

D I A L O G U E

2014 Supreme Court Review and Preview

Summary

On October 1, 2014, the Environmental Law Institute (ELI) held its annual U.S. Supreme Court update for the 2014 term, again featuring the leading experts in the country. ELI President John Cruden led a discussion with two of the most distinguished environmental law school professors in the nation to review the important Clean Air Act cases decided this year, and forecast their implications for future rulemaking, particularly in the greenhouse gas arena. The panel turned to the cases already set for argument in the October sitting of the Court, including a significant state water allocation dispute and a case addressing federal removal standards, as well as future merit cases concerning the Natural Gas Act, APA rulemaking requirements, equitable tolling under the Federal Tort Claims Act, and evidence-retention requirements under 18 U.S.C. §1519—which the U.S. Congress included in the Sarbanes-Oxley Act. Pending cert petitions of interest to environment, energy, and natural resource professions were also covered. Below, we present a transcript of the event, which has been edited for style, clarity, and space considerations.

John Cruden (moderator) is President of ELI.

Robert Percival is Stanton Professor of Law and Director of the Environmental Law Program at the University of Maryland Carey School of Law.

E. Donald Elliott is Professor at Yale Law School and Co-chair of the Environmental Practice Team at Covington & Burling LLP.

John Cruden: This is always an interesting time in Washington, D.C. We have begun a new Supreme Court term, and it's just like a new baseball season, where everybody is full of anticipation at what's going to happen. Today, we'll be discussing the new term from the perspective of environment, natural resources, and energy law. I'm going to introduce briefly the two extraordinary individuals who will lead the Dialogue, then I will give some very quick opening remarks, and then we're going to dive right into the cases that we think you should know about.

First, here's who you're going to be hearing from. Don Elliott has been a professor on the Yale Law School Faculty since 1981. He is also senior of counsel at the Washington, D.C., office of Covington & Burling LLP where he co-chairs the firm's environmental practice. He has been elsewhere in other organizations, but well-known to many of you as serving as an assistant administrator and general counsel of the U.S. Environmental Protection Agency (EPA) during the George H.W. Bush Administration.

Don is certainly one of the most well-known, well-regarded environmental law professors in the nation, along with the other professor and past practitioner who's with us today, Bob Percival. Bob is the Stanton Professor of Law at the University of Maryland and director of the Environmental Law Program there. He has been professor at numerous law schools throughout the nation, and even at the China University, so it's probable that some of you had him in law school. He clerked on the Supreme Court, and he's worked as a practitioner for the Environmental Defense Fund.

With that, let's get started. Last term, 2013-2014, 69 merit cases were decided. Of those 69 merit cases, only 20 were affirmed; most, of course, were reversed. Looking at the reversal rate for federal circuits whose decisions were reviewed by the Supreme Court, it's a little misleading if you just do percentages because if you do that, then the Third and Eighth Circuit had 100% of their cases reversed. Sounds bad, right? Not so bad. There was only one case from the Third Circuit and two from the Eighth Circuit. Compare that to the past and current leader in having the most cases reversed: the Ninth Circuit. The Ninth had 11 cases taken for cert (as did the Sixth Circuit, by the way). So, Ninth and Sixth both had the most cases taken for cert. The Ninth Circuit had all but one reversed. The Sixth Circuit fared better, having all but two cases reversed. We'll see what happens this year.

Here's the format for what we're going to do in this Dialogue. I'm going to ask Bob and Don if they would, first of all, take a look at some of the blockbuster cases that were decided this past term, particularly the two Clean Air Act (CAA)¹ cases, which were absolutely significant, and then try to bring them forward to the present day. Thereafter, we'll discuss other pending cases where certiorari has been granted, so you can get a complete picture of those case we know the Supreme Court will hear.

1. Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

Then, just for fun, I'm going to ask each of our panelists to gaze into their crystal ball for a second. I will ask them to identify one or two petitions that are pending [as of today, Oct. 1, 2014] and then ask them to explain why they think those cases are important and whether or not the Supreme Court might take the cases. When we're done, we'll have a chance for the audience to ask us questions.

Bob, you will go first. One of last year's big cases concerned EPA's Cross-State Air Pollution Rule (CSARP).² When you tell our audience about it, would you address at least the press reports that Justice Antonin Scalia made a mistake in the writing of his opinion?

Robert Percival: Sure. I think it's important as we discuss these cases to bear in mind that today we live in a very different era from when most of the environmental statutes were passed by Congress by overwhelming bipartisan majorities. Today, we have complete gridlock in Congress with respect to environmental legislation, which forced the agencies to adopt more creative interpretations of existing laws. As a result, most of the action now seems to be in the courts. That was certainly true with respect to the CAA last year in the Supreme Court.

The *EME Homer City Generation*³ case involved EPA seeking to reverse the D.C. Circuit's ruling that struck down the Agency's second attempt to adopt a rule on transboundary air pollution. The provisions of the CAA that deal with transboundary air pollution had lain dormant for a long period of time, even though that was a principal justification for federalizing CAA regulation. But in the waning days of the William Clinton Administration, EPA got more active. Then, during the George W. Bush Administration, EPA promulgated the Clean Air Interstate Rule (CAIR),⁴ which was struck down by the D.C. Circuit in a decision that allowed the Agency to revise its approach while keeping the existing rule in place.

For nearly a decade, EPA has been trying to come up with a workable way of dealing with the horrendous problem that many states are unable to meet the national ambient air quality standards (NAAQS) because of pollution that blows in from other states. EPA responded to the first D.C. Circuit decision by adopting the Cross-State Air Pollution Rule (CSAPR), or Transport Rule, applicable to 27 upwind states. What EPA did was promulgate federal implementation plans that tried to roughly assess what those states would have to do to reduce their pollution to ensure that they weren't contributing more than 1% of the pollution in any downwind state with respect to NAAQS. EPA came up with a creative solution to do it on a least-cost basis by determining each state's obligation based upon how much it would cost it to reduce the transbound-

ary pollution, so that states that could do it more cheaply would be the ones that would do it first.

That creative solution was again struck down by the D.C. Circuit in a split 2-1 decision. Many people thought the decision was breathtaking in its implications because it essentially required EPA to do such complicated calculations to try to ensure that no state was being required to overcontrol its pollution by even a tiny amount. It would have been the modern-day equivalent of the old *Corrosion Proof Fittings*⁵ decision with respect to the Toxic Substances Control Act (TSCA).⁶ In that case, the Fifth Circuit had required EPA to do such detailed analysis just to justify a ban on asbestos that the Agency essentially said "it would be impossible for us to comply." The D.C. Circuit's decision might have made it virtually impossible for EPA to develop a workable transboundary air pollution rule. So, it was very important that the Supreme Court granted cert to hear the case.

The D.C. Circuit has exclusive venue over CAA cases, so if cert is granted, it's not to clear up any circuit conflict. The final result in the case was a huge victory for EPA. It was a 6-2 decision with both Justice Anthony Kennedy and Chief Justice John Roberts joining Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan in saying that the D.C. Circuit was wrong, that EPA had acted reasonably and its regulations were entitled to *Chevron*⁷ deference.

John alluded to one unusual feature of the decision—Justice Scalia's initial dissenting opinion. (Justices Scalia and Clarence Thomas were the only dissenters in this case because Justice Samuel Alito had recused himself.) Justice Scalia felt so strongly that EPA had acted illegally that he read his dissent from the bench. As a result, the decision announcement reportedly took almost half an hour, which is an unusually long time. But Justice Scalia made a major faux pas in his decision. He accused EPA of taking a position in a former case that it had not taken. His initial dissent said that this was not the first time EPA sought to convert the CAA into a mandate for cost-effective regulation, citing the *American Trucking*⁸ case. But it turned out that that had not been EPA's position in that case.

In fact, EPA had diametrically opposed that position, and it had been the position of the industry petitioners. Justice Scalia should have known that, because his own unanimous majority opinion for the Court in the *American Trucking* case rejected that argument. When this faux pas was quickly pointed out by a law professor, suddenly, the opinion appeared online the very next day in an amended form that took that out.

The reasons I think that's significant are rather disappointing. First, it's kind of shocking that Justice Scalia's

2. See U.S. EPA, Cross-State Air Pollution Rule (CSAPR), <http://www.epa.gov/crossstaterule/actions.html#feb7> (the rule was originally published at 76 Fed. Reg. 48208 (Aug. 8, 2011)).

3. Environmental Protection Agency v. EME Homer City Generation LP, No. 12-1182, 44 ELR 20094 (U.S. Apr. 29, 2014).

4. U.S. EPA, Clean Air Interstate Rule (CAIR), 70 Fed. Reg. 25162 (May 12, 2005).

5. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 22 ELR 20304 (5th Cir. 1991).

6. Toxic Substances Control Act (TSCA), 15 U.S.C. §§2601-2692, ELR STAT. TSCA §§2-412.

7. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 14 ELR 20507 (1984).

8. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 31 ELR 20512 (2001).

clerks and others didn't catch the mistake in chambers. But it also illustrates an unfortunate feature of the way Justice Scalia has been trying to demonize EPA in opinions such as the old *Rapanos*⁹ decision, by portraying it as an Agency out of control that's power-hungry. This is a narrative that environmentalists know to be false. But *EME Homer* was a major victory for EPA, upholding their transboundary air pollution rule.

John Cruden: Don, we will now turn to you. I want you to address the case considering EPA's greenhouse gas rules, but before you jump into that important decision, any thoughts on *Homer City*?

Donald Elliott: Just a couple of quick points. I agree with almost everything Bob said. I think one of the things that the *Homer City* opinion shows is that Justice Ginsburg has not lost a step. This is one of the best opinions in an administrative law case I've ever read, and I recommend it as evidence that Justice Ginsburg is still doing very well. As Bob pointed out, this case is the culmination of an almost 20-year struggle by EPA to deal with interstate air pollution. It's interesting that in the final page or two of Justice Ginsburg's majority opinion, she propounded a new doctrine in administrative law with far-reaching consequences, but she doesn't really cite anything for it.

As Bob indicated, the prior cases had criticized EPA for not getting it exactly right. The D.C. Circuit said EPA couldn't overcontrol; that some states might be overcontrolled; some states might be undercontrolled. That was their reason for invalidating the rule. In the last two pages of the Court's *Homer City* opinion, Justice Ginsburg admits that it could be the case that there might be some states that would have to control too much. In other cases, they might not control enough. But she says that's not a reason for invalidating the whole rule.

She basically invents out of whole cloth the notion that if there are case-specific or state-specific problems, those can be taken up separately. They're not a reason to invalidate the whole rule. That's a kind of severability doctrine, if you will, that we haven't seen previously in administrative law. I think it is very important to eliminate some of the long delays by saying that a hypothetical or abstract or speculative problem with the rule isn't necessarily a reason to invalidate the whole rule. I think that is potentially a decision with very far-reaching implications.

The other major case decided last term, *UARG v. EPA*,¹⁰ involved EPA's rules for regulating greenhouse gases (GHGs) from existing stationary sources pursuant to the prevention of significant deterioration (PSD) program under §165 of the statute. Basically, this case harkens back to the 2007 *Massachusetts v. EPA*¹¹ decision, the first GHG case. There, the Supreme Court famously held that

carbon dioxide (CO₂) could be an air pollutant and certainly implied that it probably *was* an air pollutant under the CAA; therefore, EPA had to give a strong reason not to regulate CO₂. EPA had wanted to continue not to regulate CO₂ because the Agency General Counsel at the time believed the term "air pollutant" was not sufficiently broad to encompass it.

The *Massachusetts v. EPA* ruling only applied directly to motor vehicles. EPA went ahead and made an endangerment finding and promulgated regulations relating to motor vehicles. In a long-standing interpretation, going back to 1978, EPA had always taken the position that if a pollutant was regulated under another section of the CAA, when the states or EPA were permitting major stationary sources, they had a requirement to impose best available control technology (BACT) for all of the pollutants that are regulated under the Act.

So, following what EPA thought was the import of the *Massachusetts v. EPA* case, the Agency said now that we've regulated CO₂ under the Act, we have to start regulating CO₂ releases from stationary sources like factories and apartment buildings. But the Agency said there's a provision in the CAA that requires EPA to consider as major sources those sources that emit either 100 tons or 250 tons of any regulated air pollutant. EPA said that works for other air pollutants, but it doesn't work for CO₂ because you can have a decent-sized apartment building releasing more than 250 tons of CO₂ per year.

To try to deal with that anomaly, EPA promulgated what it called the Tailoring Rule,¹² which basically purported to change the wording of the statute and at least defer EPA action on the smaller sources and substitute a 10,000-ton limit for 100 or 250 tons. It probably would not have been controversial had it been merely a simple deferral of EPA action, but EPA also purported to require the states to do the same tailoring. This action was, in a sense, amending the statute by construction.

I think the *UARG* case is a good example of an important Supreme Court strategy, which is how to lose gracefully. The D.C. Circuit, in a very interesting opinion, held that no one had standing to challenge the Tailoring Rule.¹³ So, it appeared that the Tailoring Rule had been upheld and the Supreme Court denied cert. But even though industry had lost its challenge to the Tailoring Rule, they didn't give up. The Supreme Court, in the *UARG* case, more or less invalidated the Tailoring Rule even though the rule wasn't technically before it. The Court granted cert in *UARG* limited to the question of whether or not regulation of stationary sources emitting CO₂ was either required or permissible under the CAA.

In the course of ruling on that issue, Justice Scalia's opinion for the majority in *UARG* holds squarely that EPA or the Administration is not permitted to change the

9. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006).

10. *Utility Air Reg. Grp. (UARG) v. Environmental Protection Agency*, No. 12-1146, 44 ELR 20132 (U.S. June 23, 2014).

11. *Massachusetts v. EPA*, 549 U.S. 497, 37 ELR 20075 (2007).

12. U.S. EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010).

13. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 42 ELR 20141 (D.C. Cir. 2012).

clear mandates of statutes via the tailoring rule. The opinion probably reflects a bit of lateral vision to some of the claims that the Barack Obama Administration is abusing its executive authority. Justice Scalia tried to write some very strong language basically saying that it doesn't matter if the wording of the statute works out to be impractical or if it doesn't work the way it was intended—that isn't an excuse to change the clear wording of the statute. Justice Scalia's opinion was for a 5-4 majority.

The other interesting part of the 5-4 majority opinion is that Justice Scalia rehabilitates a case called *Brown & Williamson v. FTC*,¹⁴ which had been more or less interpreted very narrowly in the original GHG case, *Massachusetts v. EPA*. *Brown & Williamson* was a case involving whether or not the U.S. Food & Drug Administration (FDA) could regulate tobacco from cigarettes. The opinion could either be interpreted quite broadly as saying major decisions of policy have to be made by Congress, not by an administrative agency; or it could be interpreted very narrowly based on specific facts in the legislative history of a whole slew of statutes about tobacco over many years.

In *Massachusetts*, the Court discounts *Brown & Williamson* and says the decision to regulate climate change is not something that has to be made by Congress; instead, it can be done by Agency interpretation. But in *UARG*, Justice Scalia attempted to rehabilitate *Brown & Williamson*, citing it for a much broader proposition. Again, I think, with a lateral vision to upcoming rulemakings by EPA, *UARG* has substantial language in the opinion saying that if the Agency is going to regulate in a different way than it has traditionally with end-of-pipe regulation such as by energy efficiency, that's the kind of decision that requires action by Congress. It's not something that the Agency can do on its own.

Now, that's dicta in the opinion, and it's probably not binding. But I would speculate that it was written with EPA's §111(d) proposals for GHG regulation from existing sources in mind, because there, in a proposed rule, currently out for public comment, EPA is saying that the best way to regulate GHG emissions from existing electric-generating units is to build more renewables or to build more nuclear, more non-emitting generation, or to use more natural gas. I think Justice Scalia is essentially firing a shot across EPA's bow and threatening the Agency with the notion that they can't do something too far afield from what they've done traditionally. That's the 5-4 part of the opinion.

The 7-2 part of the opinion is a situation in which the Solicitor General lost very gracefully. Although the Tailoring Rule was invalidated, EPA got most of what it wanted. The Court essentially said that if EPA is regulating a major source for other pollutants, it also must—or it's at least permissible that EPA also regulate GHG emissions. As Chief Justice Roberts kept pointing out in the argument, under that interpretation, EPA can regulate 83% of the sources, rather than 86% of the sources. And he kept looking over

at Justice Kennedy (who was anticipated to be the key vote) and repeating 83% versus 86%.

So ultimately, although EPA lost in a sense, it won its backup position in its brief by saying maybe we can't regulate sources if they're only a major source for CO₂ emissions, but we can regulate them if they're a major source for other regulated pollutants.

I think the key moment in the case came at oral argument when the industry counsel made a remark about *Massachusetts*, saying they were leaving that decision to one side, and Chief Justice Roberts stepped in. Chief Justice Roberts said, "I was in the dissent in that case, but you can't leave it to one side. We're going to follow it." Then, Peter Keisler, who was arguing for industry, did what I believe was a brilliant thing by pointing out that on the same day that *Massachusetts* was decided, the Supreme Court had decided another environmental case, the *Duke Power*¹⁵ case about the new source review (NSR) permitting program. One of the linchpins of that case was the notion that the same word, in this case "pollutant," can have different meanings in different sections of the statute.

So, we have a funny situation today in which the narrow holding of the case is that GHGs are a regulated pollutant for purposes of motor vehicles, but are not necessarily a pollutant for purposes of §165. What that launches us on is a case-by-case process of deciding which sections of the CAA can or cannot be used to regulate GHGs.

A number of years ago, Rep. John Dingell (D-Mich.) said, "It would be a glorious mess if we didn't pass a law directed specifically to regulating greenhouse gases, but instead try to regulate them under the existing Clean Air Act." I didn't agree with that. I was an early advocate of regulating under the existing CAA.¹⁶ But I do think that Congressman Dingell had a point, and we're now in the midst of that glorious mess in the sense that we don't really know exactly how the existing CAA applies to GHGs until we go through the statute section by section and the Supreme Court tells us.

John Cruden: Bob, I would like your comments on *UARG*. Then, I am going to ask you about another decided case, *CTS v. Waldburger*.

Robert Percival: My two comments about *UARG*: First, I think one of the most important things that happened there, happened before the oral argument, and that was when the Supreme Court granted cert. There had been a ton of cert petitions raising every possible issue that was in the case in the court below. There were over 300 lawyers involved because there were so many challenges to what EPA had done. The D.C. Circuit had heard two full days of oral argument. What the Supreme Court did that surprised so many people when it granted cert was it indicated that it was limiting cert to one narrow question that did

15. *Environmental Defense et al. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

16. E. Donald Elliott, *Let's Get On With It as Soon as Possible*, 26 ENVTL. F. 52 (Mar./Apr. 2009).

14. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

not include the industry's challenge to EPA's endangerment finding.

I think that was key to the ultimate decision. What it did was to assure Justice Kennedy, who I agree with Don was the key swing vote here and who had voted with the four dissenters to form a majority in the *Massachusetts* case, that the holding in *Massachusetts* was not under threat. The D.C. Circuit had upheld EPA's endangerment finding, saying that it would defer to EPA's judgment about the science and would not second-guess it. Once the cert grant excluded challenges to the endangerment finding, Justice Kennedy felt more comfortable joining the four conservatives in saying that EPA went a bit too far in trying to regulate GHGs, knowing full well that that would not knock out the linchpin of all GHG regulation under the CAA.

It's interesting that both Justices Thomas and Alito filed partial concurrences and partial dissents where they basically said that they still didn't agree with *Massachusetts*. They would like to rule that EPA can't regulate under the CAA at all, but that now is absolutely settled law and this case just reinforces that.

Donald Elliott: Let me add a comment to that quickly. While the endangerment finding was not technically before the Court, if one looks at the introductory paragraph of Justice John Paul Stevens' opinion in *Massachusetts*, and then one looks at the introductory opinion of Justice Scalia's opinion for the Court in *UARG*, they're totally different. Justice Stevens begins with "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related." Justice Scalia, seven years later, says EPA "recently set standards for 'greenhouse gases' (substances it believes contribute to 'global climate change')." Justice Scalia's opinion was almost dripping with sarcasm about EPA's belief that there is a global climate change problem. So, while the issue was not technically before the Court, I think what the language indicates is that there's a big division between the Justices on this issue still.

John Cruden: There was one other Supreme Court case, not nearly as important as either *UARG* or *Homer City*, a CERCLA¹⁷ matter concerning statutes of repose and statutes of limitation. And I know that there have been state actions since the time of the decision. Bob, can you fill the audience in as to not only what was decided, but also what has happened since that time.

Robert Percival: I thought that was a really fascinating case. *CTS v. Waldburger*¹⁸ was decided by the Court on June 9, 2014. Going back to the history of the Superfund legislation—its formal name is Comprehensive Environmental Response, Compensation, and Liability Act, but it's kind of

misnamed because a provision for an administrative compensation system for victims of exposure to hazardous substance releases was cut out of the legislation before it was adopted by Congress. That was part of the compromise in 1980 where they set up a special study group to look at how difficult it was to use state tort law to recover for releases of hazardous substances. That group reported to Congress and said one problem is statutes of limitations that may run before the contamination has been discovered or before the harm has occurred to those exposed to it.

The study group recommended preempting by federal law both state statutes of limitations and state statutes of repose in cases of hazardous substance releases. The difference between them is that statutes of repose don't toll; they impose a date when lawsuits are barred regardless of whether the tortious act or harm it caused has been discovered yet. The distinction was not widely appreciated, but Congress in 1986 in the Superfund amendments passed a very unusual CERCLA §309 expressly mandating a federal rule that statutes of limitations are tolled until the contamination has been discovered or should have been discovered by the plaintiffs.

North Carolina, in addition to having a statute of limitation, has a statute of repose. In North Carolina, the statute of repose provided an absolute bar on lawsuits 10 years after the last act by the defendant that underlay the litigation. In *CTS v. Waldburger*, the contamination allegedly caused by a chemical company in North Carolina was discovered after the statute of repose expired. The plaintiffs sued the company for allegedly contaminating underground drinking water 17 years after the defendant's last act causing the contamination. The plaintiffs argued that CERCLA §309 applies; because we didn't discover the contamination until recently §309 preempts both the statute of limitations and the statute of repose. The plaintiffs lost in the North Carolina federal district court and the case went to the Fourth Circuit. The Wake Forest University Environmental Law Clinic took the case for the plaintiffs and a third-year law student argued the case and convinced the Fourth Circuit to reverse on the ground that Congress' intent was clearly to preempt both statutes of limitations and statutes of repose.

At oral argument in the Supreme Court, both Justices Kennedy and Scalia admitted that until this case arose they didn't know the distinction between state statutes of limitation and statutes of repose. Nevertheless, the Court, by a 7-2 vote with only Justices Ginsburg and Breyer dissenting, agreed that because the study group had separately referred to statutes of limitation and statutes of repose, whereas Congress wrote only "statute of limitations" in CERCLA, the result was that the case was barred.

What's really surprising is that 11 days later, the North Carolina General Assembly unanimously passed legislation saying, in effect, that the Supreme Court misinterpreted North Carolina law. Here, I'm quoting from it: "The General Assembly finds that prior to the U.S. Supreme Court ruling in *CTS v. Waldburger*, there was ambiguity and uncertainty regarding the effect of federal law on the

17. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

18. *CTS Corp. v. Waldburger*, No. 13-339, 44 ELR 20125 (U.S. June 9, 2014).

North Carolina statute of repose. The General Assembly finds that it was the intent of the legislature to maximize under federal law the amount of time a claimant had to bring a claim predicated on exposure to a contaminant regulated by federal or state law.” So, the state legislature basically said that the Supreme Court got it wrong. But what the Court was doing was interpreting a federal law, which can’t be changed by North Carolina.

What the North Carolina General Assembly effectively did was they passed a new exception that says our state statute of repose doesn’t apply in cases of hazardous substance releases from this day on and for all cases that have not been litigated to judgment at this point. Why did the state legislature do that? It is widely assumed the action stemmed from another case in which North Carolina residents sued the U.S. military for groundwater contamination at Camp Lejeune. That might explain why the Solicitor General surprised many people by filing a brief on behalf of the defendants in this case instead of siding with the homeowners.

John Cruden: Thank you. This shows that just when we think the Supreme Court is the last word on all these cases, maybe they’re not. Other things can happen. Now that we have discussed cases decided in the last term, we are going to turn to the Supreme Court term this year. I will start with two cases that are set for argument.

The first one is *Kansas v. Nebraska*,¹⁹ set for argument on October 14. An interesting part of the Supreme Court’s docket is what we all refer to as the original jurisdiction cases. These are cases where the Supreme Court acts like a trial court. When you have a state-versus-state action, then the state’s petition goes directly to the Supreme Court. They decide whether or not to hear the case, and if they do hear it, then they’re the trier of fact for that case. *Kansas v. Nebraska* concerns a long-standing dispute between those two states over the allocation of water from the Republican River that flows through Colorado, Kansas, and Nebraska.

Kansas first filed suit in 1988. There was a congressionally approved water compact that allocated water among the three affected states. This dispute began over groundwater. Is the groundwater that feeds into the Republican River covered by the compact? If so, how do you measure that? The states were able to settle that issue in 2003, concluding that groundwater was covered by the compact. They came up with a modeling protocol to determine usage. I think all the states hoped that that would be the last word. However, Kansas decided that, almost from the very beginning, Nebraska was violating the compact by taking more water than Kansas thought it should. Kansas took their complaint to the Supreme Court, who decided to hear the case.

Once the Court takes a case between states, it is completely under its original jurisdiction from the beginning. They assign a special master to make factual determinations

and recommendations on how to proceed. In this case, the special master found that Nebraska had in fact taken more water than it should have, awarded damages to the state of Kansas, but did not give Kansas the injunctive relief it had sought. Also, because there was some accounting problems that the special master thought were a mistake, he made changes to those accounting protocols. The U.S. Department of Justice filed a brief supporting the special master’s decision. Not surprisingly, all the states disagreed with some findings by the special master.

What should everybody be looking for in this case? First, this is an important case because of water shortage problems. I often tell people that when I’m on the East Coast I’m talking about water quality, but when I’m on the West Coast I’m talking about water quantity. This is a Midwest water-quantity allocation case. What states are doing and how they handle groundwater allocation is enormously important.

Second, though, is what the special master did in arriving at a damage award in the case. You would expect that the damages would be based on the value of the water to the state that lost the water. But it turns out that the water was really more valuable to Nebraska than it was to Kansas. So, it benefited Nebraska significantly more than the detriment of what Kansas lost. The special master factored that in his decision, requiring the state of Nebraska to disgorge some of their additional benefit in coming up with an overall damage award of \$5.2 million. That is an important issue that will be argued before the Supreme Court on October 14.

By the way, there is another water case pending before the Court that I’m not going to discuss in any detail: *Florida v. Georgia*.²⁰ This controversy involves use of the Chattahoochee River, which comes from Atlanta, converges with the Flint River, and then flows into Florida. The state is back before the Court arguing that Georgia is taking too much water and devastating Florida’s oyster industry, and they want the Court to apportion the water. The United States filed an amicus brief saying that the case is worthy of consideration, but recommending that the Court waits while the U.S. Army Corps of Engineers acts. The Corps, which operates the dams, is about to issue a new Master Water Control Manual that could impact water apportionment. However, this is a cert worthy case.

The second case worth watching: *Dart Cherokee*.²¹ This is not per se an environmental case, but it’s relevant to environmental practitioners. It’s also fun because it takes us back to the first year of law school. In federal civil procedure class, every one of us was indoctrinated by people like Professor Elliott telling us that the difference between state and federal pleading is that federal pleading has notice pleading.

19. *Kansas v. Nebraska*, Orig. No. 126 (argued Oct. 14, 2014). For more on this case, visit <http://www.scotusblog.com/case-files/cases/kansas-v-nebraska-and-colorado/>.

20. *Florida v. Georgia*, Orig. No. 220142 (docketed Oct. 4, 2014). For more on this case, visit <http://www.scotusblog.com/case-files/cases/florida-v-georgia-2/>.

21. *Dart Cherokee Basin Operating Company, LLC v. Owens*, No. 13-603 (10th Cir. Sept. 7, 2014), cert. granted, No. 13-719 (argued Oct. 7, 2014). For more on this case, visit <http://www.scotusblog.com/case-files/cases/dart-cherokee-basin-operating-company-llc-v-owens/>.

Notice pleading, short and simple facts. It's in the *Federal Rules of Civil Procedure* that when you're making your arguments, they should be short and simple. Now, that procedural requirement is before the Supreme Court. The facts are relatively straightforward and involve a class action seeking royalty payments for oil and gas leases. What's important is that while the lawsuit was filed in state court, the plaintiffs wanted to be in federal court. Under the Class Action Fairness Act, there are jurisdictional requirements for removal, such as having over 100 parties and the case is potentially worth more than \$5 million. Relying on the short pleading arguments, the plaintiffs alleged the statutory requirements but they didn't file any evidence in support of their assertion.

The federal district court dismissed. The plaintiffs went to the Tenth Circuit, which agreed with the district court in a split decision. They then sought en banc and the Tenth Circuit split 4-4. The real question in the case is fundamentally a first-year law school kind of question. Is it enough that the plaintiffs asserted they had evidence of 100 parties and \$5 million? Or should the plaintiffs have presented supporting evidence when they sought removal to prove that they've satisfied the federal standard? That is the crux to be argued October 7.

Donald Elliott: For those of you who have gone to law school more recently than John and I, you'll recognize that the Supreme Court in two cases, *Twombly*²² and *Iqbal*,²³ disavowed the old *Conley v. Gibson*²⁴ rule about notice pleading, holding instead that a plaintiff must allege sufficient facts for a cause of action to be plausible. One way to think about the *Dart Cherokee* case is that it's a question of whether or not the *Iqbal* and *Twombly* standard for notice pleading also applies to petitions for removal to federal court.

John Cruden: Before I start asking questions about pending petitions, I want to add a footnote to Don's comment (which I agree with). And that is, very recently, Chief Justice Roberts has been talking publicly to practitioners and audiences about the need to, quote, be brief. He's been commenting that Supreme Court merits briefs are just too long. I would urge each of you to look at the merits brief filed in the *Dart Cherokee* case. It's about one-half as long as a normal Supreme Court brief. It's about 25 pages, one of the shortest I've seen, and it's well put together. The arguments are detailed and quite well-written. If nothing else, this is a party that's paying attention and trying to follow the Chief Justice's recommendation on brief lengths.

Those are important cases. Stay tuned to them. Now, let's move on. Don, you were a general counsel at EPA and are an expert on the Administrative Procedure Act (APA).²⁵ What do you think about the *Perez* case, which presents

the issue of what agencies have to do when they change their mind?

Donald Elliott: You're talking about the *Perez v. Mortgage Bankers*²⁶ case. Cert was granted and it's set for argument on December 1. It concerns an issue that has been kicking around for a long time. Those of you who know your administrative law would know it as the *Paralyzed Veterans*²⁷ or the *Alaska Professional Hunters*²⁸ issue. For about 10 years, the D.C. Circuit has gradually developed a doctrine that if an agency adopts an interpretation of a rule and then later changes it, the agency has to go through notice-and-comment rulemaking for the second change. So, an agency gets one interpretation of its rule for free, but after that, if it wants to change its interpretation, it has to do notice-and-comment rulemaking.

I think that the *Perez* case, this is a doctrine that—you mentioned agency general counsels. I once settled a case on very favorable terms with EPA by going to one of my successors and saying, "You don't want to go down in history as the EPA general counsel who lost the *Paralyzed Veterans* case or who got the Fifth Circuit to adopt the *Paralyzed Veterans* doctrine." But, gradually, several other circuits have adopted the *Paralyzed Veterans* doctrine. The government finds it, I think, very burdensome. There's a long history of the lower courts and academics trying to tell agencies when they have to do rulemaking. I think, generally, the Supreme Court has properly said that whether an agency does interpretational rulemaking is a discretionary decision for the agency. There's a whole line of Supreme Court cases saying that, including the *Bell Aerospace*²⁹ case.

I think what *Perez* illustrates is the great advantage that the United States and the Solicitor General's Office have in picking what case to use to take an issue to the Supreme Court. This, I think, is a case that would be extremely difficult for the Solicitor General not to win. The Solicitor General is challenging the *Paralyzed Veterans* doctrine, arguing, "It's made out of whole cloth. It's inconsistent with the language of the Administrative Procedure Act. And it's inconsistent with the *Vermont Yankee*³⁰ case about courts making up their own procedural requirements that are not found in statute."

The *Perez* facts involve the question of whether a mortgage agent at a bank is deemed administrative personnel or not. Whether an employee is classified as exempt from wage and hour laws requiring overtime pay is a fairly standard issue in labor and employment law and one on which the administering agency, the U.S. Department of Labor, has issued four different opinions over time. I think one of the interesting things we're seeing in a lot of cases

22. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

23. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

24. *Conley v. Gibson*, 355 U.S. 41 (1957).

25. Administrative Procedure Act (APA), 5 U.S.C. §§501 et seq., available in ELR STAT. ADMIN. PROC.

26. *Mortgage Bankers Ass'n v. Harris*, No. 12-5246 (D.C. Cir. July 2, 2013), cert. granted sub nom. *Perez v. Mortgage Bankers Ass'n*, No. 13-1041 (argued Dec. 1, 2014).

27. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

28. *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

29. *National Labor Relations Board v. Bell Aerospace*, 416 U.S. 267 (1974).

30. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 8 ELR 20288 (1978).

now is that because of the very strong political contrast between the second Bush Administration and the Obama Administration, there are many cases where agencies have reversed their interpretations. In this instance, there were two interpretive rules in 1999 and 2001 saying that bank mortgage agents were not administrative personnel, and, therefore, they had to be paid for their overtime. In 2006, the agency reversed its construction and said, “No, they’re administrative personnel. You don’t have to pay them for their overtime.” And then in 2010, the agency went back to the original interpretation. Thus, four different interpretations; three of them going in one direction, one of them going in the other direction.

The D.C. Circuit held in 2010 that an agency has to engage in notice-and-comment rulemaking when it’s going back to the original interpretation. In what I believe is a very strong brief, the Solicitor General’s Office, in both the cert petition and the merits brief, starts out by quoting the language of the APA that clearly provides that an agency doesn’t have to do notice and comment for interpretive rules. And here, we have four interpretive rules, and the D.C. Circuit is saying, based on this judge-made doctrine, that when an agency does it for the fourth time, it must go through notice-and-comment rulemaking.

John referred to the fact that when the Supreme Court takes a case, there is already about a two-thirds chance that it’s going to be reversed. I would say it’s substantially higher than that here. And I would be very surprised if the Supreme Court didn’t by a large majority say that there’s really no basis for the lower courts to be making up these additional requirements. You have to remember that you have five conservatives on the Supreme Court who oppose judicial lawmaking as a general matter. Here, you have the Obama Administration and the Solicitor General’s Office also saying that there’s no basis for this.

I think we’ll get a large majority opinion by the Supreme Court. I hate to go out on a limb because every time I do, I’m wrong. But I think it’s very likely that as an administrative law matter, the court will hold that there’s no basis for the D.C. Circuit to have that doctrine. There’s an excellent amicus brief by administrative law professors taking that position, written by Profs. Richard J. Pierce Jr. and Robert L. Glicksman, both with the George Washington University Law School.

John Cruden: Bob, let me ask you this. I enjoy fishing on occasion, and when I fish, I’m a proponent of the catch-and-release program. I’m now consulting you, as my lawyer, as to whether or not I should be wary of releasing my fish for fear that they could be evidence in some case.

Robert Percival: I think the answer is just don’t destroy the evidence after you’ve been told to retain it when you were caught with an undersized catch. This is a case, *Yates v. United States*,³¹ argued on November 5. The facts involve

federal fisheries regulations, but the legal issue in the case instead concerns part of the Sarbanes-Oxley Act³² passed four years ago by Congress. Mr. Yates was operating the *Miss Katie*, a fishing vessel, in federal waters in the Gulf of Mexico. He got caught by an officer of the Florida Fish and Wildlife Commission deputized by the National Marine Fisheries Service to enforce federal law, and was found to have 72 undersized red grouper. This is the case of the disappearing red grouper.

The officer measured them. There’s a controversy over how you measure fish for compliance with fishing regulations. Do you do it with the fish’s mouth closed? How do you pinch the tail? Anyway, the officer segregated them into two groups: legal fish that were above 20 inches, and the 72 undersized red grouper. He said, “Go to shore. We’re going to seize the undersized fish when you get to shore.” The vessel arrives at shore and it turns out that all the undersized fish have disappeared. The government then charges Yates with violating a provision of the Sarbanes-Oxley Act.

Now, what surprised me when I first looked at the case is that prior to Sarbanes-Oxley there was no general federal destruction-of-evidence statute. You have obstruction of justice, but one of the things that the Sarbanes-Oxley Act added was 18 U.S.C. §1519, which makes it a crime for anyone who, “knowingly alters, destroys, mutilates, conceals, covers up, falsifies . . . any record, document or tangible object with the intent to impede, obstruct or influence an investigation.” The claim here is that that section was only supposed to refer to documents, and not to fish.

The Eleventh Circuit had no problem at all, issuing a very short, unanimous opinion saying that the text of the statute clearly covers any tangible object and fish are a tangible object. But Mr. Yates’ lawyer is arguing that the intent of Congress was only to apply §1519 to pieces of paper and not the disappearing red grouper. This will be a fun case.

I did want to make a comment about a case that many people thought might be cert-worthy, but the Supreme Court denied the petition.³³ There’s a tremendous amount of litigation going on now around the country challenging state renewable energy standards or portfolio standards on the grounds that they might violate the Dormant Commerce Clause. The Dormant Commerce Clause forbids states from taking actions that would discriminate against interstate commerce. And there’s a fairly well-established doctrine that any state statute that facially discriminates against interstate commerce is virtually per se invalid.

When California adopted its low-carbon fuel standard, an important element of the state efforts to enforce their cap-and-trade program to reduce carbon emissions dramatically, they required a life-cycle analysis of the carbon footprint of various fuels used in the state for purposes of calculating compliance with the standard. One of the ele-

www.scotusblog.com/case-files/cases/yates-v-united-states/.

32. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, enacted July 30, 2002.

33. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *pet. for reh’g denied*, No. 12-15135, 2014 WL 223797 (9th Cir. 2014), *cert. denied* (U.S. June 30, 2014) (Nos. 13-1148 et al.).

31. *United States v. Yates*, No. 11-16093 (11th Cir. Aug. 16, 2013), *cert. granted*, No. 13-7451 (argued Nov. 5, 2015). For more on this case, visit

ments included was the location of where the fuel originated, so that they could calculate transportation costs of getting the fuel to California. The argument was made that this was a facial discrimination against interstate commerce because fuels originating out of state have to travel greater distances. California defended on the ground that the state had a good reason to factor in location because it was a critical part of calculating the actual carbon footprint.

Among the things that the Ninth Circuit noted in upholding the standard by a 2-1 vote was that for sugarcane-based ethanol coming from Brazil, its location also factored in and it doesn't really jeopardize that at all because it has such a low-carbon footprint in general and is transported to California by ship. But the Rocky Mountain Farmers Union of ethanol producers from out of state claim it discriminated against them. One of the reasons people thought that this might be cert-worthy was that there was a very vociferous dissent from the denial of rehearing en banc in the Ninth Circuit, joined by several judges, that looked like a plea for the Supreme Court to grant cert.

I think the Court had good reasons not to grant cert. One is that the litigation is not over. All the Ninth Circuit did was tell the district court, "You were wrong in saying it was facial discrimination. Now, go back and do the usual *Pike v. Bruce Church*³⁴ balancing test to determine if the overall fuel standard discriminates against interstate commerce." So, the case could come back to the Ninth Circuit eventually.

The other reason for denying cert is there's not really that much chance of direct circuit conflicts because California has the toughest standard now. Each state has their own kind of renewable portfolio standards with their own set of Dormant Commerce Clause issues. So, you're not likely to get clear federal circuit conflicts that would cry out for Supreme Court review.

John Cruden: For our audience, this is what we have covered so far. We've talked about what has been decided by the Court and about cases where the Court has already acted either by granting or denying cert, including the case about the California low-carbon fuel standards.

Now, I want our experts to make predictions. Don, tell me one case where there's a cert petition pending right now, and why we should care about that petition. And then predict as to whether the Supreme Court will grant or deny cert.

Donald Elliott: I think a case for which the Supreme Court might very well grant cert is the petition relating to the Mercury and Air Toxics (MATS) Rule.³⁵ [The Supreme Court subsequently agreed to review this case, announcing on November 25, 2014, that it had granted cert] This is a

rule that restricts mercury and other trace elements in the coal from coal-fired power plants. About 98% of the benefits comes not from restricting mercury but co-benefits from closing down coal-fired power plants and reducing other pollutants.

The biggest news in recent energy policy in the United States is a major shift away from coal, from 48% or so down to about 35%, and replacement with natural gas, which is less polluting, at least in the combustion phase, from the standpoint of GHGs and other pollutants. This reduction is driven largely by differences in price. It's cheaper to generate electricity now from natural gas than from coal.

But looming in the background, the big regulatory driver for moving away from coal and closing over 300 smaller coal-fired power plants in the United States, is the MATS Rule. EPA estimates that it will have an annual cost of \$9.6 billion per year and benefits much larger, at least by EPA's computations. About 40 states have asked the Supreme Court to take that case. It's still in its early stages. We've only had a cert petition filed by UARG, the Utility Air Regulatory Group.³⁶ I think there are 23 states opposing the rule and asking the Supreme Court to hear it, while 13 other states and the District of Columbia are supporting it, for a total of about 40 states asking the Court to take it. So, I think it's likely that they will grant cert. It's a very interesting case. Section 112 of the CAA talks about regulating electric steam generating units if "appropriate and necessary."³⁷ The key issue in the case is whether or not "appropriate" allows EPA to consider costs. This is again an issue on which the agency has been back and forth in different administrations.

A very interesting opinion was issued on April 15, 2014, by the D.C. Circuit in a case called *White Stallion Energy Center*.³⁸ It's a majority opinion by Chief Judge Merrick Garland joined by Judge Judith Rogers, but with a very strong dissent by Judge Brett Kavanaugh, which I think got a lot of attention from the conservatives on the Supreme Court. Because of its importance, we might very well see a cert grant in that case. I think Judge Garland has written a very strong, very confident opinion as a moderate, essentially doing the same analysis that the Supreme Court did in the *Whitman v. American Trucking* case and saying there are many other sections in the statute that mention cost specifically. This particular language doesn't mention costs. So, it will be very interesting to see if the Supreme Court does grant cert, and whether or not Justice Scalia distinguishes his famous phrase about Congress not hiding elephants in mouse holes. Because the argument would be that the word "appropriate" is the statutory mouse hole.

John Cruden: Okay, Don has predicted a cert grant on the mercury air toxics case. Bob, what are your views and please give us your case that you believe might have cert granted.

34. *Pike v. Bruce Church*, 397 U.S. 137 (1970).

35. *White Stallion Energy Center LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), cert. granted sub nom. *Michigan v. EPA*, Nos. 14-46 et al., cert. granted Nov. 25, 2014. For more on this case, visit <http://www.scotusblog.com/case-files/cases/michigan-v-environmental-protection-agency/>. For information about the MATS Rule, visit <http://www.epa.gov/mats/actions.html>.

36. See *White Stallion*, supra note 34.

37. 42 U.S.C. §7412(n)(1)(A); ELR STAT. CAA §112(n)(1)(A).

38. See *White Stallion*, supra note 34.

Robert Percival: Just a comment on mercury versus air toxics. I'm exactly like Don in that I normally don't join amicus briefs, but I did join the law professors on their amicus briefs in this case, opposing the petition for cert, because I think it's such an important issue and I believe EPA is right. Two other interesting cert petitions are pending before the court. *Utility Air Regulatory Group v. EPA* is a challenge to EPA's revision of the NAAQS for ozone.³⁹ You'll recall that this round of revisions was what gave rise to the *American Trucking* case when EPA in 1997 initially lowered the standard for ozone. This issue has been bouncing around for a long time.

The D.C. Circuit upheld EPA's decision to lower the standard for ozone from 0.8 to 0.75. The court said we're not going to get into a battle of scientific experts; we'll defer to the agency's judgment with respect to the science. It was a case where the Clean Air Scientific Advisory Committee had recommended that EPA go even lower. They were challenged on that by some environmental groups. Those groups did succeed in getting the court to remand the secondary NAAQS for ozone. But the industry groups that wanted to stop EPA from lowering either the primary or secondary standard lost the case. I don't think the Court will grant cert. The decision below was unanimous, and the D.C. Circuit has exclusive venue over CAA cases. I just can't see there being any major reason for the Supreme Court to get involved in this. [The Supreme Court subsequently denied cert in this case on October 6, 2014].

The other cert petition that's pending as of now is a case involving the BP settlement, *BP Exploration & Production, Inc. v. Lake Eugenie Land & Development, Inc.*⁴⁰ You may know that BP agreed to a surprisingly broad settlement agreement with private litigants as a result of the *Deepwater Horizon* oil spill. Now, it's come to regret that because huge sums of money are being paid, much greater than BP had originally estimated. BP alleges fraud and asserts that payments are going to claimants who didn't suffer any injury.

So, BP is making essentially two arguments. One is that regardless of what they may have agreed to (because every time they challenged this, the court in the Fifth Circuit says, "Well, you agreed to it"), it's a fundamental violation of due process to have to pay damages to anyone that wasn't actually injured. The second issue here that might have some more salience is one on class action certification. BP is arguing that the Fifth Circuit, in conflict with several other federal circuits, certified a class that includes numerous members who haven't suffered any injury caused by the defendant.

I think it's unlikely the Supreme Court will take this case, in part because at this point, it's essentially an interlocutory appeal. I don't see a compelling reason why the

Court would want to wade into the thicket right now. [The Court subsequently denied cert in this case on December 8, 2014]. As for the MATS case, the D.C. Circuit has exclusive venue over the CAA, and if I were the Supreme Court I wouldn't want to venture there in response to Judge Kavanaugh's dissent below inviting the Court to intervene. Some Justices might want to address the extent to which cost considerations are required to be taken into account by the Agency. [When the Court subsequently granted cert on November 25, 2014, it limited the grant to the question: "Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities."] I will hesitate to predict whether the Court will take that case. It may end up being a very light term for environmental cases in the Supreme Court.

John Cruden: Don, at different times now in this dialogue, we've said that the D.C. Circuit has exclusive jurisdiction over CAA cases. I read recently that not all the federal circuits agree with that. Is that a cert-worthy question?

Donald Elliott: I was going to pick up on that. I don't think we've said that as a panel. I don't agree with that. I think Bob misspoke. As he's well aware, the D.C. Circuit has exclusive jurisdiction over CAA cases of national applicability, which are the rules that we're talking about. The other federal circuits have jurisdiction over cases that are regionally applicable, such as a state implementation plan approval.

Robert Percival: Yes, I was talking about [nationally applicable CAA cases.]

Donald Elliott: I just wanted to clarify that. I think a very interesting case that is at a very early stage is *Clean Water Action Council of Northeastern Wisconsin v. EPA*,⁴¹ a Seventh Circuit opinion issued on August 29. It's interesting because it's a CAA case, even though it was brought by the Clean Water Action Coalition. Chief Judge Frank Easterbrook intentionally, I think, created a circuit conflict by holding that the 60-day requirement for filing challenges under CAA §307(b), which applies both to nationally applicable and locally applicable requirements, is not jurisdictional. Previously, the D.C. Circuit and the Tenth Circuit had held that it is jurisdictional. EPA has used that very successfully on people who challenge a particular rule. The agency would say, "Oh, I'm sorry. The rule was promulgated 10 years ago. That really is just an application of the rule, promulgated 10 years ago. If you didn't sue within 60 days of that one, you're out of luck."

Judge Easterbrook, writing the panel's decision that the 60-day requirement is not jurisdictional, took the extraordinary step of reviewing the entire Seventh Circuit and basically asking if any judge objected. I've never heard of that procedure before. It's like going en banc without a

39. *Missouri v. EPA*, No. 08-1200 (D.C. Cir. July 23, 2013, reissued Dec. 11, 2013), cert. denied sub nom. *Utility Air Regulatory Group v. EPA* (U.S. Oct. 6, 2014) (No. 13-1235). For more, visit <http://www.scotusblog.com/case-files/cases/utility-air-regulatory-group-v-environmental-protection-agency-2/>.

40. *BP Exploration & Prod., Inc. v. Lake Eugenie Land & Dev., Inc.*, No. 13-30315 (5th Cir. Mar. 3, 2014), cert. denied (U.S. Dec. 8, 2014) (No. 14-123). For more, visit <http://www.scotusblog.com/case-files/cases/bp-exploration-production-inc-v-lake-eugenie-land-development-inc/>.

41. *Clean Water Action Council of Northeastern Wisconsin v. EPA*, No. 12-3388 (7th Cir. Aug. 29, 2014).

request. So, we clearly have a conflict in circuits over the question of whether or not the 60-day requirement under §307 is jurisdictional.

It's more important than it may seem because EPA frequently and successfully has argued that decisions made in later rules are really encompassed by earlier rules and therefore can't be challenged because you're out of the 60-day period. I think that's an important case to watch. Will it go to the Supreme Court? I don't know. But I think now that there's a conflict in circuits, the issue will eventually have to be decided by the Supreme Court.

John Cruden: It's fascinating to examine the cert petitions and have our two experts use their crystal ball to make predictions. I have questions from the audience, but first I want to pick up on something that Don just mentioned—not the case itself, but the fact that the panel decision was written by Chief Judge Easterbrook. I think several of you have mentioned the name of the individual judge or Justice who has written the opinion or the dissent. You are close followers of the Supreme Court. How much of a difference does it make, in the Supreme Court's decision to grant or deny a petition, who wrote the underlying opinion? Do you think the Court pays a lot of attention as to who authored the lower court opinion?

Donald Elliott: Sure, I think the Court pays attention to who authored the decision below. The federal judiciary, particularly at the appellate level, is really quite small. They all know one another quite well, particularly some of the more prominent judges like Frank Easterbrook or Kavanaugh. So, I think the fact that there is a Kavanaugh dissent would be more noticed by Justices of the Supreme Court.

Let me address a variation of that point that I think is very important. That is, I think that increasingly the Justices, particularly Justices Scalia and Kennedy, don't necessarily feel bound by the language of opinions they didn't write. It's quite striking to me that the Court would allow Justice Scalia to say some of the broad things he said in the *UARG* case that I talked about.

Now, I think the reason for it is that they just don't consider themselves bound. They sign on to the results in a case, but they don't necessarily sign on to the full opinion. You see this particularly in the fact that Justice Scalia or Justice Kennedy will frequently quote their own concurring opinions as correctly stating the law, rather than the majority opinion in the same case. I think one of the things that Prof. Richard Lazarus taught me is that when you're thinking about the Supreme Court, you really have to think of five Justices. You can't look at it the way that we might be taught to in law school in terms of the opinions of the Court and what's the correct opinion of the Court. You really have to put together whether or not you can get the five.

John Cruden: Bob, same question. You were a Supreme Court clerk. We all know that it takes five votes to win, but it only takes four votes for a cert grant. How does that

work? And the same question that I asked Don, does it make a difference who wrote the underlying opinion?

Robert Percival: I think the court is very different now than it was when I was clerking back in the days when dinosaurs roamed the earth. Back then, there weren't any consistent ideological splits that could allow you to easily predict the outcome of a particular case. As a result, it was very different. Now, it's much more polarized, even in the selection of law clerks. It used to make no difference whether you clerked for a liberal or a conservative judge. The late Chief Justice William Rehnquist told his clerks, "You can be as liberal as you like. I don't care, so long as you do a good job." Now, there are certain judges who are feeder judges for Supreme Court clerks—the conservative judges for conservative Justices, and liberal judges for liberal Justices.

I think what often happens in these lower court decisions is that they're written specifically with the view of getting the attention of the Supreme Court. Maybe that even leads to some hyperbole and exaggeration concerning the importance of the case by a dissenting judge that wants the Court to vindicate him by overturning the case. Justice Byron White, my old boss, repeatedly told me, "We review judgments, not opinions," which I think is consistent with Don's comment that a lot of things might be in an opinion that the Justices don't necessarily view as controlling. In his confirmation hearing—to show you how different things were back then, Justice White's confirmation hearing lasted 40 minutes—he was asked his view of the role of a judge. He said "it's to decide cases." He had no particular ideological ax to grind. He was confirmed a few weeks later by voice vote of the Senate.

Now, we know there are grueling confirmation battles in the Senate. Even people that are immensely well-qualified, whom no one can object to, like John Cruden, have to wait a long time to get confirmation. It's very troubling for our legal system, I think, and for our system of justice that we've reached that stage. Take, for example, these environmental cases, where it used to be that the major statutes were passed by overwhelming bipartisan majorities. Now, there are some who seek to gain political capital by trying to demonize EPA as an out-of-control power-hungry Agency and also to demonize environmentalists.

John Cruden: Don, I have a question from our audience on a comment you made about the *UARG* case. The question is, when Justice Scalia wrote his opinion in *UARG*, what makes you think that he was referring to EPA's §111(d) rulemaking? Is it possible that Justice Scalia was motivated by something else?

Donald Elliott: Oh, it certainly is possible, but there's a famous line that says that judges read the newspapers. I think the way Justice Scalia phrased his opinion struck me, at least, as being directed toward the §111(d) proposal that had recently come out. I heard a great line by Justice Scalia from one time when he was meeting with some of us up

at Yale. He said he always told Justice Stevens that Justice Stevens didn't really understand *Chevron*, even though he had written it. I think Justice Scalia's point was that it's not really the intention of the opinion writer when they write the opinion, but once it's out there, what does it mean?

When I look at that as a former general counsel, I would look at it in terms of it being potentially threatening to what the Agency is proposing to do under §111(d). EPA Administrator Gina McCarthy said that the *Homer City* case was a strong vindication of EPA's interpretative authority under *Chevron*, and was giving the Agency a green light to go forward on aggressive GHG regulations. All I was trying to say is that that signal should be counterbalanced with the signal that I read in the Justice Scalia opinion of his saying, "Don't go too far. Don't get too adventurous in terms of your interpretations."

John Cruden: My follow-up question on *UARG* is, what's happening now? The Court, in holding that EPA could not use the numbers in their regulation, also stated that the Agency could use *de minimis* methodology. You taught administrative law. Where did that come from, this *de minimis* methodology in a post-*Chevron* world?

Donald Elliott: Well, that's very interesting. I'm glad you brought that up. *De minimis* comes from an old common-law maxim, *de minimis non curat lex*, which we lawyers get to say sometimes. When our words are really serious, we speak Latin. It means that the law does not bother itself with trifles. A number of years ago, an opinion by Judge Harold Leventhal in the D.C. Circuit called *Kennedy v. Monsanto*⁴² imported this *de minimis* notion into environmental law. In that case, it was claimed that the plastic that Coca-Cola was bottled in necessarily contaminated the product as a matter of molecular theory; some molecules had to get from the plastic into the Coke. Judge Leventhal said, "No. That's not enough. You actually have to show that there is a measurable, appreciable, or significant level." Ever since, there's the notion that in many areas of environmental law, the Agency doesn't necessarily have to consider levels that are too low. While invalidating the 10,000-ton limit that was in the Tailoring Rule, the Court suggested that there could be a *de minimis* level, if there was some level low enough not to be bothered with.

We won't know for 20 years, but I would suspect that probably was a comment from somebody, one of the other Justices on the opinion: "Well, we're not going to rule on *de minimis*." But it did suggest that although the Court disapproved the Tailoring Rule (even though it wasn't technically before them under the limited grant of cert), they did suggest that EPA could set a *de minimis* level. Some people have taken the view—I know Vickie Patton from the Environmental Defense Fund has taken the view—that the Tailoring Rule is still in effect even though the Court disapproved of it. I think it remains to be seen what interpretation EPA will come out with as to what a *de minimis*

level might be. Some people have suggested that they could reiterate the 10,000-ton limit and just call it *de minimis*.

Logically, historically, *de minimis* has typically been limited to those things that are so low that they don't have a significant effect, particularly in terms of not being worthwhile in the Agency's administrative costs. But I don't think there's a clear definition of that. I think it was an invitation for EPA to come back if they wanted and set some other limit and say, "Well, we don't have to go all the way to what the statute says. There's some *de minimis* level of CO₂ released." But that remains to be seen.

John Cruden: Bob, a question for you on the *Homer City* case. EPA apparently won the case. If so, why isn't that new rule in effect? Why is the old rule still in effect?

Robert Percival: Good question. I don't know the answer to that. [At the time of this panel discussion, the D.C. Circuit had not yet lifted its stay of EPA's rule, even though the Supreme Court had reversed the decision striking it down in April 2014. After considering new briefs, the D.C. Circuit lifted the stay a month after this panel discussion]. What would you say?

Donald Elliott: What was interesting about the case is that when the D.C. Circuit invalidated CAIR, it said the rule had fundamental flaws, but left it in effect. So, everybody has been complying with it in the meantime. The two standards are basically very, very similar. One of them achieves a 70% reduction. The other achieves a 71% reduction.

The only place they're really different is the CSAPR rule, the more recent rule, which includes Texas, where the earlier rule did not. So, it's very significant for some of the Texas sources, including Homer City, which is (or was) a big coal-fired power plant in Texas. But I do believe that the rule is in effect.

Now, part of the problem (and maybe this is what they're talking about) is that the way the rule is structured, it's a trading system. So, it has to go into effect as of the first of the year. It may just be a transitional issue they're talking about. But the rule has been upheld and presumably it will go into effect as of January 1, 2015. You can't do an annual trading system beginning in midstream. You have to pick it up at the beginning of the next calendar year.

Robert Percival: Yes. It illustrates how, even in cases where the D.C. Circuit has strongly disagreed with something that EPA did, if it's really important to maintain some sort of controls in place, the court will allow the Agency to continue with the rules that had already been struck down in the first decision, because they have to have something in place in the meantime. It's just a practical reality.

Donald Elliott: Yes, I think that's a very important point. It's a major trend that's developed in the D.C. Circuit. Particularly when the D.C. Circuit invalidates a rule on the grounds that it didn't go far enough, the court tends to leave

42. *Kennedy v. Monsanto*, 613 F.2d 947 (D.C. Cir. 1979).

the rule in effect because they'd be shooting themselves in the foot if they got rid of the rule entirely. I think that was part of the problem with the CSAPR rule, as well as with the CAIR rule. Plus, I think that a lot of companies had already spent the money to comply and were in compliance.

I think one of the problems that we're seeing generally is that the legal process is awfully slow by the needs of these dynamic and moving markets. Sometimes, when the Supreme Court comes in—you mentioned the *Deepwater Horizon* case. In the previous spill, the *Exxon Valdez* case, that spill occurred in 1989. The final Supreme Court decision was issued in 2009, 19 years later. It took us about 20 years to get straight on interstate pollution issues. So, I think one of the major problems we have is that the legal process works a lot more slowly than what is really needed.

Robert Percival: That's good. The premise of the unusual legal challenge by several states that have gone to the D.C. Circuit to try to halt the §111(d) rulemaking is that because it takes so long to decide these cases, the court should invoke the All Writs Act and issue a writ of mandamus to stop EPA from doing something that the plaintiff states consider patently illegal. I think that will be bounced quickly from the D.C. Circuit, because they haven't taken any final action yet. But there's a thunderous editorial in today's [Oct. 1, 2014] *Wall Street Journal* saying that the fact that the D.C. Circuit is even hearing the case suggests that they might win an unusual victory.

John Cruden: Bob, we have already talked about the very significant CAA rules that are out for public comment right now, the new source performance standards for future and existing power plants. If they are litigated, when would the cases actually be heard? If the Supreme Court did take either of those cases, would it be with this Administration, or will it be during future administrations that courts are going to be dealing with those potential cases?

Robert Percival: I think it's going to take long enough. EPA has stated that it will have the §111(d) rule out by June 2015. The Agency has already extended the public comment period because it's received thousands of comments and some states said they didn't have enough time to prepare their comments. That comment period was extended until December 2014. The agency has indicated that it still plans to come out with the rule in June of 2015. There are some suggestions that there may be major changes in the rule in light of the public comments. EPA has signaled that it wants to be as flexible as possible and fair to the states in defining this rule. You may see a situation where the legal challenges would actually be decided in a post-Obama Administration.

Donald Elliott: Can I make a point along those lines? I agree with everything Bob said about that mandamus petition to try to halt the rulemaking before it begins. It's an extraordinary action. But one of the things that does

happen is that the markets often respond when a rule is proposed, not when it's finalized or upheld in court. One example of that was recently on the Yale 360 website (an excellent environmental site, by the way). There was a chart comparing the U.S. power plant capacity additions in the first six months of 2013 and the first six months of 2014, two six-month periods. It shows about three times as much natural gas added as renewables in 2013. Almost no new natural gas plants or coal-fired power plants added in 2014; essentially all renewables.

I think a lot of that is reacting in anticipation of the §111(d) rule. I have counseled a number of companies in the electric utility industry over the years. They look far into the future when they decide to make a capital investment in a new plant. The point is that in some real sense, the §111(d) rule is already in effect, even though EPA has only proposed it, because it's already having a significant effect on the decisions that people are making as to what kind of units to build.

John Cruden: Don, you get the last question from our audience. A listener asks: "You seem to think that the Supreme Court in the *Perez* case will say that an agency doesn't have to follow the APA when changing its mind. What's wrong with the APA? Why wouldn't an agency simply follow the APA? It's noticed. It's transparent. It's helpful."

Donald Elliott: Well, it also says that when you do interpretative rules, you don't have to go through notice and comment. So, the argument in the *Perez* case is based on the wording of the APA. It's based on the notion that the D.C. Circuit is the one that's not following the APA. I'm sorry I wasn't clearer about that.

But I think the cert petition and the merits brief for the United States start out by quoting, in the very first sentence, the APA language that says you do not have to engage in notice-and-comment rulemaking when you do an interpretative rule. All four of these things were interpretative rules and everybody concedes that. So, the D.C. Circuit is, in some sense, in its *Paralyzed Veterans* case, ignoring the clear language of the APA. Or so the Solicitor General argues. I love the APA; I'm in favor of the APA.

John Cruden: With that final comment, I want to thank our audience for excellent questions. Here is what we have covered in this presentation: We have talked a bit about three Supreme Court cases decided in 2014. We have also discussed a few cases in which cert has already been granted, and one case in which cert was denied. Our panel of experts has also commented on a few pending cert petitions with significance to the practice of environment, energy, and natural resource law. Finally, our two professors used their crystal ball to opine on future considerations by the Supreme Court. On behalf of all of the Environmental Law Institute, my personal thanks to our expert panel and to our audience.