

Scalia's Death Deals Blow To Clean Power Plan Foes

By **Keith Goldberg**

Law360, New York (February 16, 2016, 8:18 PM ET) -- The death of U.S. Supreme Court Justice Antonin Scalia removes a leading skeptic of the U.S. Environmental Protection Agency's authority to regulate carbon emissions from the nation's top court and boosts the Clean Power Plan's chances of surviving legal challenges, experts say.

Justice Scalia, who died Saturday at age 79, joined the high court's four other conservative members in voting last week to stay the Clean Power Plan while it's being challenged in court, over the votes of the court's four liberal justices. To many observers, the unprecedented move was a signal that a majority of justices doubted the EPA had the Clean Air Act authority to carry out the Obama administration's signature climate change mandate that existing power plants slash carbon emissions.

With the judge's death, that majority is likely gone, experts say.

"As morbid as it may sound, the prognosis of the Clean Power Plan improved a bit," said Dorsey & Whitney LLP partner Jim Rubin, formerly with the U.S. Department of Justice's Environment and Natural Resources Division. "He's certainly been critical of where he thought the EPA had stretched its authority, and greenhouse gas emissions is an area where he thought they had, going back all the way to *Massachusetts v. EPA*."

In that landmark 2007 case, the Supreme Court said by a 5-4 vote that the EPA could regulate greenhouse gas emissions under the CAA, which Justice Scalia contested in a dissenting opinion.

A more recent example of the judge's skepticism toward the EPA came in June 2014, when he led a 5-4 majority in striking down the EPA's inclusion of greenhouse gas emissions in the CAA's Title V and Prevention of Significant Deterioration permitting programs for stationary sources.

Justice Scalia said in his opinion that the EPA's attempt to shoehorn GHGs into its PSD and Title V permitting authority is unreasonable because it would greatly expand the EPA's regulatory authority without clear authorization from Congress.

"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," the judge wrote. "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."

Agency decisions don't get much more economically and politically significant than the Clean Power Plan, which is currently being challenged in the D.C. Circuit.

"That certainly suggests that he would have agreed that the EPA's approach to regulating electric power sources with a systemwide approach comes with some entrenched degree of skepticism," Ballard Spahr LLP partner Brendan Collins said.

Then of course, there was his final word on the EPA when he voted for a stay of the Clean Power Plan four days before his death.

"He certainly wasn't a fan," Collins said. "I guess we'll never know how much of an opponent he would have been."

Justice Scalia's absence foreshadows a potential high court deadlock on the Clean Power Plan's legality, especially since the process to replace him is shaping up to be an epic political showdown.

The Republican-controlled Senate has vowed to fight any replacement proposed by President Barack Obama before he leaves office in January 2017. If filling Justice Scalia's seat is left to the next president, the confirmation battle will be fierce, regardless of whether a Republican or Democrat occupies the White House.

Meanwhile, the D.C. Circuit has scheduled oral arguments in the Clean Power Plan case for June 2 and could issue a ruling as early as this fall. A Supreme Court writ of certiorari petition would likely follow in short order.

"With a 4-4 split, whatever the D.C. Circuit holds is, at least right now, unlikely to be reversed by the Supreme Court," said Crowell & Moring LLP partner Tom Lorenzen, a former DOJ environmental assistant chief who is currently representing several CPP challengers. "The Supreme Court could try and hold the case as long as possible in order to get a full bench. But at some point, they're going to have to resolve it."

The deadlock potential also raises the already-high stakes in the D.C. Circuit, since a 4-4 split in the Supreme Court over the Clean Power Plan would mean the lower court's ruling is automatically upheld.

"A Supreme Court split would leave the D.C. Circuit in the position of having its ruling be the final word," said Bicky Corman, a former EPA deputy general counsel who recently joined Rubin & Rudman LLP. "It will make the D.C. Circuit opinion absolutely crucial."

That could ultimately work to the government's benefit, since the three-judge panel tasked with hearing the case includes two Democratic appointees and judges that have previously backed the EPA's view of its own authority. The panel also unanimously denied a bid to stay the Clean Power Plan while they considered its legal merits, though they were eventually trumped by the Supreme Court.

However, one of the panelists, U.S. Circuit Judge Sri Srinivasan, has been touted as a potential pick by Obama to replace Justice Scalia.

"If he recuses himself because he's being considered for the Supreme Court, then that could affect the balance of the D.C. Circuit panel that would hear the case," Corman said. "The question is what's going to come out of the D.C. Circuit, and that may depend on who is on the panel."

Regardless of who sits on the D.C. Circuit panel, the way the appeals court crafts its ruling on the Clean Power Plan will go a long way in defining the issues that the Supreme Court will have to consider in a writ of certiorari petition, experts say. That consideration could change dramatically with Justice Scalia's death and the prolonged uncertainty over his eventual successor.

"I suspect that advocates for the petitioners' side of this case had been, up until Saturday, developing arguments they felt would not only have attraction with the D.C. Circuit, but the Supreme Court as it was constituted," Collins said. "The absence of Justice Scalia may well deprive the petitioners of the best audience they were working to in their briefs."

--Editing by Katherine Rautenberg and Kelly Duncan.

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