

FEDERALISM ISSUE: SHOULD THE FEDERAL GOVERNMENT IMPOSE STRICT CARBON STANDARDS ON THE STATES?

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In August 2015, President Obama and the Environmental Protection Agency presented the Clean Power Plan, a plan aimed at reducing carbon pollution from power plants.¹ According to the EPA, the Clean Power Plan is “fair, flexible and designed to strengthen the fast-growing trend toward cleaner and lower-polluting American energy” by providing “strong but achievable standards for power plants, and customized goals for states to cut the carbon pollution that is driving climate change.”² This plan sets mandates from the federal government to be implemented by each state.³ States are required to create plans that regulate power plants in their borders such that they achieve CO₂ performance rates set by the federal government in an approach called “cooperative federalism.”⁴ These plans vary by state, according to each state’s energy needs and current energy use, and plans are established both for the interim from 2022 to 2029 and for the long term by 2030.⁵ This framework claims to account for states’ conditions in order to ensure that each can meet the ultimate goal of reducing carbon dioxide emissions by 32% from 2005 baseline by 2030.⁶ In practice, this plan gives states the autonomy to reduce carbon pollution as they see fit so long as they meet the criteria set by the federal government.⁷ Each state must submit its own individual plan to the federal government demonstrating how it will meet the federally assigned goals.⁸ Thus, each state provides its own path for achieving these standards, allowing flexibility and the ability to work around its own system.⁹ Furthermore, states may work with other states in order to achieve goals, so long as each state meets its own federal requirements.¹⁰ Through this program, Obama hopes to combat climate change in an affordable, efficient, and effective way.

However, many have seen this plan as, in effect, costing the country jobs and money by reducing the productivity of power plants. Furthermore, many constitutional experts have claimed that this plan is an unconstitutional violation of the Tenth Amendment.¹¹ Constitutional scholar Laurence Tribe has cited several Supreme Court cases to support his

argument against the constitutionality of the Clean Power Plan.¹² Tribe has cited both *New York v. United States (1992)* and *NFIB v. Sebelius (2012)* to contend that “such federal commandeering of state governments defeats political accountability and violates principles of federalism that are basic to our constitutional order.”¹³ The EPA can constitutionally impose federal plans for the states so long as it has statutory authority to do so; however, the Obama administration has not gotten legislative authority to do this and thus the Clean Power Plan does not have this legal foundation.¹⁴ Moreover, Tribe has denounced the EPA’s extension of power that “Congress never delegated to it in the first place” and has cited *Utility Air Regulatory Group v. EPA (2014)* and *New Jersey v. EPA (2008)* to further demonstrate the unconstitutionality of this extension of power.¹⁵ Defenders of the Clean Power Plan rebut this claim with the argument that the Clean Power Plan gives enough flexibility to the states that it will not force the states to do anything; rather, it “will require only that power plants meet their targets.”¹⁶ Thus, experts Jody Freeman and Richard J. Lazarus argue “the proposed rule allows States to step aside and leave the federal government to implement its regulation without any help. By providing states such a choice, the proposal does not ‘commandeer’ the states, and so it cannot violate the 10th Amendment.”¹⁷ Thus, the constitutionality of this plan is still disputed.

Many states have tried to opt-out of the Clean Power Plan or have sued over this plan. However, some experts have argued against non-compliance, explaining that, “refusing to write a state plan would invite the EPA to impose its own system for reducing emissions, denying state officials the ability to craft rules in a way that best fits the state’s unique circumstances.”¹⁸ To underscore this claim, EPA Administrator Gina McCarthy stated that if states do not provide necessary plans, “there will be a federal system in place to allow us to move forward.” Thus, while the consequences of not following this rule are ambiguous, there could be consequences detrimental to the state’s wellbeing

with a likely default to a federal carbon plan.¹⁹

In response to these suits, the D.C. Circuit Court of Appeals, the court assigned to national pollution standard cases, denied requests to “stay” the Clean Power Plan, as they found the challengers had not “satisfied the stringent requirement for a stay.”²⁰ Following this ruling, the petitioners appealed to the Supreme Court, and on February 9, 2016, the Supreme Court in a 5-4 decision issued a “stay” of Obama’s Clean Power Plan.²¹ This stay will remain as the D.C. Circuit decides upon the merits of the plan and until the Supreme Court finishes resolving appeals to the plan.²²

THE CANDIDATES

Views on Obama’s Clean Power Plan split on party lines. Republican presidential nominee Donald Trump has repeatedly released statements questioning climate change. He has, for example, tweeted about climate change as a concept “created by and for the Chinese in order to make U.S. manufacturing non-competitive” and has claimed that “global warming is a total, and very expensive, hoax!”²³ Specifically on the Clean Power Plan, Trump has promised that he would “rescind all the job-destroying Obama executive actions including the Climate Action Plan and the Waters of the U.S. Rule” within his first 100 days in office.²⁴ He has also repeatedly stated that he would abolish the EPA, the agency that oversees the Clean Power Plan, if he were to assume the presidency.²⁵ The Republican Party Platform also denounces the Clean Power Plan, stating that the “Clean Power Plan – the centerpiece of the President’s war on coal – has been stayed by the Supreme Court. We will do away with it altogether.”²⁶ The platform defends this position by explaining that, “The Democratic Party does not understand that coal is an abundant, clean, affordable, reliable domestic energy resource. Those who mine it and their families should be protected from the Democratic Party’s radical anti-coal agenda.”²⁷ In this way, the Republican Party stands united in its condemnation of the Clean Power Plan.

On the other side of the partisan divide, Democratic presidential nominee Hillary Clinton has defended the Clean Power Plan and has supported aggressive regulatory climate action. In response to the Clean Power Plan, Clinton released a statement calling the plan “a significant step forward in meeting the urgent threat of climate change...It’s a good plan, and as President, I’d defend it.”²⁸ Furthermore, Clinton went on to say, “the Clean Power Plan standards set the floor, not the ceiling. We can and must go further.”²⁹ Thus, Clinton has proposed a plan for her presidency that

would not only include the Clean Power Plan, but it would also include a Clean Energy Challenge, which would “give states, cities and rural communities that are ready to lead the tools and resources to succeed.”³⁰ In September, Clinton went on to release an energy plan that further expanded upon her plans, calling for major investments in energy infrastructure, “as part of a continent-wide strategy that ensures safe, reliable, and affordable energy delivery, unlocks economic opportunity for American businesses and workers, and accelerates the transition to a clean energy economy across the North American continent.”³¹ Clinton has said on several occasions that she would “defend” the Clean Power Plan, and she stated during a Democratic primary debate on April 14, 2016 that the Clean Power Plan is “under attack by fossil fuels and the right in the Supreme Court,” implicitly demonstrating her belief in the legality of the plan.³² However, she has not explicitly spoken on the legality of the plan’s mandated reach of the federal government over the states. The Democratic Party has affirmed its support of Obama’s Clean Power Plan in its party platform, acknowledging, “Democrats are committed to defending, implementing, and extending smart pollution and efficiency standards, including the Clean Power Plan, fuel economy standards for automobiles and heavy-duty vehicles, building codes and appliance standards.” Thus, the Democratic Party as a whole stands behind the plan.³³ ■

2016 SWING STATES
AFFECTED:
▸ OHIO
▸ PENNSYLVANIA

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