

Industry has come up with a Scalia-like argument to fight the proposed climate regulations for existing power plants. The problem arises because Congress passed two different versions of section 111(d) without realizing it. The Senate version clearly gives EPA the authority to regulate CO₂ under this provision. But opponents of regulation argue that the House version is controlling and that its language doesn't allow EPA to regulate. The reason, they say, is that the House version exempts sources that are regulated under section 112, which includes power plants (and just about everything else you can think of). This is a clever argument, though maybe too clever by half.

There are a number of possible responses to this argument, but EPA has come up with a particularly nifty one. The challengers' argument is very formalist — nobody really believes that Congress meant to gut section 111(d); it's a textualist argument based on textual arguments. "You want textual arguments?" EPA said in effect, "We'll give you textual arguments." If you read the House version really carefully, it actually means that opposite of what the opponents say!

The House version says that EPA can use 111(d) "for any existing source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or emitted from a source category which is regulated under section 7412. [a/k/a section 112]." If you read this language quickly, it seems to support the challengers. But EPA points out two reasons why that's wrong.

First, the House used "or", not "and," to describe the categories: a pollutant has been covered if *any* of the three categories apply. Greenhouse gases indisputably fall in the first category. Hence they're covered by section 111(d). QED.

Second, the first two categories have "nots" in them, but the third one doesn't. It says a pollutant is covered if it is "emitted from a source category which *is* regulated under [section 112]." Since power plants are regulated under section 112, the plain language of the House version says that they're covered by the section 111(d) as well. Game over, Justice Scalia, the text is clear.

Of course, the House probably didn't mean that either. The House language is clumsy, but most likely the House meant the same thing as the Senate.. Section 111(d) is a fallback provision. When EPA imposes regulations for emissions for a pollutant from a category of new sources, and those same emissions aren't regulated elsewhere, then section 111(d) comes into apply. We can all play games with dictionaries and grammar books to support our views. But wouldn't it be simpler just to give the statute a sensible interpretation? The answer to that seems pretty clear.