
I am very sensitive to the emotions surrounding the sudden death of Justice Antonin Scalia and feel deep sympathy for his family, many friends and colleagues. He was a towering intellectual force and we will be dissecting his influence for years to come. Yet the death of a public figure — especially one as important and significant as Scalia — has obvious and immediate ramifications far beyond the pain and loss his loved ones feel for him. And on environmental issues, Scalia's death will have huge consequences. On no issue is this more true than whether the President's Clean Power Plan to cut carbon pollution from power plans will be upheld. Before Scalia's death, the odds were firmly against Obama's climate plan. The fact that five members of the Court voted just last week to halt the plan's implementation signaled serious skepticism among the five justices that the plan was valid. And Scalia's intellectual fingerprints — though largely invisible in the order halting the plan — are all over the stay. With his death, the odds that the CPP are upheld have increased dramatically. I'd rank the change in odds as moving from less than 25 percent to higher than 75 percent, with the caveat that predicting Supreme Court outcomes is a bit like reading tea leaves.

First, some background. Scalia's reputation as the leading intellectual conservative force on the Court was as true in the environmental area as any. Indeed, though many commentators have noted that Scalia failed to win majorities for his views by building consensus on the Court, he wrote a number of important majority opinions in environmental cases. These include, as Dan has described, decisions limiting standing for environmental plaintiffs, striking down a regulation limiting mercury emissions under the Clean Air Act, and finding for property owners in cases under the Takings Clause of the Fifth Amendment. They also, remarkably, include two cases that were big victories for the government and environmental groups, including upholding strict ozone standards under the Clean Air Act and setting greenhouse gas emissions standards for new large sources of carbon pollution (with an important exception I'll describe below). Moreover, unlike in

some areas where his dissents were joined by only one or two of his colleagues, when he lost environmental cases it was often only because he failed to persuade Justice Anthony Kennedy to join him, losing 5-4 (or in the case of the hotly contested question of EPA jurisdiction over wetlands, writing a plurality decision in *Rapanos v. United States* that Kennedy's concurrence completely undermined). The most important environmental case the Court has ever decided, *Massachusetts v. EPA*, which essentially required EPA to regulate greenhouse gas emissions from automobiles, was a 5-4 decision with Scalia writing one of the dissents.

Given that Scalia (joined by Chief Justice Roberts and Associate Justices Alito and Thomas) dissented in *Mass v. EPA*, arguing among other things that greenhouse gases are not "pollutants" under the Clean Air Act and therefore not subject to regulation by the EPA, it seems almost a given that these four would have voted against the Clean Power Plan. But things are not quite as straightforward as predicting future votes from a single past vote. In the case of greenhouse gas regulation, an intervening case, *UARG v. EPA*, complicates the story considerably. I've described the UARG case in previous blogs and I'm borrowing significantly from my previous explanations of the case in describing it here.

In the regulations at issue in *UARG*, EPA had to determine how to apply permitting provisions of the Clean Act to new facilities that emit greenhouse gases. Under what are known as the Prevention of Significant Deterioration (PSD) provisions, EPA requires permits for the construction of "major emitting facilities" that emit "air pollutants" if they emit 250 tons or more per year of any "air pollutant". The problem for EPA in devising regulations for greenhouse gas emitters was that, although the 250 ton per year limit makes sense in the context of conventional pollutants like lead, ozone and carbon monoxide, it makes less sense for GHGs, which are emitted at much higher levels. Staying absolutely true to the statutory language would potentially sweep thousands of small companies and apartment buildings into EPA's permitting system. EPA decided instead first to go after big emitters of GHGs that already had to get permits because they also emitted other air pollutants, then to go after big emitters of GHGs that were not otherwise required to get permits, (those emitting more than 100,000 tons per year) and finally to gradually phase in smaller sources even though the plain language of the statute says that new facilities are those emitting 250 tons per year or more of any air pollutant. EPA called this rule the "Tailoring rule."

In the *UARG* case, Justice Scalia upheld only part of the tailoring rule. EPA could regulate new facilities that emit greenhouse gases but only if those facilities already would have had to get a permit anyway (so called "anyway sources") because they emit other traditional air pollutants like lead or sulfur dioxide. EPA could not, however, sweep in the huge number of

new facilities that would not otherwise be subject to regulation except for their greenhouse gas emissions. In reality, this was a huge victory for EPA and something of a surprise that Scalia wrote the majority opinion. The reason it was a victory for EPA is that 83 precent of all carbon pollution from new facilities would still be covered by the part of the Tailoring rule that remained in effect. The reason it was something of a surprise that Scalia voted to uphold the most significant part of the regulation is that in doing so he followed the majority decision in *Massachusetts v. EPA* by assuming that greenhouse gases are pollutants that EPA can regulate under the CAA.

But Scalia undoubtedly understood that a far bigger battle loomed ahead, and that battle was over the regulation of greenhouse gases from existing power plants. And in striking down the other part of the Tailoring Rule in UARG, Scalia strongly signaled that he would vote to strike down future aggressive carbon regulations. He did so even though the judicial standard to review agency regulations is one of deference, as Dan explained in his post. Indeed, as Dan pointed out, in the only three cases in which the Supreme Court has struck down an agency as "unreasonable" (the standard that applies), Justice Scalia authored the opinion. Importantly, in UARG, he also got all of his fellow conservatives, including Justice Kennedy, to go along with him. What he decided was this. Even though the permitting provisions of the Clean Air Act seemed on their face to apply to small new sources, EPA's regulations that included small sources were unreasonable (even though the part of the regulations that applied to "anyway sources" were valid). Rather than looking at the plain language, he argued, the Court should look at the overall structure and purpose of the Act. Moreover, and this is the money language that Scalia clearly directed at future EPA regulation:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. Moreover, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it. Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently

> unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant. (internal citations omitted)

The Clean Power Plan could easily fit into Scalia's characterization here (though I have argued elsewhere with my co-author Megan Herzog that it should not). In regulating existing power plants, EPA is not just requiring direct regulation of the plants themselves but is treating the electricity system as one giant machine. As a result, in setting greenhouse gas targets for each state, it is basing those targets on the single machine, treating reductions "outside the fenceline" of the power plant, like using renewable energy for electricity rather than carbon-based fuel, as part of the achievable targets (for a much more detailed explanation of the highly complex CPP, see here). Scalia would undoubtedly have viewed this move as "an agency laying claim to extravagant statutory power over the national economy," discovering "in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" And in granting the stay, it looks like he got four of his brethren to agree with him.

If the stay petition had come before the Court just a week or two later, the decision would have been 4-4 and would not have been granted. But it is in effect. Not only is it in effect but the Court made clear in its order that the stay will remain in effect until the Court either denies a petition for certiorari or issues a judgment. This is true even if the D.C. Circuit Court of Appeals, which will hear the case on June 2, upholds the Clean Power Plan.

So what will happen going forward? First, the D.C. Circuit panel that will hear the case is a very good panel for the EPA, as Megan described here. Two of the judges are Democratic appointees and the third is a Republican one who has voted with EPA on several occasions. This group voted to deny the petition seeking to halt temporarily the implementation of the CPP, though of course was reversed by the Supreme Court. So the odds seem high that the D.C. Circuit will uphold the Clean Power Plan. The odds seem high not just because the judges are more liberal than the conservatives on the high Court but also because the default position for courts in reviewing agency regulations is to be deferential. As long as the regulations are a "reasonable" interpretation of the statutory language the agency is interpreting, a court should uphold the regulation. Justice Scalia was an outlier in voting to strike down regulations as unreasonable. Agencies typically prevail on such challenges.

Regardless of who wins in the D.C. Circuit, though, the loser will petition the Supreme Court for review. It takes only four justices to grant a petition. We already know that four justices voted to deny the stay and four plus Scalia voted to grant it. So there are likely to

be four votes to grant the petition no matter who wins in the D.C. Circuit. I say likely because Justice Scalia's death could alter the internal politics of voting to grant cert — who knows what influence he had on his fellow justices about whether to hear a particular case? Indeed it will be interesting to see in the next several years whether the Court continues to display such a strong interest in environmental cases or whether Scalia was strongly influential not just in case outcomes but in determining whether to take cases in the first instance.

Assuming that the Court were to vote to grant cert to hear the Clean Power Plan case, though, that's when things could get really interesting.

The most obvious question is whether the Senate will approve President Obama's nomination for the Supreme Court. But an important and related question is who the nominee is likely to be. Many observers are guessing that it will be Sri Srinivasan, a current D.C. Circuit Court of Appeals judge. Not only is he a D.C. Circuit judge, but he's also on the panel that will hear the Clean Power Plan! If he is still on the D.C. bench when the case is argued in June (and not yet elevated to the Supreme Court), and participates in deciding the case at the court of appeal level, he will almost certainly recuse himself when the case goes to the Supreme Court. Then only 8 justices will hear the case. If he's nominated and approved by June, then we'll get a new D.C. Circuit appointee to the Clean Power Plan panel and Judge Srinivasan will be able to hear the Clean Power Plan as a member of the Supreme Court. If someone other than Srinivasan is appointed to the Supreme Court and approved, then the Clean Power Plan will likely be upheld by the U.S. Supreme Court on a 5-4 vote.

Alternatively, Srinivasan, if nominated, could decide to recuse himself from the D.C. Circuit panel hearing the Clean Power Plan. Under 28 U.S.C. Section 455, a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Srinivasan could feel that his vote on the CPP in the D.C. Circuit could be influenced by his pending Supreme Court nomination — how he votes on the CPP could easily influence how a Senator would view his appointment to the Supreme Court. This is all, of course, in the realm of massive speculation. If he recused himself at the court of appeal level, we would need a new appointment to the D.C. Circuit panel. I'll stop speculating here about what a new judge on a hypothetical panel would mean.

If the Senate fails to approve an Obama nomination, then it may also be the case that only 8 justices hear the case depending on how fast the D.C. Circuit decides the case. If the 8 justices split 4-4, then the D.C. Circuit opinion will stand. Assuming the votes line up as predicted (the 4 conservatives versus the 4 liberals), and assuming the D.C. Circuit is favorable to EPA, the Clean Power Plan will be upheld. It is also, of course, possible that

one of the Justices could vote with the other side. The most likely is Justice Kennedy, who voted with the liberals in *Mass v. EPA*.

If the Senate fails to approve an Obama nominee, then of course a new Justice will be appointed by the new President. And odds are that whoever wins the White House will appoint someone that will vote predictably on the Clean Power Plan along party lines.

The long and short of it is that the death of Justice Scalia changes everything and dramatically improves the fate of the Clean Power Plan. The effect on the Paris Agreement should also be positive, though whether the parties to the Agreement will be interested in all the ins and outs of the succession drama remain to be seen.