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**Subject:** DC Circ. Puts Clean Power Plan Foes, Backers On Hot Seat

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## PUBLIC POLICY

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Wednesday, September 28, 2016

### TOP NEWS

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#### DC Circ. Puts Clean Power Plan Foes, Backers On Hot Seat

Ten D.C. Circuit judges wrestled Tuesday with the Obama administration's ambitious plan to slash greenhouse gas emissions at existing power plants, grilling government, industry and environmental attorneys about the new rule's constitutionality and the EPA's authority to craft it.

#### Senate Dems Demand Garland Vote Before Fall Recess

Democratic senators on Tuesday again called on their Republican counterparts to hold a confirmation hearing and vote on President Barack Obama's U.S. Supreme Court nominee Judge Merrick B. Garland, demanding the vote take place before a pre-election recess.

#### House Votes To Carve Exemption In ACA Individual Mandate

The House of Representatives voted Tuesday to exempt former customers of failed insurance cooperatives from the Affordable Care Act's individual insurance mandate, despite a veto threat from the White House over the measure's attempt to undercut the administration's signature health care law.

#### High Court Urged To Limit President's Appointment Powers

A pair of think tanks told the U.S. Supreme Court on Monday that the Obama administration's 2011 nomination for the post of National Labor Relations Board general counsel rests on a "self-serving" interpretation of the law governing temporary appointments.

#### Flint Water Fight Sinks Stopgap Gov't Funding Measure

Senate Democrats, along with a handful of Republicans, voted down the first attempt at a stopgap government funding bill Tuesday after complaints over the measure's snub of funding for lead-contaminated water infrastructure in Flint, Michigan.

#### Calif. Gov Signs Bill To Limit Choice-Of-Law Provisions

Employers in California can't require workers to arbitrate disputes outside the state starting Jan. 1, according to a bill signed by Gov. Jerry Brown on Sunday that deems choice-of-law provisions in employment contracts illegal.

### LAW FIRMS

Alston & Bird  
Altshuler Berzon  
Arnold & Porter  
BakerHostetler  
Barnes & Thornburg  
Bird Marella  
Briggs and Morgan  
Brune Law PC  
Chadbourne & Parke  
Clyde & Co  
Crowell & Moring  
Debevoise & Plimpton  
Dechert  
Fish & Richardson  
Gibbons PC  
Gibson Dunn  
Greenbaum Rowe  
Hueston Hennigan  
Hughes Hubbard  
Hunton & Williams  
Jenner & Block  
Jones Day  
Kirkland & Ellis  
Krevolin & Horst  
Lief Cabraser  
McDermott Will  
McGlinchey Stafford  
McGuireWoods  
Millberg Gordon  
Morrison & Foerster

## DOJ Official Says Cos. Must Help Early In Civil Cases

A top U.S. Department of Justice official on Tuesday said that companies that wait until they are subpoenaed by federal prosecutors to cooperate with ongoing investigations would face tougher penalties than those that volunteer information without being asked.

## Speaker Ryan Plays Down TPP Vote Prospects, Citing Trump

Speaker of the House Paul Ryan threw more cold water on any hope of passing the sweeping Trans-Pacific Partnership trade deal Tuesday, the morning after both presidential candidates trashed the pact, reiterating that the administration would have to overhaul critical aspects of the deal in order for it to survive.

## ANALYSIS

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### Family Businesses At Risk Under Clinton's Estate Tax Plan

Family businesses that fail to budget early for covering estate taxes could face the threat of forced liquidation under Hillary Clinton's plan to hike estate tax rates, and an Internal Revenue Service proposal to prevent the undervaluation of transferred interests could compound the problem.

### Ex-OFAC Official Says Iran Accord Hinges On Aircraft Deals

Businesses have been reluctant to pursue deals in Iran even after a landmark deal to peel back heavy sanctions, but former Office of Foreign Assets Control official Adam Smith told Law360 that a smooth path forward for Boeing and Airbus in Tehran could give the market a shot in the arm.

## BANKING & SECURITIES

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### Supreme Court Won't Stay In-House SEC Suit Against Tilton

The U.S. Supreme Court on Tuesday denied private equity magnate Lynn Tilton's bid for a stay of the U.S. Securities and Exchange Commission's \$200 million in-house fraud case against her and Patriarch Partners.

### CFTC Chair Tackles Stress Tests At Clearinghouses

The head of the Commodity Futures Trading Commission said Tuesday the agency is working on its own supervisory or regulatory stress tests of domestic clearinghouses to analyze the impact of potentially stressful events on clearinghouses and their members.

### 11th Circ. Says Ex-Fla. Mayor Can't Escape Fraud Conviction

The Eleventh Circuit ruled Tuesday that former North Miami Mayor Lucie Tondreau can't escape a conviction and over-five-year prison sentence for an \$8 million scheme in which she and others used a radio show to recruit straw borrowers for fraudulent mortgage loans, saying it found no error in the lower court's decision.

## ENERGY & ENVIRONMENTAL

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### Flint Aid Looms Over Water Projects Bill In House

House Republicans pushed forward Tuesday with consideration of the biennial Water Resources Development Act, despite a fight over aid to Flint, Michigan, that has increasingly tied the project authorization bill to efforts to keep the government running after the end of the week.

## HEALTH & LIFE SCIENCES

Orrick Herrington

Paul Hastings

RJS Law

Ropes & Gray

Sidley Austin

Step toe & Johnson LLP

Stroock & Stroock

## COMPANIES

AT&T Inc.

Aaron's Inc.

Advocate Health Care Inc.

Airbnb Inc.

Alliance of Automobile  
Manufacturers

American Bar Association

American Civil Liberties Union

BNP Paribas

Bank of America Corporation

Bayerische Motoren Werke AG

CTIA

Campbell Soup Company

CenturyLink Inc.

Communications Workers of  
America

Electronic Frontier Foundation

Electronic Privacy Information  
Center

Ernst & Young

Facebook

FedEx Corporation

Fitbit Inc.

Ford Motor Company

Google Inc.

Illinois Tool Works Inc.

Immigration Reform Law Institu

Institute for Justice

Internet Corporation for Assigne  
Names and Numbers

JPMorgan Chase & Co.

Kind LLC

Lambda Legal Defense &  
Educational Fund

LegalZoom.com Inc.

Lyft Inc.

National Basketball Association

New York Daily News Co.

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## Menendez Criminal Case Will Wait On High Court Appeal Bid

Sen. Robert Menendez, D-N.J., was given the opportunity Monday to briefly pause the federal government's corruption and conspiracy case against him while he petitions the U.S. Supreme Court to review whether the charges against him improperly rely on constitutionally protected legislative acts.

## IP & TECHNOLOGY

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### ABA Sections Largely Back IP Licensing Guideline Changes

Proposed changes to the federal Antitrust Guidelines for the Licensing of Intellectual Property will help attorneys and their clients better understand their obligations under federal antitrust laws, according to a Monday joint letter by the antitrust and intellectual property law sections of the American Bar Association.

## TRANSPORTATION & INFRASTRUCTURE

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### Christie Enjoyed Lane Closures, GWB Scandal Architect Says

The government's star witness testified Tuesday at the George Washington Bridge lane-closing trial that he and one of the defendants bragged to New Jersey Gov. Chris Christie about causing a traffic jam to punish a mayor for not endorsing the governor for re-election and that Christie "seemed to be enjoying it."

### Auto Group Concerned With 'Flawed' Future Emissions Report

The Alliance of Automobile Manufacturers on Monday expressed concern with a U.S. Environmental Protection Agency and National Highway Traffic Safety Administration report examining automakers' ability to meet greenhouse gas emissions standards and implement fuel-efficient technologies for light-duty vehicles, calling the study's data and analyses "flawed."

### Groups Blast 'Intrusive' TSA Body Scanner Rule At DC Circ.

The Competitive Enterprise Institute and the Electronic Privacy Information Center both told the D.C. Circuit on Monday that the Transportation Security Administration's recent final rule on airport body scanners downplays the technology's intrusiveness and has actually heightened travel risks by inducing people to drive instead of fly.

## REAL ESTATE

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### NJ Court Clears Path For \$1.15B Meadowlands Bond Sale

A New Jersey state appeals court on Tuesday denied a nonprofit group's attempt to block the New Jersey Sports and Exposition Authority from issuing \$1.15 billion in bonds to pay for construction of the unfinished American Dream mall at the Meadowlands, saying the group's arguments lacked merit.

### 'Airbnb And The Rentals Of Doom' Reported By NY Legislators

Members of the New York state legislature issued a report Monday that found dangerous conditions in some Airbnb rentals in New York City that advertise space for large numbers of guests and called for new laws to help crack down.

## EMPLOYMENT

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Planned Parenthood Federation  
Public Company Accounting  
Oversight Board  
SIFMA  
Safe Horizon Inc.  
Steward Health Care System LI  
The Boeing Company  
Toyota Motor Corporation  
Uber Technologies Inc.  
United Parcel Service Inc.  
Yahoo! Inc.  
eBay Inc.

## GOVERNMENT AGENCIES

Army Corps of Engineers  
Bureau of Citizenship and  
Immigration Services  
Commodity Futures Trading  
Commission  
Consumer Product Safety  
Commission  
Election Assistance Commissio  
Executive Office of the Presiden  
Federal Bureau of Investigation  
Federal Communications  
Commission  
Federal Deposit Insurance Corp  
Federal Trade Commission  
Food and Drug Administration  
Immigration and Customs  
Enforcement  
Internal Revenue Service  
NAFTA  
National Highway Traffic Safety  
Administration  
National Institutes of Health  
National Labor Relations Board  
National Security Council  
New Jersey Meadowlands  
Commission  
Office of Foreign Assets Contro  
Port Authority of New York & N  
Jersey  
Securities and Exchange  
Commission  
Standing Rock Sioux Tribe  
Transportation Security  
Administration

## NC Lawmakers Look To Dodge Depositions In HB 2 Suit

North Carolina's legislative leaders and Gov. Patrick McCrory asked a federal court Monday to recognize their legislative privilege to not be deposed by the U.S. and others suing over the state's law requiring transgender people to use bathrooms and locker rooms corresponding to the sex on their birth certificates.

## Bangladeshi Diplomat's 'Slave' Awarded \$1M Wages, Damages

The former Bangladeshi consul general in New York and his wife must pay nearly \$1 million to a domestic servant they allegedly kept in "a state of slavery," a Manhattan federal judge ruled on Tuesday.

## Wisc.'s 'Right-To-Work' Law Survives Fed. Court Challenge

A Wisconsin federal court threw out labor union claims that the state's "right-to-work" law violates the Fifth Amendment and a national law, holding Monday that legal precedent required the case be tossed.

## PRIVACY & CONSUMER PROTECTION

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## FTC Heads Face Senate Scrutiny Over Data Security Approach

The heads of the Federal Trade Commission on Tuesday defended their recent decision to continue to press data security claims in a case where no consumers suffered financial harm, although they did push U.S. Senate lawmakers for additional powers to close gaps in their ability to regulate privacy issues.

## Facebook Can't Collect WhatsApp Data: German Regulator

A German data protection regulator on Tuesday ordered Facebook to stop using and immediately destroy any data on German users that it had obtained from its subsidiary WhatsApp, saying that the new data-sharing arrangement flies in the face of the duo's earlier promises to keep the information separate.

## 2nd Circ. Won't Take NYC GPS Taxi Ruling For Another Ride

The Second Circuit on Monday refused to reconsider its recent ruling that a cab driver couldn't assert a Fourth Amendment challenge to New York City's mandate that all taxicabs be equipped with GPS tracking devices because he didn't have a protectable privacy or property interest in any particular cab.

## Ohio School Ordered To Let Trans Student Use Girls' Room

An Ohio school district can't use the federal court system to block guidance from the Justice and Education Departments over how to treat transgender students before it has been enforced, nor can it ban a transgender student from using the girls' bathroom, an Ohio federal judge ruled Monday.

## Canadian Regulators Target Cybersecurity Disclosures

Canadian securities regulators plan to increase scrutiny of public companies' cybersecurity disclosures, saying Tuesday that threats have grown significantly since the body first provided guidance in 2013, but many issuers continue to release boilerplate or skimpy disclosures.

## PRODUCT LIABILITY

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## FDA Says 'Healthy'-Labeled Food Enforcement May Be Eased

The U.S. Food and Drug Administration may allow fattier foods to be

U.S. Army

U.S. Customs and Border Protection

U.S. Department of Agriculture

U.S. Department of Education

U.S. Department of Health and Human Services

U.S. Department of Homeland Security

U.S. Department of Justice

U.S. Department of State

U.S. Department of the Interior

U.S. Department of the Treasury

U.S. Environmental Protection Agency

U.S. Navy

U.S. Senate

U.S. Supreme Court

Wisconsin Department of Justice

described as “healthful” under new guidance released Tuesday.

## GOVERNMENT CONTRACTS

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### Defense Secretary Asks Congress To Let 9/11 Bill Veto Stand

Defense Secretary Ashton Carter in a letter made public Tuesday urged lawmakers not to support an override of President Barack Obama’s veto on a bill to allow victims of terrorist attacks to sue foreign governments for alleged complicity, saying it would put the U.S. military at risk.

## INTERNATIONAL TRADE

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### Commerce Secretary Wants To Talk About Cyber Threats

U.S. Secretary of Commerce Penny Pritzker wants business and government to talk more candidly about cybersecurity threats by making it easier for companies and institutions to acknowledge emerging cyber attacks without being reprimanded, the commerce secretary said on Tuesday.

### CBP Boss Pledges Vigilant Trade Enforcement To Lawmakers

U.S. Customs and Border Protection Commissioner Gil Kerlikowske on Tuesday told a congressional panel about the steps his agency has taken to implement a sweeping new trade enforcement bill that aims to facilitate legitimate commerce and weed out unfair imports and counterfeit items.

### WTO Forecast Shows Further Slowdown In Trade Growth

Overall global trade will grow by just 1.7 percent, which would mark the slowest growth rate since the nadir of the global financial crisis in 2009, according to World Trade Organization figures released Tuesday.

## TAX

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### IRS Tackles ‘Unnecessary’ QTIP Elections

The IRS offered further relief Tuesday to widows and widowers when it released a new revenue procedure that nullifies estate tax deferrals that are unnecessary for reducing an estate tax to zero, treating as void an irrevocable decision with potentially adverse tax consequences.

### IRS Floats Guidance On Qualification Requirements For RICs

The IRS released guidance Tuesday related to income test and asset diversification requirements that are used to determine whether a corporation may qualify as a regulated investment company for federal income tax purposes.

### Abusive IRS Asset Seizures Targeted In Senate Bill

Two U.S. senators have proposed to reform the IRS’ controversial civil asset forfeiture program by requiring the tax agency to obtain probable cause before seizing money from those suspected of illegal activity, citing reports that innocent parties were often targeted and struggled to recover their legitimate earnings.

## IMMIGRATION

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### DC Circ. Grants Injunction In Voter ID Requirement Dispute

The D.C. Circuit issued a split opinion Monday fleshing out an earlier decision that a U.S. elections agency must remove a proof-of-citizenship requirement



from a mail-in federal voter registration form used for November's election in Alabama, Georgia and Kansas, with voting-rights organizations calling it a "victory for our democracy."

### Dems Slam Private Immigrant Detention Centers Amid Review

Sen. Patrick Leahy, D-Vt., and 11 other senators urged the Department of Homeland Security on Monday to freeze planned private detention facility procurements pending an internal review of the use of private contractors for immigration detention.

## NATIVE AMERICAN

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### AG Lynch Touts \$107M For Tribal Justice Programs

The U.S. Department of Justice will issue more than \$107 million in grants for Native American programs to improve public safety, support juvenile justice and combat violent crime, the department said Monday.

## TELECOMMUNICATIONS

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### Google Presses For Internet Handover Amid GOP Backlash

Google Inc. stepped up its support Monday for transitioning U.S. stewardship of the internet's domain name system to a global community of stakeholders, saying the change will prevent governments from taking the lead in determining the online future, despite Republican warnings that foreign states would be empowered to limit internet freedom.

### NY Sen. Backs Alert System Upgrades Following Bombings

Sen. Charles E. Schumer, D-N.Y., voiced his support Sunday for upgrading the Wireless Emergency Alert system to allow for longer messages, better location accuracy and the ability to include photos, changes pushed in the wake of last week's bombings in New York City and New Jersey.

### Business Data Rate Regs Will Hurt Workers, Union Tells FCC

The Communications Workers of America has told the Federal Communications Commission that any new regulatory scheme for the special access services market that imposes a "drastic" rate cut could hurt workers' jobs and standards of living, according to a filing posted Tuesday.

### FCC Commish Seeks Probe On Wi-Fi At Monday's Debate

Federal Communications Commissioner Jessica Rosenworcel tweeted Tuesday that she has asked the Enforcement Bureau to investigate the "Wi-Fi situation" at Hofstra University during the presidential debate Monday night, citing past FCC action for Wi-Fi blocking amid reports that the school forced reporters onto its network at a price of \$200.

## EXPERT ANALYSIS

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### EPA Signals Intent To Exercise TSCA Section 6 Authority

The U.S. Environmental Protection Agency is poised to begin exercising its expanded regulatory authority over the makers and users of chemical substances pursuant to recent amendments to the Toxic Substances Control Act. In addition to other proposals, the EPA may soon publish proposed rules regulating uses of specific chemical substances under Section 6 of the TSCA, says Lawrence Cullen of Arnold & Porter LLP.

## Small-Breach Focus Shows Growing Scope Of HIPAA Probes

Flexing more enforcement muscle, the U.S. Department of Health and Human Services recently announced it will more widely investigate breaches of protected health information affecting fewer than 500 individuals. As a result, health care providers and other covered entities and their business associates should expect an uptick in the volume of enforcement actions triggered by small-scale breaches, say attorneys with Ropes & Gray LLP.

## Why Have Lawyers Forgotten About The Middle Class?

Sorry, fellow lawyers, judges and legislators, but the jig is up. It's time to show the public the cards up our sleeves and give them a chance to weigh in on the fairness of a system that touches so many aspects of their everyday lives, says Chas Rampenthal, general counsel of LegalZoom.

## LEGAL INDUSTRY

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### Kirkland, Facebook Send Top Guns To Appease Judge

Kirkland & Ellis LLP and Facebook Inc. on Tuesday sent a delegation of partners, associates and former U.S. Magistrate Judge Paul Grewal to make nice with the Brooklyn federal judge who scolded the firm late last week for sending a young lawyer to speak in a pre-motion conference.

### BigLaw Hits Training Snag With Kirkland Benchslap

A judge may have dealt a setback to a BigLaw effort to train the next generation of litigators when he scolded Kirkland & Ellis LLP last week for sending an associate and not a partner to handle a terrorism case against Facebook, experts say.

### Scheindlin Knocks Stop-And-Frisk Debate 'Facts'

Shira Scheindlin, the former New York federal judge evoked during an acrimonious U.S. presidential debate, gave low grades Tuesday to both candidates for clumsy portrayals of stop-and-frisk policing and took issue with being called a "very against police judge" by Donald Trump.

### 9th Circ.'s O'Scannlain To Take Senior Status, Opening Seat

U.S. Ninth Circuit Judge Diarmuid F. O'Scannlain, considered a leading conservative voice on the federal appellate bench, will be assuming senior status effective Dec. 31, leaving an additional vacancy for an active judgeship on the court for the next president to fill.

### Clyde & Co.'s Senior Partner Moves To US Leadership Role

Clyde & Co. senior partner James Burns is stepping down after three years to become the international law firm's first head of the Americas, overseeing its continued growth in the United States, Canada and Latin America, the firm announced Tuesday.

### Pro Bono Firm Of 2016: Hughes Hubbard & Reed

From securing exonerations for clients convicted of crimes on flimsy or nonexistent evidence to helping a young immigrant wade through what can be an overwhelming process for U.S. citizenship, Hughes Hubbard & Reed LLP's extensive pro bono work makes it an undeniable member of Law360's Pro Bono Firms of 2016.

### Rainmaker Q&A: Bird Marella's Benjamin Gluck

A well-read local blogger who was no fan of mine at all once referred to me

as an “evil genius” who was “a fraudster’s dream lawyer.” That posting brought me more business than any other marketing efforts I’ve ever done, says Benjamin Gluck, principal at Bird Marella Boxer Wolpert Nessim Dooks Lincenberg & Row PC.

### Rainmaker Q&A: Briggs And Morgan's Michael McEllistrem

Sometimes you make a real connection with a client, but other times you realize a pitch is not going according to plan. No need to bore a future prospect with the balance of your presentation and brochures — just make a solid connection, thank them for the opportunity and gracefully withdraw, says Michael McEllistrem, a shareholder at Briggs and Morgan PA.

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