Supreme Court limits federal regulation of greenhouse gases

John Burton
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The United States Supreme Court issued a split decision Monday on the authority of the Environmental Protection Agency (EPA) to regulate "greenhouse gases"—common emissions such as carbon dioxide, methane and nitrous oxide—that the EPA has identified as "the root cause of human-induced climate change."

The decision was based on six consolidated petitions filed by the Chamber of Commerce and other industry groups, along with various states, including Texas. Justice Antonin Scalia, joined by Chief Justice John Roberts and Justice Anthony Kennedy, ruled that the EPA can only require "stationary sources" such as factories and power plants to use the "best available control technology" to limit greenhouse gas emissions when the facility is already subject to regulation for other pollutants.

The two other arch-conservative justices, Clarence Thomas and Samuel Alito, would deny the EPA all authority to regulate greenhouse gases, while the four dissenting justices would uphold EPA authority to expand greenhouse regulations, giving Scalia different majorities on each aspect of his decision.

While the media is portraying the ruling in *Utility Air Regulatory Group v. EPA*, the lead case, as a victory for environmental legislation, Scalia's rationale for denying the EPA the power to regulate facilities solely on the basis of greenhouse emissions could be used by polluting businesses to mount future court challenges to environmental protection measures.

The Supreme Court ruled 5-4 in 2007 that the EPA acted within its jurisdiction when classifying greenhouse gases as "air pollutants" subject to regulation under the Clean Air Act. By extending the Clean Air Act to cover greenhouse gases, this allowed the EPA to require the installation of devices on new vehicles to minimize emissions into the atmosphere.

The EPA then turned to the regulation of greenhouse gases emitted by stationary sources. To protect small businesses, the Clean Air Act limits EPA regulation to facilities having the potential to emit at least 250 tons of air pollutants a year.

At the time that law was passed, air pollutants were considered to be sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. When the Clean Air Act is extended to cover greenhouse gases, a 250 ton limit would bring millions of locations, even private residences, under EPA jurisdiction.

Accordingly, the EPA limited its new greenhouse gas regulations only to stationary sources with the potential to emit more than 100,000 tons, and to facilities that were already covered by existing regulations because of their potential to emit 250 tons per year of other pollutants, what Scalia refers to in the decision as "anyway sources."

The greenhouse gas regulations remain in effect only for "anyway sources"—i.e., the EPA cannot regulate greenhouse gas emissions at sources that emit more than 100,000 tons of greenhouse gases, but less than 250 tons of other air pollutants.

Under existing legal standards, which are based on the constitutional separation of powers, court review of challenges to administrative regulations is strictly limited to whether the federal agency is acting "reasonably" and "within the bounds" of the enabling law. The Court of Appeals for the District of Columbia Circuit, which frequently entertains such challenges, determined that the EPA regulations made sense in light of the requirement that greenhouse gas emissions be regulated.

Scalia reversed this decision. He ruled that under the 2007 ruling the EPA can regulate greenhouse gases as

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air pollutants. He wrote, however, that the EPA cannot exempt facilities producing more than 250 tons per year, a floor set by Congress long before greenhouse gases were identified as an environmental risk.

Imposing EPA regulations on millions of businesses and residences that would otherwise be exempt from the Clean Air Act due to their minuscule emissions makes no sense, Scalia reasoned in a twisted and sophistic argument, so he struck down the EPA's rule altogether. In establishing this rule, Scalia accused the EPA of "laying claim to extravagant statutory power over the national economy" not specifically contained in congressional legislation.

Since most large polluters can still be regulated (because they are covered by the 250 ton limit included in the Clean Air Act), EPA issued a statement calling the decision "a win for our efforts to reduce carbon pollution" because regulation will continue "for the largest pollution sources."

However, industry groups grabbed onto Scalia's accusation of EPA overreaching to lay the groundwork for new challenges.

For example, the National Association of Manufacturers embraced the decision as "a victory for the integrity of our regulatory process and rational limits on executive power." General Counsel Linda Kelly threatened more litigation: "As the EPA considers its next suite of regulations for new and existing power plants, manufacturers encourage the agency to heed the warning of the Supreme Court that it may not 'bring about an enormous and transformative expansion in the EPA's regulatory authority without clear congressional authorization."

The decision is clearly intended to be a shot fired across the bow of the EPA, and other federal agencies responsible for regulating big business.

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