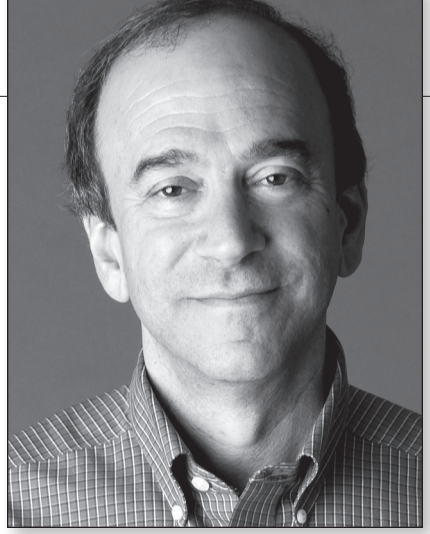

By Richard Lazarus

Keep on, Trucking: Justice Scalia

In an earlier column, I suggested that outstanding advocacy on behalf of the agency in *EPA v. EME Homer City Generation, L.P.,* might "well prove the difference" in the case. That proved accurate and the Supreme Court recently ruled in the agency's favor, upholding its Cross-State Air Pollution Rule.

But what no one could have predicted was that the biggest national news in the wake of the Court's decision was not the restoration of a regulation that EPA projects will save tens of thousands of lives each year. What swamped news coverage instead was an embarrassing mistake in Justice Antonin Scalia's dissent. Commentators quickly feasted, describing the misstep as an "epic blunder" and "cringeworthy." (The error was first reported by this correspondent.)

So what was the mistake? Why was it so embarrassing? What prompted the error? The answer to the last question may be the most interesting of all because it suggests the potential paradox of advocacy that is *too* effective.

The mistake was that Scalia misstated EPA's argument in a prior Supreme Court case. One of the central issues in *EME Homer* was whether EPA could consider costs in calculating how much upwind states were required to decrease their emissions to avoid downwind-state air quality violations. In contending that the relevant statutory language precluded EPA from considering costs in this manner, Scalia claimed the agency had unsuccessfully made a similarly flawed argument in *Whitman v. American Trucking Associations,* a case in which the Court had ruled that EPA could not consider costs in setting National Ambient Air Quality Standards.

Scalia's error was that EPA had *not* made that argument. In fact, it had made the exact opposite argument. The agency argued that it could not consider costs in setting NAAQS and therefore had won, not lost, *American Trucking*. Scalia's dissent had everything backwards. But what made the mistake especially embarrassing was that Scalia himself had written the Court's *American Trucking* opinion. The justice had accordingly effectively miscited himself.

The problem was then compounded by the justice's own signature writing style, which created a "glass houses" problem. With all rhetorical trumpets blaring, Scalia literally introduced his mistake with the equivalent of bold caps and an exclamation point: a heading that seemingly mocked EPA by announcing "Plus Ca Change: EPA's Continuing Quest for Cost-Benefit Authority." The loudness of the dissent's rhetoric contrasted sharply with the way the Court quietly replaced the dissent with a corrected version on its website the next day.

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So what may have caused the mistake? (With the caveat that whatever its cause, no explanation can justify the lapse in failing to spot an error that would have been quickly revealed had anyone gone back and read the *American Trucking* opinion). There are two possibilities, both of which may well have been further promoted by the fact that the "cost" issue in *American Trucking* was raised by industry's cross-petition, rather than EPA's own petition. A too-casual reader of the case caption, *Whitman v. American Trucking*, might therefore have wrongly assumed EPA had disputed the lower courts' conclusion that EPA could not consider costs when the agency had in fact won that issue and petitioned the High Court for review on a separate (nondelegation doctrine) issue.

One possibility is that Scalia's error finds its roots in Justice John Paul Stevens's making the same mistake in his dissent years ago in *Entergy v. Riverkeeper*, a Clean Water Act case that was widely cited in the briefing in *EME Homer*. Stevens mischaracterized EPA's position in *American Trucking*, also getting it backwards. Perhaps Scalia's chambers unwittingly relied on Stevens's mistake without carefully checking its accuracy.

But the more likely cause is the merits brief filed on behalf of industry and labor respondents in *EME Homer* — which the Scalia dissent mimicked to a remarkable extent. The brief referenced *American Trucking* by stressing that the Court was not "writing on a blank slate," and the dissent, striking the same theme, stated that "this was not the first time" the Court had faced the issue. Using the same words, both the brief and the dissent next described how the Court had "confronted" in *American Trucking* the contention that EPA could "consider costs in setting NAAQS."

To be sure, the brief, unlike the dissent, never erroneously stated that it was "EPA's contention" the Court had rejected, but the tone of the brief was certainly that the Court had denied EPA some authority, which I suspect Scalia's chamber too quickly misinterpreted to mean that it had been authority EPA had in fact sought. Taking your opponent's prior win and using it against them in a new case is standard operating procedure in effective advocacy. But on this occasion, the maneuver apparently proved too effective for at least one chamber that neglected to read closely between the advocate's lines.

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