

Reviewing the Clean Power Plan — and the Fate of the Paris Agreement

In a landmark moment for environmental law, 195 nations in Paris this past December committed to preventing climate change's harshest consequences by reducing greenhouse gas emissions. Decades in the making, the possibility of such an accord seemed futile a few years ago, which is why UN Secretary General Ban Ki-moon described the agreement as "truly a historic moment. For the first time, we have a truly universal agreement on climate change, one of the most crucial problems on earth." Underscoring the stakes, the Eiffel Tower displayed a lit image declaring "No Plan B" as nations struggled to reach consensus in the Paris meeting's final hours.

Everyone in Paris understood that no such agreement would have happened absent President Obama's championing EPA's promulgation of the Clean Power Plan this past October, requiring significant reductions in greenhouse gas emissions from the country's existing power plants. The nations of the world also understood that it was essential to frame the

Paris Agreement in a way that did not require ratification by the United States Senate, because such ratification would not happen with a Senate led by Kentucky's Mitch McConnell.

What those same nations might not have fully appreciated, however, is the essential role our country's third branch — the federal judiciary — also plays in our domestic climate-law equation. The Clean Power Plan must now survive judicial review. And, while such review may in some countries be largely pro forma, that is certainly not so in the United States.

Or at least there is nothing pro forma about the litigation currently being launched against the Clean

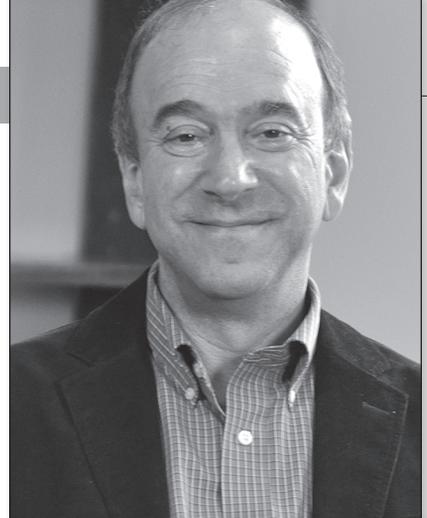
Power Plan in the U.S. Court of Appeals for the District of Columbia Circuit. In the wake of EPA's receipt of approximately 4.3 million comments during the rulemaking, 150 parties have filed 41 separate petitions contesting the plan's legality. Approximately 60 parties have intervened in support of EPA.

Nor are these miscellaneous entities. They include 45 states: 27 against EPA and 18 in support (only Alaska, Idaho, Nevada, Pennsylvania, and Tennessee are sitting this one out). Not surprisingly, the coal industry and many business interests are among the challengers. But those intervening in support include a competing group of business interests and utilities. (Note: The author is serving as counsel for amici William Ruckelshaus and William Reilly in support of the agency.)

The litigation is quickly becoming a slugfest, as the challengers seek to derail the Clean Power Plan. After failing last spring to persuade the D.C. Circuit to prevent EPA from even making the plan final, they brought suit

within minutes of its publication and sought an immediate stay. There will be threshold battles this winter through the spring over every aspect of the litigation: the stay, the identity of the three judges sitting on the stay and merits panel, and the briefing schedule, including whether the court should agree to challengers' request to bifurcate the litigation by front-loading challenges that would throw out the entire plan. The earliest the case could be heard in part or entirely on the merits would likely be May before the D.C. Circuit summer recess.

Whatever happens in the D.C. Circuit, one cannot discount the



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possibility of Supreme Court review. If the challengers lose, they will most certainly seek High Court review, given their recent Clean Air Act win in *Michigan v. EPA* and the potentially sympathetic language contained in Justice Antonin Scalia's CAA opinion for the Court one year earlier in *Utility Air Regulatory Group v. EPA*. If the agency loses, whether it seeks review no doubt depends on who is then in the White House.

Should a losing party seek Supreme Court review and the Court agree to hear the case, the earliest the justices would likely hear oral argument in the case would be the fall of 2017, with a decision in 2018. But it is also not out of the question that it could take a year longer, with an outside chance of a year earlier.

Who would be on the Court then, however, is far from clear. Three members of the current court would be more than 80 years old in 2018, and a fourth would be turning 80 that year.

Should the courts overturn the president's Clean Power Plan, that might well prove fatal to the Paris Agreement. But that is also why the Paris Agreement could influence the judicial outcome. Judges, including justices, are not immune from appreciating that agreement's historic nature and might, for that reason, pause before striking down the EPA rule. At least in a close case or with a swing justice, that could prove dispositive.

Will the justices give cognizance to the international effects of their climate ruling?