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The Clean Power Plan, The Supreme Court's Stay, and Irreparable Harm

--Erin Ryan[±]

Last week, the Supreme Court controversially stayed implementation of the Clean Power Plan¹ (CPP), the cornerstone of the Obama Administration's climate policy, while twenty-nine states proceed with litigation against it. The CPP targets greenhouse gas emissions from power plants, which account for about a third of all U.S. carbon emissions. The rule is designed to reduce emissions from coal-fired plants, the dirtiest form of energy production, through a mix of stricter limits on existing plants, measures to increase energy efficiency, and other mechanisms that encourage producers to shift from coal to cleaner renewables and natural gas.

The CPP provides for substantial flexibility² in how reduction targets may be attained within states, allowing states to choose among various options proposed in the rule, to come up with their own proposals, or to opt for federal regulation in lieu of state oversight. Nevertheless, generators heavily invested in coal argue that implementation will require expensive changes.

It therefore surprised no one that states with the most coal-dependent economies, and with political leadership most sympathetic to the coal industry, are challenging the CPP in court.³ They argue, among other things, that EPA is unauthorized to regulate power plants this way, that the standards imposed by the rule did not take fair account of the costs of implementation, and that the final rule was insufficiently related to the proposed rule on which the public provided comment. Eighteen other states are supporting the rule, together with environmental groups and some power companies (including utilities in some states that are challenging the rule). Proponents contend that federal environmental laws have always targeted energy production,⁴ a primary source of regulated pollutants, and that the CPP legitimately follows from established legal authority, the regulatory record, and the proposed rule.

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¹ *Clean Power Plan for Existing Power Plants*, U.S. EPA, <https://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants> (last visited April 10, 2016).

² See Julie DeMeester & Sarah Adair, *EPA's Clean Power Plan: Understanding and Evaluating the Proposed Federal Plan and Model Rules*, 45 ENVTL. L. REP. NEWS & ANALYSIS 1155 (2015).

³ Jonathan H. Adler, *Placing the Clean Power Plan in Context*, WASH. POST, Feb. 10, 2016.

⁴ See Hannah J. Wiseman & Hari M. Osofsky, *Regional Energy Governance and U.S. Carbon Emissions*, 43 ECOLOGY L.Q. 143, 157-58 (2016).

EPA always knew the CPP would be litigated,⁵ and so the lawsuits came as no surprise. But the Court's move to stay the rule—before the issues had even been aired in open court—has apparently surprised everyone. The one-page order made no judgment on the merits of the case, but it suspends implementation of the rule⁶ while the litigation runs its full course, a process expected to take at least eighteen months. The Court split along ideological lines in issuing the stay, with the five more conservative justices voting for the stay over opposition by the four more liberal justices. Just weeks earlier, the D.C. Circuit declined to issue the plaintiffs' request for the stay,⁷ following uniformly applied federal judicial norms—until now.

The Supreme Court has never before blocked implementation of a generally applicable regulation before its merits have been considered by a federal appeals court, so the stay has provoked a vociferous response. Supporters of the CPP excoriate the move as “unprecedented” while opponents hail it as “historic.” Undue judicial activism may be in the eye of the beholder, but most agree that the stay does not bode well for the future treatment of the CPP before the Court. Such an unusual move cannot help but send signals that at least five of the justices are skeptical of at least parts of the rule.

The CPP is the Obama Administration's last and best effort to take on the super-wicked problem of climate change,⁸ and its ambition responds appropriately to the magnitude of the challenge. All of us will benefit from sensible climate policy in the long run, but as with all regulatory changes, there will be winners and losers in the short run—and the losers are passionately defending their interests in the litigation at hand. They are entitled to do so, and the courts must give their arguments the most serious consideration.

Nevertheless, the Court's novel stay raises concerns of a different order. It represents another move by the Roberts Court to shift power toward the judiciary on matters that relate not to individual constitutional rights—where judicial prowess necessarily overtakes the majoritarian tendencies of the political branches—but to the complex allocation of costs and benefits within a comprehensive regulatory program, where judicial capacity is easily eclipsed by legislative and executive competence. The three branches of government specialize in answering very different legal questions,⁹ and conservative-leaning courts like the Roberts Court are usually quick to remind us that broad-brush public policymaking is not a judicial task.

⁵ Jody Freeman, *How Obama plans to beat his climate critics*, POLITICO, Aug. 3, 2015.

⁶ Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES, Feb. 9, 2016.

⁷ Sonal Patel, *D.C. Circuit Denies Stay of Clean Power Plan*, POWER, Jan. 21, 2016.

⁸ Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009).

⁹ ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011)

The CPP, for example, makes sophisticated choices about responsibly balancing the potential harms of regulating and not regulating harmful pollutants, and how to structure regulatory obligations to maximize health benefits while minimizing economic harms—all after exhaustively accounting for public input on the proposed rule. If the justices nevertheless find legal infirmity after carefully engaging all evidence and arguments, it is their duty to reject it. But when the Court breaks with its own norms to block the President’s capstone climate initiative for the remainder of his final term—before meaningful judicial review of the merits—perhaps that approaches the boundaries of appropriate use of its own authority. If it does not invite pause about the constitutional separation of powers, it at least gives cause to reflect on the lessons of the *Lochner* era¹⁰ (in which the Court struck down state economic regulations of which the majority disapproved).

Opponents of the CPP argue that the stay is legitimately unprecedented because the CPP is itself unprecedented¹¹—asserting a wide range of authority that is both proven and untested, prompting deliberation of legal questions with which the Court has not previously engaged. Yet most litigation reaching the Supreme Court raises novel questions of law; if not, they would be easily resolved in the lower courts. Claims that a pre-litigation stay was required to prevent irreparable harm are also overblown, because the CPP was designed to phase changes in gradually,¹² giving states producers and ample time to move forward and adjust at a measured pace. States had until 2018 to submit plans for compliance—well after this litigation is expected to conclude—and until 2025 to begin showing actual progress.

The irreparable harm with which we must now contend is to the fragile international consensus on sustainable climate governance. In signaling such strong skepticism toward the CPP, the stay could irreparably damage the global community’s efforts by weakening the very U.S. leadership that led to the historic climate accord¹³ reached in Paris just two months earlier. On December 12, 2015, breaking through decades of stalled progress, 195 nations pledged to work together on forestalling the catastrophic effects of a warming climate. While the agreement itself did not guarantee the needed results, it established a critical framework for global collaboration that, many hoped, would further spur world financial and energy markets toward investment in carbon-neutral renewables and away from fossil fuels.

President Obama helped inspire the participation of other nations by assuring them that the U.S. would honor its own commitments under the agreement, and the CPP was the centerpiece of this effort. Now, all who relied on U.S. assurances before making their own commitments must be deeply unsettled. Even though the CPP may yet emerge wholly or mostly

¹⁰ Ilana Haramati, *Will SCOTUS usher a return to the “Lochner era”?*, CBS NEWS, April 5, 2012.

¹¹ Adler, *supra* note 3.

¹² Clean Power Plan – Technical Summary for States, U.S. EPA, <https://www3.epa.gov/airquality/cpptoolbox/technical-summary-for-states.pdf> (last viewed April 10, 2016).

¹³ Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES, Dec. 12, 2015.

unscathed in litigation,¹⁴ as many experts predict it should,¹⁵ the damage to post-Paris momentum could already have been done. Without even reaching the merits of the case, the Supreme Court has thus cast doubt on the entire prospect of U.S. compliance with the Paris accord—and with it, doubt on compliance by other nations as well.

In this way, the stay could cause irreparable harm not only to countless U.S. citizens affected by domestic climate policy, but to the hundreds of millions¹⁶ of the world's most vulnerable people—none of whom are represented in these proceedings—who are at risk from sea-level rise, hurricanes, drought, and fires associated with climate change.

(Pause here for somber reflection... for an appropriately long and somber time.)

Okay: that's the depressing, glass-half-empty view of what has happened this week. Resisting the urge to just hide under the covers, let me now suggest a more hopeful alternative. The Court has undeniably, inexplicably dealt a blow to the CPP in the short term. But in the long term, perhaps it is not the death knell for the underlying elements of the plan, for U.S. compliance with the Paris accord, and for continued momentum for a global response to the climate crisis.

The CPP was designed to nudge U.S. energy markets away from its path-dependence on fossil fuels and toward sources that impose fewer harmful externalities on human health and the environment. But that path is changing anyway, as both market and environmental forces operate to shift energy production toward renewables. In some parts of the country, wind energy is now cost competitive with natural gas.¹⁷ In places like West Texas, solar photovoltaic¹⁸ is now cost competitive with gas. Extending beneficial tax treatment to renewables that oil and gas have long enjoyed would move them toward economies of scale more quickly, but the trends suggest that low-carbon energy sources will make economic sense even without regulatory incentives.

As low-carbon sources become increasingly economically competitive,¹⁹ many states will continue to follow important elements of the CPP even if the Supreme Court ultimately rejects it.

¹⁴ Tomas Carbonell, *A Look at the Strong Legal Foundation of the Clean Power Plan*, CLIMATE 411 (Oct. 21, 2015), <http://blogs.edf.org/climate411/2015/10/21/a-look-at-the-strong-legal-foundation-of-the-clean-power-plan/>.

¹⁵ Jody Freeman & Richard Lazarus, *A rebuttal to Tribe's reply*, HARVARD LAW TODAY, March 21, 2015.

¹⁶ Benjamin Strauss & Scott Kulp, *New Analysis Shows Global Exposure to Sea Level Rise*, CLIMATE CENTRAL, Sept. 23, 2014.

¹⁷ U.S. ENERGY INFO. ADMIN., LEVELIZED COST AND LEVELIZED AVOIDED COST OF NEW GENERATION RESOURCES IN THE ANNUAL ENERGY OUTLOOK 2015 (2015).

¹⁸ *Texas Solar*, SOLAR ENERGY INDUSTRIES ASSOCIATION, <http://www.seia.org/state-solar-policy/texas> (last visited April 10, 2016).

¹⁹ U.S. ENERGY INFO. ADMIN., *supra* note 17.

More than half the states have already established well-developed renewable portfolio standards²⁰—requirements that a certain percentage of their electricity must come from renewable energy sources—and they will likely continue to implement them regardless of the Court’s conclusion. Most states in the Northeast are already on track to comply with the CPP.²¹ Ongoing progress in energy efficiency will further cut carbon emissions, even without changes in production.

Moreover, even if the CPP struggles in court, carbon emissions from power plants will still be regulated under the Clean Air Act. Why? None other than the Supreme Court required it in *Massachusetts v. EPA*,²² which famously held that the Clean Air Act requires EPA to regulate greenhouse gases. Other air pollution rules, such as the Mercury and Air Toxics Standards that limit the emission of hazardous pollutants,²³ will likely prevent new coal plants from coming online. Indeed, few, if any, new plants have been built in recent years.

Finally, it’s important to remember that while half the states have lined up against the CPP, most of the remaining half stand with it. Even some of the states opposing the rule are politically split—such as Colorado, where the attorney general opposes the plan, but the governor endorses it. There remains substantial support for the CPP, and a growing list of experts have publicly argued that it should survive judicial review on the merits,²⁴ notwithstanding the Court’s apparent skepticism. So while the future of the CPP is uncertain, it is certainly not over. Only time will tell, and although time is not on our side, we can make the most of it by keeping on the path to cleaner energy as best we can while the litigation plays out.

²⁰ *Renewable Portfolio Standard Policies*, U.S. DEPT. OF ENERGY, <http://ncsolarcenterprod.s3.amazonaws.com/wp-content/uploads/2015/11/Renewable-Portfolio-Standards.pdf> (last visited April 10, 2016).

²¹ Gerald B. Silverman, *Most RGGI States on Track to Meet Power Plan Targets*, BLOOMBERGBNA, Aug. 13, 2015.

²² *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

²³ *Cleaner Power Plants*, U.S. EPA, <https://www3.epa.gov/mats/powerplants.html> (last visited April 10, 2016).

²⁴ Tomas Carbonell, *A Growing Number of Experts Affirm the Strong Legal Basis for the Clean Power Plan*, CLIMATE 411 (Nov. 10, 2015), <http://blogs.edf.org/climate411/2015/11/10/a-growing-number-of-experts-affirm-the-strong-legal-basis-for-the-clean-power-plan/>.