

Clean Power Plan Finally Has Its Day In Court - Now What?

Nearly a year after the U.S. Environmental Protection Agency's Clean Power Plan was published in the Federal Register, its numerous state and industry challengers finally had their chance to present their arguments in court in *West Virginia v. EPA*. They did so on Sept. 27, 2016, before a nearly full D.C. Circuit, a packed courtroom and several overflow rooms. The 10 judges (minus the recused Chief Judge Merrick Garland) were well prepared, the litigants in top form, and the arguments fascinating but exhausting, going beyond seven hours with only a brief lunch break. As the smoke begins to clear, this observer now ponders what actually happened and what may be yet to come.

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Reading the Tea Leaves?

Oral argument is just that — an opportunity for the litigants to press their best arguments and for the court to explore the boundaries and logic of those arguments. Judges do not necessarily telegraph how they may rule on an issue, let alone an entire case, and may ask questions that do not reflect their ultimate legal views on a matter. Nor can one assume that judges will necessarily rule in a manner that reflects the party affiliation of the president who appointed them.

With these caveats, one can certainly seek to discern from the tone and content of questions at oral argument, and sometimes judicial body language, where particular judges might be heading on a particular issue. One can then do the math to determine if and how a majority might be constructed on that issue. On Sept. 27, this imperfect calculation was no doubt being performed by both the litigants and most of the overflow crowd.

The case will likely be close. At least several judges expressed concern with key issues upon which the Clean Power Plan was constructed. There were also several judges, including some recent Obama appointees, who appeared more receptive to the EPA's assertions of authority. Finally, three judges stayed relatively silent. From this rough

observation , it is unlikely either EPA or its challengers would muster a unanimous decision from the court, at least on fundamental issues. The ruling will be more nuanced, reflecting the complexity of the substantive issues, discussed below.

1. Standard of Review

One fundamental issue is whether the court should give deference to the EPA's interpretation of its authority under the Clean Air Act to establish through section 111d, a seemingly modest provision, a wide-ranging national program that seeks to shift the power industry faster toward cleaner energy sources. Recent Supreme Court case law has suggested the traditional Chevron deference test has been amended by the "clear statement" doctrine, where a rule with "transformative" economic or political impacts requires a clear statement of intent from Congress to support the rule. As Judge Brett Kavanaugh explained, the "clear statement" doctrine derives from the separation of powers doctrine, since an executive agency should not act as a legislature on issues of such importance, nor should the court take on the legislative role.

The standard of review can be critical to a case like the Clean Power Plan where the lawfulness of a rule may hinge upon whether the EPA's interpretation of its authority is due deference or stronger scrutiny. Hence, a significant portion of the oral argument centered on whether the EPA's rule was transformative in impact or technique, or whether the EPA was simply exercising traditional authority and codifying developments already underway in the power sector. On this and other issues, the shadow of the Supreme Court's ruling in *AEP v. Connecticut*, 564 U.S. 410 (2011), loomed large for several judges, since in that prior case the court held the EPA had authority to regulate greenhouse gases under section 111d; this narrowed the question down to how the EPA exercised its authority to regulate greenhouse gases under section 111d, not whether it could.

There appeared to be a split on this threshold standard of review issue. Judge Kavanaugh and Judge Thomas Griffith (and perhaps Judge Janice Brown) appeared most sympathetic to the petitioners' arguments that the EPA's plan was unprecedented in scope and impact, and so required a clear congressional statement. Judges David Tatel, Cornelia Pillard, Patricia Millet and Sri Srinivasan were more measured on the issue, pressing questions on how the generation-shifting differed from other techniques which the EPA had long used in its rules or which regulated entities used for compliance with those rules. But even Judges Tatel, Judith Rogers and Srinivasan pressed the EPA with tough questions on the relatively broad impact of the rule on power sector investment. The remaining judges were largely silent.

Hence, it is difficult to determine exactly how this issue may be handled by a majority of judges. However, were a majority of the court to agree with petitioners that the "clear statement" doctrine applied in this matter, it is less clear if such a ruling would end the case or allow the EPA still to prevail by proving its interpretation reasonably reflected clear congressional intent. On the other hand, even if the EPA were accorded deference, it would not necessarily mean its regulatory methods would be upheld.

2. Legal Authority

There were two main legal authority issues in this case. The first overlaps substantially with standard of review and asks whether the EPA could interpret section 111d's requirement for "best system of emission reductions" to encompass a national grid-wide generation shifting program that requires some form of emissions trading or credit programs for many states to comply. Again, the judges appeared divided on the issue on largely the same lines as with standard of review, although Judge Rogers made some statements suggesting that the EPA's reliance on generation shifting was reasonable, citing an amicus brief by "grid experts." Judge Tatel explained that, in his view, the petitioners had to show section 111d clearly prohibited the EPA's generation shifting. Several of the judges appeared to take great interest in arguments from counsel for respondent intervenor power companies that generation switching was considered "business as usual" by major portions of the industry.

The second authority issue concerns dueling House and Senate language from the 1990 Clean Air Amendments. Broadly speaking, one reading (a House amendment codified in the U.S. Code) would prevent the EPA from regulating existing power plant sources under section 111d if the agency had already regulated these sources under section 112, the hazardous air toxics provision. The second reading (a Senate amendment published only in the U.S. statutes at large) would limit the EPA only from regulating the same pollutant under both sections. Several judges struggled with this issue, bemoaning the complexity and ambiguity of the legislative history. But there did appear to be a consensus among the active judges on this issue that it would be best to seek a reading of House and Senate language that could give effect to both. The petitioners' reading would not do so and could conceivably impact the EPA's authority beyond this case — creating in Judge Roger's words a "loophole" for some sources to evade regulation. It did not appear the court would seek such a result if it could read the provisions more consistently in light of the legislative history and purpose of the 1990 amendments. Counsel for the EPA and respondent intervenors offered such a reading, securing some judicial nods of approval.

3. Constitutional Issues

Beyond the separation of powers issue discussed above with respect to standard of review, the court heard two other constitutional challenges from petitioners. The petitioners argued that the Clean Power Plan violated the principle of federalism by supplanting states' regulatory authority over their power systems. The petitioners also alleged that the rule violated the 10th Amendment by coercing a state into complying by threatening state authority over its power generation. Despite the argument of Professor Laurence Tribe for the petitioners on these issues, it did not appear that most of the judges who asked questions viewed these as key issues for their decision; some, like Judge Tatel, saw the EPA's exercise no different than other regulatory programs impacting states. In fact, Judge Tatel suggested the issues were irrelevant in light of

Massachusetts v. EPA, 549 U.S. 497 (2007), which gave the EPA authority to regulate greenhouse gases. Indeed, the court would likely seek to avoid determining constitutional issues if it could base its decision on other grounds, including statutory authority. Hence, the debate on these issues often veered back to legal authority.

4. Procedural Issues

The petitioners raised the issue of inadequate notice, that the EPA had so significantly changed the final rule from the proposed rule that the petitioners did not have a meaningful opportunity to comment on the final substance of the rule. The judges active on this issue appeared to view the matter as not yet ripe for review, since the parties had filed petitions for reconsideration with the EPA that were still pending. Even Judge Kavanaugh appeared to complement the EPA for changing the rule to address public comments. Nor did the court appear disposed toward granting the petitioners' request to overrule prior jurisprudence while sitting en banc, an argument that the petitioners were not able to brief since the case was initially assigned to a regular panel.

5. Record Issues

The petitioners raised a number of more specific issues that essentially questioned the EPA's determination of state goals through calculations and assessments of the three building blocks. Much of these discussions focused on the alleged lack of achievability and demonstration of the federal performance standards, especially the argument that many states could not reach their targets or plants their performance standards. On these matters, the active judges did appear split somewhat on the substance, but potentially united in the view that the arguments may not be ripe. Looking to recent Supreme Court law in the EPA v. EME Homer City Generation case, 134 S.Ct. 1584 (2014), Judge Kavanaugh wondered if states could bring "as applied" challenges when the rule actually was in effect, while Judge Millet sought assurances that states would have meaningful judicial relief if it turned out their targets were unattainable in practice.

How Could the Case Come Out and When?

As stated above, one cannot conclude with any certainty from oral argument how the court will ultimately rule. In particular, this case has defied prediction; it has been most unusual from the start, with over 150 petitioners, several unsuccessful legal challenges prior to actual publication of the rule, an unexpected Supreme Court stay of the rule followed by the unexpected death of Justice Antonin Scalia — perhaps the EPA's greatest critic on the Supreme Court and the deciding vote on the stay, and finally the last-minute addition of Judge Pillard to the panel. Judge Pillard had previously recused herself, but reversed course, an announcement made days before the argument. Nevertheless, she was well prepared, and asked many questions that, on balance, appeared more favorable to the EPA's positions.

Judge Pillard's appearance (plus Chief Judge Garland's continued recusal) leaves 10 judges to decide the case. The D.C. Circuit rules are unclear on how a 5-5 tie might be decided in a case where there was no underlying district court or panel decision on which to revert. While some have argued that a tie would go to the EPA — that petitioners would need six judges to have their petitions granted — the court would likely seek to avoid such an outcome, particularly because this would complicate potential Supreme Court review.

Given the split in views suggested by the judges on several major issues, securing a majority opinion in this matter could be very complex; indeed, it could likely involve some of the "horse trading" of issues which is often discussed with respect to the Supreme Court's determinations. Such trading is very difficult when it involves issues that are fundamental "all or nothing" propositions since these leave little room for compromise. One such issue is EPA authority, since a finding of lack of authority would presumably resolve the matter. Hence, were the court to decide no deference was owed to the EPA, it is uncertain if it could nevertheless uphold the agency's interpretation; the analysis of the two issues does overlap. On the other hand, the EPA could be given deference and still be found to have over-extended its authority in whole or in part.

Therefore, based solely on the oral argument, it is very difficult to predict precisely how the case will come out and whether the Clear Power Plan may survive in whole or substantial part (e.g., portions of the rule or the EPA methodologies are upheld while others are remanded). If vacated in whole or part, it is also uncertain whether the court would issue sufficient guidance to allow the EPA to revise the rule on remand to render it more lawful (assuming the next administration would support the rule, see below). In other cases, such as interstate pollutant transport, the EPA has tried to navigate among different rulings over a period of years with relatively unclear guidance. A 10-judge court raises the risk of a mixed ruling with confusing directions.

As to when an opinion may issue, a close case may require considerable time to draft an opinion, or opinions (e.g., dissent, concurrence). It is unlikely, though possible, that the court could issue an opinion prior to the end of the year. An early to mid-2017 date is more probable, when there will be a new administration in power.

It is also important to keep in mind that litigation over the new source rule, the EPA's regulation of new power plants under section 111b, is proceeding though the D.C. Circuit on a slower pace, with briefing only about to begin. Since section 111b is a precedent to 111d regulation, the ultimate resolution of the new source rule could materially impact the Clean Power Plan, should the latter be upheld prior to a final decision on the former. Thus, the Clean Power Plan could survive scrutiny only to be undercut by an adverse decision on the new unit rule.

Will this Case Go to the Supreme Court?

Probably, but after this case passes through the D.C. Circuit, its fate becomes even more uncertain, given the current status of the Supreme Court. Down to eight justices, there

are enough (four) to grant a petition for certiorari review but may not be enough for a majority ruling. A 4-4 split preserves the ruling of the D.C. Circuit. Without a ninth justice, the Supreme Court may be reluctant to take up a controversial ruling if it is uncertain it can generate a majority decision. This puts pressure on the D.C. Circuit to render as clear and thorough an opinion as possible, and with the largest majority it can muster.

Again, much will depend on the national elections. A Clinton administration would likely seek review of an adverse decision; it would also likely nominate a ninth justice considered favorable to the administration's views of agency authority and deference. A Trump administration, on the other hand, may not be interested in seeking review of an adverse decision, leaving to state parties and other respondents the role of petitioning, and raising the specter of a U.S. brief in opposition to certiorari, if not to the rule itself. A Trump-selected Supreme Court justice could also make the survival of the rule less likely on review. In either case, a ninth justice would have to be appointed prior to the case going on review, and political disputes may render such timing unlikely.

Even without a petition for certiorari, should the EPA win its case, it would still need to seek dissolution of the stay in the Supreme Court, which could result in some additional litigation. The Supreme Court stayed the rule until it reviewed the matter and ruled or it decided not to undertake review, but the stay does not dissolve by itself.

In any event, it may be some time before the matter reaches the Supreme Court. Were a D.C. Circuit opinion to be released after January 2017, which seems likely, it may not make it onto the docket for a spring hearing, and perhaps not be heard until fall of 2017 or even later. Legal uncertainty thus could continue into 2018, when states were originally to file their plans with the EPA.

Conclusion

This has been a strange and unique case from the beginning, and has consistently defied prediction. Thus, reading the leaves here is particularly an uncertain art. Perhaps the best conclusion is that the case has been thoroughly briefed and argued and will be thoroughly considered by the D.C. Circuit. The EPA did not face an overtly hostile court, nor did it face a court united in its favor. The ruling will likely be close, at least on fundamental issues, and take some time to emerge. Even then, its ultimate fate remains unclear due to the Supreme Court's current status and the impact of the national elections.