule would eventually be rejected, five justices likely relied on a highly dubious canon of statutory interpretation. This canon privileges stasis over change, and government inaction over government action.[23] Wheeling such a loaded canon into the decision on the stay of the Clean Power Plan would practically preordain the outcome. Yet, as far as one can discern based on the arguments made before the Court, this may be exactly what the Court did.

2. *Irreparable harm?* The Court's implicit finding that, in the absence of a stay, irreparable harm would have occurred during the period in which the D.C. Circuit reviews the Clean Power Plan appears to have rested on an almost parental protectiveness toward the states and/or the energy industry. No legal deadline was imminent for any of the applicants for a stay. States' plans to implement the EPA's rule were not due until September 2016, with extensions until 2018 available based on a modest presentation of information about the plans.[24] States could also choose not to develop such plans and to leave this responsibility to the EPA[25]—a choice pervasive in longstanding cooperative-federalism regimes. To find that irreparable harm to the states would occur before the D.C. Circuit had a chance to rule on the merits of the Clean Power Plan, the Court must have deemed it unacceptable to press the states either to begin developing their own plans or to decide to stick with the EPA's plan. That is, the Court must have deemed it unacceptable to press the states even to take the initial steps toward opting in or out of a cooperative-federalism regime. Such a finding would not only reflect a new and aggressive antipathy to a regime of cooperative federalism, but would also envision the states as delicate flowers that must be sheltered, at all costs, from federal stimuli.

It is even harder to imagine how the Court might have found irreparable harm on the part of the energy industry. The Clean Power Plan's interim deadlines for

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22. The applications for a stay also relied heavily on the Court's recent decision in *Michigan v. EPA*, which as noted above also created a new interpretive principle. The parties cited this case, however, not so much for the interpretive principle created by the Court's decision there, but for the idea that the case stood as a cautionary tale against *not* granting a stay of an EPA rule that might eventually be rejected.

23. Heinzerling, *supra* note 12.

24. Clean Power Plan, 80 Fed. Reg. at 64,669; 40 C.F.R. § 60.5765(a).

25. Clean Power Plan, 80 Fed. Reg. at 64,666; *see also* William W. Buzbee, *Federalism-Facilitated Regulatory Innovation and Regression in a Time of Environmental Legislative Gridlock*, 28 GEO. ENVTL. L. REV. 451 (2016).

power plants to meet specified performance rates do not begin until 2022,[26] and final compliance is not due until 2030.[27] To attribute current and near-term declines in the extraction and use of coal in the energy sector to the distant deadlines of the Clean Power Plan, rather than to other factors such as growing competition from other energy sources, including natural gas and renewables, would be to accept a melodramatic vision of the power of the Clean Power Plan.[28] If planning for compliance with distant regulatory deadlines suffices to show irreparable harm and justifies a stay of a nationally applicable regulation, the Supreme Court's docket will burst with applications for regulatory stays.

3. *The unprecedented nature of the Court's stay*. No party weighing in on the applications for a stay, either in favor or opposed, was able to identify any previous case in which the Supreme Court had stayed the application of an agency rule before any court had reviewed it.[29] Yet the Supreme Court is, by and large, an *appellate* court. With the exception of a handful of constitutionally based varieties of original jurisdiction,[30] none relevant in the context of the Clean Power Plan, the Supreme Court reviews judgments of the lower federal courts and of the highest state courts with authority to decide relevant questions. In the case of the Clean Power Plan, however, the applicants for a stay did not ask for review of the judgment of a lower court. A three-judge panel of the D.C. Circuit declined to stay the Clean Power Plan pending its own review of the rule,[31] but no party seeking a stay of the rule asked the Supreme Court to review the D.C. Circuit's denial of a stay.[32] No party, in other words, paired its application for a stay with a petition for certiorari asking the Court to review the D.C. Circuit's denial of a stay. Instead, all challengers asked the Court to stay, not a judgment of a lower court, but the Clean Power Plan itself. In granting a stay of the Clean Power Plan, rather than of a decision of a lower court, the Supreme Court acted not as an appellate court—a court of last resort—but as a court of first resort, with effectively original jurisdiction. The legal and factual circumstances of the case did not, as discussed earlier, warrant granting a stay at all, much less breaking new legal ground in doing so.

4. *The unclear jurisdictional basis for the Court's orders.* The unique posture of the case creates uncertainty about the jurisdictional basis for the Court's

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26. Clean Power Plan, 80 Fed. Reg. at 64,669.

27. *Id.* at 64,667.

28. For detailed argument, *see* Non-State Respondent-Intervenors' Opposition to Applications for Stay of Final Agency Action Pending Appellate Review at 17–19, West Virginia v. EPA, No. 15A773 (U.S. Jan. 26, 2016).

29. On Application for Immediate Stay of Final Agency Action, Nos. 15A773, 15A776, 15A778, 15A787, 15A793 (U.S. Feb. 3, 2016).

30. U.S. CONST. art. III, § 2 (granting original jurisdiction to the Supreme Court in "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party").

31. Order Denying Stay, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

32. *See, e.g.*, Application by 29 States, *supra* note 4, at 1, 48 (29 states and state agencies ask for stay of EPA's decision).

orders. In its brief, identical orders granting the five applications for a stay of EPA's rule, the Court did not identify the source of its power to hear the case.[33] Moreover, the five different sets of applicants for a stay did not agree about the source of the Supreme Court's authority to hear the case and issue a stay.[34] The applicants' disarray reflects the uncertain jurisdictional basis for the Court's orders.

Consider again the posture of the case. The applicants for a stay sought a court order directing an executive branch agency to stand down.[35] They did not seek a court order holding a decision of another court in abeyance. They did not even seek a court order holding EPA's decision in abeyance, while they sought review of a decision of another court. In this posture, it was functionally irrelevant that the D.C. Circuit was in the midst of its own review on the merits of the Clean Power Plan, and it was also irrelevant that the D.C. Circuit had itself denied a stay of the rule. The applicants for a stay cut out the middleman—the D.C. Circuit—and instead went straight for the EPA and its rule.

Article III of the Constitution states that the Supreme Court "shall have appellate Jurisdiction, . . . with such Exceptions, and under such Regulations as the Congress shall make."[36] The applicants for a stay of the Clean Power Plan cited, in varying configurations, four different statutory provisions, which, they asserted, gave the Supreme Court jurisdiction to hear the case: 28 U.S.C. § 1254(1) (on certiorari jurisdiction),[37] 28 U.S.C. § 2101(f) (on stays pending the filing of writs of certiorari),[38] 5 U.S.C. § 705 (Administrative Procedure Act's provision on stays of administrative action),[39] and 28 U.S.C. § 1651(a) (All Writs Act).[40]

Let us take these statutory provisions one at a time, starting with section 1254(1), concerning the Supreme Court's review of federal appellate court decisions. Section 1254(1) provides for review of "[c]ases in the courts of appeals . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."[41] No party asking for a stay of the Clean Power Plan filed a writ of certiorari, nor indicated an imminent intent to file one. Nor did the Court treat the applications for a stay as petitions for a writ of certiorari. A provision giving the Court jurisdiction over

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33. *See, e.g.*, Order Granting Stay, West Virginia v. EPA, No. 15A773 (U.S. Feb. 9, 2016).

34. *See infra* notes 37–40.

35. *See, e.g.*, Application by 29 States, *supra* note 4, at 1, 48 (requesting stay of EPA's final Clean Power Plan).

36. U.S. CONST. art. III, § 2.

37. Application by 29 States, *supra* note 4, at 5; Application of Business Associations, *supra* note 4, at 4; Application by North Dakota, *supra* note 4, at 5.

38. Coal Industry Application, *supra* note 4, at 11.

39. Application of Utilities, *supra* note 4, at 5.

40. *Id.*

41. 28 U.S.C. § 1254(1) (2015).

cases in which it grants a writ of certiorari does not give the Court jurisdiction over cases that do not even involve a request for, much less a grant of, a writ of certiorari.

One of the applications for a stay of the Clean Power Plan seemed to recognize as much. The application for a stay from the self-denominated "Coal Industry," represented by Professor Laurence Tribe of Harvard Law School, noted that the D.C. Circuit's judgment on the Clean Power Plan "*will be* subject to review" under section 1254(1) (presumably, once the D.C. Circuit has in fact rendered such a judgment), and argued that the Court "*therefore* has jurisdiction to entertain and grant a request for a stay pending review under 28 U.S.C. § 2101(f)."[42] For their part, therefore, the Coal Industry applicants appear to have acknowledged that jurisdiction did not yet exist under section 1254(1).

The applications for a stay asked the Court to halt, not a lower court decision, but a ruling by an executive branch entity. Over 100 years ago, the Supreme Court held that the writ of certiorari was unavailable for such a purpose:

> The writ of certiorari is one of the extraordinary remedies, and being such it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an *attempt to use the writ for the purpose of reviewing an administrative order*. This cannot be done.[43]

If a writ of certiorari may not be used for the purpose of reviewing an administrative decision, then the Court must not have relied on its certiorari jurisdiction in granting the stay of the Clean Power Plan.

Turning to section 2101(f), on which the Coal Industry relied, this provision permits "a [J]ustice of the Supreme Court" to stay "the execution and enforcement of . . . a judgment or decree," with the latter phrase referring to "the final judgment or decree *of any court* that is subject to review by the Supreme Court on writ of certiorari."[44] This provision does not, by its terms, give the Supreme Court the power to stay an *agency regulation* that has not been the subject of a "final judgment or decree of any court."[45] Even assuming that the D.C. Circuit's denial of a stay could be considered a "final judgment or decree," the parties asking for a stay were not seeking review of that decision. Again, no party petitioned for certiorari on that decision and the Court did not treat the applications for a stay as petitions for certiorari. The only "final judgment or decree" at issue in the applications for a stay was EPA's final rule. But section 2101(f) says

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42. Coal Industry Application, *supra* note 4, at 11 (emphasis added).
43. Degge v. Hitchcock, 229 U.S. 162, 172 (1913) (emphasis added).
44. 28 U.S.C. § 2101(f) (2015) (emphasis added).
45. *Id.*

nothing about final agency rules.[46]

The Coal Industry applicants also cited *Nken v. Mukasey*[47] as authority for their application, noting that in that case the Court granted an application to stay agency action, while a petition for review was still pending in the federal appellate court.[48] The Coal Industry applicants failed to mention, however, that the Court treated Mr. Nken's application for a stay as a petition for certiorari seeking review of the lower court's denial of a stay, granted review, and stayed the agency action pending its own review of *the lower court's decision denying a stay*.[49] *Nken v. Mukasey* would have supported the Court's treating the applications for a stay of the Clean Power Plan as petitions for certiorari seeking review of the D.C. Circuit's denial of a stay, granting the petitions, and then reviewing the D.C. Circuit's denial of a stay. But that is not what the Court did. The Court did not review or stay a lower court decision; it reviewed and stayed an action of the executive branch.

Next, section 705 of the Administrative Procedure Act ("APA")[50] is not a grant of jurisdiction.[51] It allows courts, including the Supreme Court, to grant relief pending judicial review of agency action, but it does not itself confer jurisdiction over cases seeking such relief. If the Supreme Court did not have appellate jurisdiction under other statutory provisions, the jurisdictional gap is not filled by section 705 of the APA.

All of this appears to leave only the All Writs Act as a source for the Court's jurisdiction over the Clean Power Plan. The All Writs Act authorizes "[t]he Supreme Court and all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions."[52] The Supreme Court has held, however, that the All Writs Act does not "enlarge" a court's jurisdiction;[53] it is "not an independent grant of appellate jurisdiction."[54] These

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46. Not even the Supreme Court's own rules, also cited by the Coal Industry applicants, appear to contemplate a stay in the absence of a challenge to a decision in the lower courts. Coal Industry Application, *supra* note 4, at 11. Rule 23 cites only to section 2101(f), which, again, refers to judgments or decrees of courts, not administrative agencies. Rule 23 also requires parties seeking a stay to include a copy of "the order and opinion, if any," to the application for a stay. *Id.* "Order and opinion" are strange words to describe final agency rules. In the context of Rule 23, moreover, it seems clear that the "if any" qualification recognizes not that the decision subject to a stay might be the decision of a governmental institution other than another court, but that in some cases the other court might not have issued a written order or opinion.

47. Nken v. Mukasey, 555 U.S. 1042 (2008).

48. Coal Industry Application, *supra* note 4, at 11.

49. Nken, 555 U.S. 1042; *see generally* Nken v. Holder, 556 U.S. 418 (2009).

50. 5 U.S.C. § 705 (1966).

51. Califano v. Sanders, 430 U.S. 99, 104–07 (1976); Anglers Conservation Network v. Pritzker, 809 F.3d 664, 670 (D.C. Cir. 2016) ("The APA is not jurisdictional.").

52. 28 U.S.C. § 1651(a) (2015).

53. Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999).

54. *Id*. at 534 (quoting 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3932 (2d ed. 1996)). *See also* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33 (2002) (All Writs Act does not furnish removal jurisdiction).

observations suggest that unless a statute, other than the All Writs Act, provided the Supreme Court with appellate jurisdiction over the applications for a stay of the Clean Power Plan, the Court did not have jurisdiction to grant relief under the All Writs Act.

In *Ex parte Republic of Peru*,[55] however, the Supreme Court held that it had the power under the All Writs Act to issue a writ of mandamus directly to a federal district court,[56] even though it had no direct appellate jurisdiction over the case.[57] Citing *Marbury v. Madison*,[58] the Court acknowledged that its "statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction."[59] Even though the Court did not have appellate jurisdiction over the case at that time, the Court relied on its historic supervisory powers over the lower courts in finding it had jurisdiction to issue the writ to the district court:

> The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so.[60]

Later cases put federal appellate courts' power to issue extraordinary writs this way: such authority "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected."[61]

Because the Supreme Court has appellate jurisdiction to review the decisions of lower courts on challenges to agency regulations, it might be argued that *Ex parte Republic of Peru* and cases in its line support a conclusion that the Court has jurisdiction to issue extraordinary writs to federal agencies under the All Writs Act. After all, just as the district court's decision in *Ex parte Republic of Peru* was not subject to direct appeal in the Supreme Court but nonetheless the Court held itself empowered to issue a writ of mandamus, so, too, EPA's Clean Power Plan was not subject to direct appeal in the Supreme Court but perhaps the Court nonetheless had power to issue a writ of mandamus holding it in abeyance.

This conclusion does not, however, follow from *Ex parte Republic of Peru* and the cases in its line. It is one thing to leapfrog over the intermediate federal appellate courts to reach the federal district courts with an extraordinary writ. It is quite another to leapfrog over them in pursuit of an agency of the executive

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55. *Ex parte* Republic of Peru, 318 U.S. 578 (1943).
56. *Id.* at 586.
57. *Id.* at 594–96 (Frankfurter, J., dissenting).
58. 5 U.S. (1 Cranch) 137 (1803).
59. *Republic of Peru*, 318 U.S. at 582.
60. *Id.* at 583.
61. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

branch. The Supreme Court's historical supervisory power over the lower federal courts does not extend to the executive branch.

Loose dicta from an opinion by Chief Justice Roberts, when he was on the D.C. Circuit, appears to suggest that relief against administrative agencies may be available under the All Writs Act: "Once there has been a proceeding of *some* kind instituted before an agency or court that might lead to an appeal, it makes sense to speak of the matter as being 'within [our] appellate jurisdiction'—however prospective or potential that jurisdiction might be."[62] In that case, however, then-Judge Roberts did not have to face the full force of his suggestion, as he found that judicial review was inappropriate in any event because no proceedings had been instituted in the relevant agency or courts before the plaintiff asked the D.C. Circuit for relief.[63] Moreover, if *prospective or potential* jurisdiction were enough to create *actual* jurisdiction, the All Writs Act would become a powerful independent source of jurisdiction, in the face of the Supreme Court's holding that it is "not an independent grant of appellate jurisdiction."[64] There would be no limit to the premature claims that could be brought against administrative agencies, if the All Writs Act trumped context-specific grants of (and limits on) Supreme Court jurisdiction.

The D.C. Circuit itself has recognized as much with respect to its own authority. It has declined to interpret the All Writs Act to create federal jurisdiction over a claim that otherwise would be unreviewable in the posture in which it is presented.[65] Indeed, the D.C. Circuit did so in rejecting a challenge to the *proposed* Clean Power Plan, holding that challengers' attempt to obtain judicial review of EPA's proposed rule, based on the All Writs Act, could not succeed:

> Petitioners contend . . . that we should consider their challenge now because they are already incurring costs in preparing for the anticipated final rule. And petitioners say that the Court will not be able to fully remedy that injury if we do not hear the case at this time. But courts have never reviewed proposed rules, notwithstanding the costs that parties may routinely incur in preparing for anticipated final rules. We recognize that prudent organizations and individuals may alter their behavior (and thereby incur costs) based on what they think is likely to come in the form of new regulations. But that reality has never been a justification for allowing courts to review proposed agency rules. We see no persuasive reason to blaze a new trail here.[66]

Before the Supreme Court stayed the Clean Power Plan, that Court, too, had never exercised jurisdiction over the kind of claim presented to it. Unlike the

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62. *In re* Tennant, 359 F.3d 523, 529 (D.C. Cir. 2004).
63. *Id*. at 529–30.
64. *See, e.g.*, *Clinton*, 526 U.S. at 534.
65. *In re* Murray Energy Corp., 788 F.3d 330, 335 (D.C. Cir. 2015) (Kavanaugh, J.).
66. *Id.*

D.C. Circuit, however, the Supreme Court appears to have seen a "persuasive reason to blaze a new trail." But the Court did not elaborate on, or even mention, the source of its authority to issue the stay. It remains a mystery why the Court thought it had the power to do what it did.

5. *A better alternative*. If, instead of granting a stay of EPA's rule, the Court had treated the applications for a stay as petitions for certiorari seeking review of the D.C. Circuit's denial of a stay, several problems would have been avoided. Treating the applications for a stay as petitions for certiorari and then reviewing the lower court's denial of a stay would have broken no new legal ground,[67] and thus would not have potentially encouraged a new flood of premature administrative challenges. Dealing with the case in this way would have fit the Court's status as an appellate court, not a court of original jurisdiction, as the decision directly under review would then have been the D.C. Circuit's denial of a stay and not EPA's final rule. This treatment of the case would have forced the Court to reflect more deliberately on its authority to order an executive branch entity to stand down from implementing a nationally applicable rule prior to any lower court decision on the merits of the rule. Treating the applications for a stay as petitions for certiorari also would have forced the Court to crystallize the scope of its review into a precisely worded question to be decided, allowed for full briefing and argument, and (barring a 4-4 tie) terminated with a written explanation of the Court's ultimate disposition. Doing so also would have shortened the length of the stay; the stay would have lasted only as long as it would have taken to resolve the legality of the D.C. Circuit's denial of the stay. Proceeding in this fashion also would have spared the D.C. Circuit the awkwardness of deciding a case in the shadow of the Supreme Court's premature consideration of the merits of the dispute. That awkwardness is made all the greater by the fact that even if the D.C. Circuit rules against the challengers and upholds the Clean Power Plan in its entirety, the Supreme Court has already taken the decision whether to stay the rule pending Supreme Court review out of the D.C. Circuit's hands.

In granting a stay of the Clean Power Plan, without simultaneously treating the applications for a stay as petitions for certiorari and granting review of the D.C. Circuit's denial of a stay, the Court at once acted with maximal aggressiveness—stopping a highly consequential agency rule before any court had ruled on its legality—and coy passivity—saying nothing about its reasoning while putting the D.C. Circuit on notice that it did not trust it to do the right thing.

6. *The absence of an explanation*. The justices should have explained themselves. True, as Justice Scalia put it in his opinion joining the Court's grant of a stay in *Bush v. Gore*, "it may not be customary for the Court to issue an opinion in connection with its grant of a stay,"[68] but there was nothing customary about the

67. *See, e.g.*, Nken v. Mukasey, 555 U.S. 1042 (2008).

68. Bush v. Gore, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring).

Court's action on the Clean Power Plan. In fact, in *Bush v. Gore*, Justice Scalia himself wrote a short opinion explaining his vote to stay the Florida Supreme Court's ruling requiring a recount,[69] and Justice Stevens filed a written dissent.[70] In numerous other cases as well, the justices have found it appropriate, when ruling on applications for stays, to express their views in writing.[71] In calling a halt to the country's signature program to address climate change, the justices should at least have explained their thinking. Without a public explanation of the votes on the stay, we have no idea what question the justices were answering when they voted and no idea what their reasoning was in answering the question in the way they did.

7. *The uncertain scope of the Court's orders*. The Court's reticence extended even to the orders themselves, which granted the stay of the Clean Power Plan in five terse sentences. The key sentence says simply:

> The Environmental Protection Agency's 'Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,' 80 Fed. Reg. 64,662 (October 23, 2015), is [sic] stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought.[72]

One applicant for a stay had requested that all of the compliance deadlines in the rule be extended, "pending final disposition of their legal challenges to the rule."[73] The Court does not say whether it meant to grant this specific request, although it granted this application for a stay.[74] The Court also does not specify what conduct on the part of EPA might be considered noncompliance with the order. EPA is now in the midst of other rulemaking proceedings on issues emanating from the Clean Power Plan.[75] May it continue with these processes in light of the Court's stay of the rule on which these other proceedings are predicated? May it continue to advise states eager to move forward under the Clean Power Plan? May it continue to advise states that are not so eager to move forward, but that wish to hedge their bets? The Court has lobbed one terse, unilluminating, and disruptive sentence into a complex and interconnected set of agency actions. It will not be surprising if confusion ensues.

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69. *Id.*

70. *Id.* at 1047 (Stevens, J., dissenting).

71. *See, e.g.*, Netherland v. Tuggle, 515 U.S. 951 (1995); Indiana State Police Pension Trust v. Chrysler LLC, 556 U.S. 960 (2009).

72. Order Granting Stay, West Virginia v. EPA, No. 15A773 (U.S. Feb. 9, 2016).

73. Application of Utilities, *supra* note 4, at 5.

74. Order Granting Stay, Basin Elec. Power Coop. v. EPA, No. 15A776 (U.S. Feb. 9, 2016).

75. *See* Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, 80 Fed. Reg. 64,966 (proposed Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, 78).

Enforcement of the stay is made even trickier by the unique posture of the case: because there is no judicial decision under review, the Court's order is targeted directly at an executive action and thus it appears that any enforcement of the stay would run directly from the Supreme Court to the executive branch. But to whom in the executive branch does the Court's order run? Not for nothing does the APA specifically require that, although a judgment or decree in a challenge to agency action may be entered against the United States, "any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance."[76] Without such specification, it would be difficult to identify who in a vast administrative apparatus is responsible for ensuring compliance (or for failing to ensure compliance) with a judicial order to an agency. The Court's orders granting a stay of the Clean Power Plan do not specify who is responsible for ensuring compliance with the orders.[77]

Further uncertainty has been introduced by the intervening death of Justice Scalia. The remaining justices now stand tied, 4-4, on the propriety of staying the Clean Power Plan. The stay remains in effect, but who will enforce it?

8. *The absence of other judges' views on the legal issues presented*. The justices' intervention before a decision on the Clean Power Plan from a lower court means that they did not have the benefit of other judges' thinking on the legal issues raised by the Clean Power Plan. Usually, the justices find it useful to know how their colleagues on other courts have responded to a legal issue before the justices even decide to accept the issue for review, much less decide it for themselves. Indeed, one standard ground for denying certiorari in the Supreme Court is that a legal issue would benefit from further "percolation" in the lower courts before coming to the Supreme Court.[78] Often, in fact, the Court lets splits in the lower courts simmer for a very long time—sometimes indefinitely—before weighing in on an issue that has vexed other courts.[79] In the case of the Clean Power Plan, due to a special provision in the Clean Air Act, EPA's rule is subject to exclusive review in the D.C. Circuit, eliminating the possibility of a circuit split.[80] Even so, if the challenge to the Clean Power Plan had proceeded along the usual lines, the Supreme Court would have had before it at least the views of a three-judge panel of the D.C. Circuit, and perhaps even the views of that court as a whole, sitting en banc. The five justices who voted for the stay apparently felt

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76. 5 U.S.C. § 702 (2012).

77. The Court's Rules require petitions for extraordinary writs to "state the name and office or function of every person against whom relief is sought." SUP. CT. R. 20(3)(a).

78. *See* SUP. CT. R. 10.

79. *See* E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977) (positing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals"); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1166 (2012).

80. Clean Air Act, 42 U.S.C. § 7607(b) (2014).

they had no need to hear more from the judges of the D.C. Circuit—the nation's preeminent administrative-law court—before stopping the Clean Power Plan.

9. *The absence of a question presented.* In granting the stay without an accompanying petition for a writ of certiorari, the Supreme Court acted without having a precise question or questions presented to it. Normally a party who has lost a case in the courts below identifies for the Court the exact issue it would like the Court to decide.[81] The party's adversary often reframes that issue[82] in opposing review. Moreover, the Court itself often reframes the issue,[83] or selects among the issues presented to it for review. Identifying the precise question or questions to be decided is, in short, a crucial step in defining and winnowing the Court's scope of review. In the case of the Clean Power Plan, however, the Court faced a welter of petitions for a stay, making a welter of legal claims. Five different sets of parties asked for a stay, and they made five different sets of legal claims. Some of these claims were statutory, some constitutional. Some claims went to EPA's authority to issue the Clean Power Plan at all,[84] others went to specific aspects of EPA's rule.[85] Yet the Supreme Court saw fit to grant each of the five different applications for a stay, using separate, identically worded orders. We are left, then, to wonder exactly what question or questions the Court answered in granting the stay. Perhaps each of the five justices voting to grant the stay answered a different question, or answered the same question in a different way. We do not know; they did not say.

10. *Pandora's new mess.* We have entered new terrain, where four of the remaining justices stand willing to call a halt to agency regulations before any other court has issued an initial decision on the merits. In granting, for what appears to be the very first time, a stay of an agency rule that has not been reviewed by any lower court, the Supreme Court has opened a new world of opportunity for those disappointed with agency regulations. Recent decisions constraining agencies' interpretive discretion when the regulatory stakes are high suggest that the new avenue of relief may be open mostly to regulated entities, not regulatory beneficiaries. These decisions have left the impression that the Court is quite willing to inject extreme uncertainty into a regulatory scheme, in the service of its general antipathy to an active administrative state.[86] The Court's

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81. SUP. CT. R. 14(A).

82. *Compare* Petition for a Writ of Certiorari at i, Michigan v. EPA, 135 S. Ct. 2699 (2015) (No. 14-46) (presenting one question regarding the word "appropriate"), *with* Brief for the Federal Respondents in Opposition at i, Michigan, 135 S. Ct. 2699 (2015) (No. 14-46) (presenting two separate questions to the Court that focus on the reasonableness of EPA regulation, rather than interpreting the single word "appropriate").

83. Michigan v. EPA, 135 S. Ct. 702 (2014) (No. 14-46) (granting certiorari upon reframing the question presented).

84. Coal Industry Application, *supra* note 4, at 25.

85. Application by 29 States, *supra* note 4, at 20, 29.

86. Heinzerling, *supra* note 12 (discussing and critiquing *UARG v. EPA*, *King v. Burwell*, and *Michigan v. EPA*).

stay of the Clean Power Plan is of a piece with this line of cases. The Court, it seems, is happy to leave the public and the political branches of government in a state of extreme uncertainty about their rights and their powers. This is not a jurisprudence of restraint; it is a jurisprudence of anxiety.

CONCLUSION

The Supreme Court's stay of the Clean Power Plan was unfortunate in virtually every respect. It rested, it appears, on a highly skewed canon of statutory interpretation and an unduly sensitive notion of irreparable harm. It offers a new and uncharted path of relief for those challenging agency rules. Its jurisdictional basis is murky at best. It was entered without the kind of process or transparency that should attend a decision of such consequence. Its one compensating feature is that it is, at least in theory, temporary.