An Autopsy of the Clean Power Plan

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The Clean Power Plan (CPP) was supposed to be great. The Environmental Protection Agency (EPA) celebrated its regulation as "a historic and important step," "fair, flexible and designed to strengthen the fast-growing trend toward cleaner and lower-polluting American energy," providing "national consistency, accountability and a level playing field," and a demonstration "that the United States is committed to leading global efforts to address climate change."[1] President Obama applauded it, too. The Clean Power Plan, he remarked, is "the single most important step America has ever taken in the fight against global climate change."[2]

We'll never know. The fate of the CPP was sealed a little after midnight on Wednesday, November 9, when the election results indicated that Donald Trump will serve as the next President. Congress, moreover, retained its Republican majorities in both the House and the Senate. The seat on the Supreme Court that had been vacant since Justice Scalia died in February will be filled by President Trump's nominee, rather than by executive and regulatory power supporter Judge Merrick Garland.[3]

One way or another, the CPP is doomed. Any branch could wield the death blow. Congress could repeal the provision of the Clean Air Act (CAA), which obligates EPA to regulate greenhouse gas emissions.[4] President Trump or his executive branch appointees could kill the CPP by refusing to defend it in

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1. *Clean Power Plan for Existing Power Plants*, EPA, https://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants; *see also* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64662 (2015).

2. Remarks Announcing the Environmental Protection Agency's Clean Power Plan, 2015 DAILY COMP. PRES. DOC. 546, at 2 (Aug. 3, 2015).

3. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985). Senator Grassley, the chair of the Senate Judiciary Committee, cited the CPP as an example of "the importance of thoroughly vetting any candidate for the lifetime appointment." Hannah Hess, *Supreme Court: Grassley Cites Key Enviro Cases In Blocking Nominee*, GREENWIRE (Feb. 25, 2016), http://www.eenews.net/greenwire/2016/02/25/stories/1060033009.

4. *See* Mass. v. EPA, 549 U.S. 497 (2007). For an illustration of what such legislation could look like, see Stop the War on Coal Act of 2012, H.R. 3409, 112th Cong. § 201 (2011–2012) (amending the CAA to exclude coverage of greenhouse gases).

court, by settling with the states and other parties who oppose it, by withdrawing the rule for agency reconsideration, or perhaps through other actions.[5] Or the D.C. Circuit or the Supreme Court could strike down the CPP.[6]

So why bother beating up on the dead? My conclusion is that the CPP was probably legal, but that was precisely the problem. Multiple legal doctrines needed to be stacked on top of one another in order to sustain the rule. In other words, *the CPP rests on the understanding that a statute enacted 47 years ago to reduce harmful air pollution also delegates lawmaking power to an agency that did not exist at the time to choose between two conflicting statutory provisions to regulate emissions of a categorically different kind of pollutant. And all this even though those regulations displace traditional state authority over energy generation and even though Congress refused to enact such a statute specifically authorizing such regulations*. I will examine each of these issues in turn, and then explain why they are especially troubling when combined.

1. CONGRESS MAY DELEGATE LAWMAKING POWER TO EPA

Congress gave lawmaking power to EPA when it enacted the Clean Air Act in 1970. It did so despite the superficially clear provision of Article I that "[a]ll Legislative powers herein granted shall be vested in a Congress of the United States."[7] The CPP sure looks like legislation. And scholars continue to question the practice of congressional delegations of lawmaking power to executive agencies.[8]

But there isn't a legal claim there. The Supreme Court held in 2001 the Clean Air Act does not violate the non-delegation doctrine.[9] All that the Court requires is for Congress to state an "intelligible principle" to guide an agency's rulemaking discretion.[10] The CAA provision upon which EPA relies refers to "standards of performance for any existing source of any air pollutant" and fits comfortably within the Court's intelligible principle jurisprudence. In reality,

5. *See* Amanda Reilly, *Clean Power Plan: Rule's Demise Looms, But How Trump Will Ax It Remains Unclear*, GREENWIRE (Nov. 9, 2016), http://www.eenews.net/stories/1060045517.

6. The D.C. Circuit heard the case en banc in a marathon day-long session held six weeks before Election Day, and the court still has the case under advisement. *See* Transcript of Oral Argument, West Virginia v. EPA, (D.C. Cir. Sept. 27, 2016) (No. 15-1363). Whatever the D.C. Circuit decides, the CPP could be invalidated by the Supreme Court, whose skepticism toward the rule had already been signaled by its January 2016 order staying its effectiveness. *See* West Virginia v. EPA, 136 S.Ct. 1000 (Mem) (2016).

7. U.S. CONST., art. I, § 1.

8. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 12 (1993).

9. *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

10. *See id.* at 473–74.

the non-delegation doctrine has only "had one good year,"[11] and it is unlikely to have another good one any time soon.

2. THE PLAIN MEANING OF THE CAA'S TEXT EXTENDS BEYOND WHAT CONGRESS INTENDED TO ACCOMPLISH

The Clean Air Act targets "traditional" pollutants. Substances, in other words, that make air dangerous to breathe or that obscure scenic views when they are emitted into the air. That is what Congress had in mind when it enacted the CAA. By contrast, the greenhouse gases that contribute to climate change are different in several respects. If the meaning of the statute is determined by congressional intent, then the CAA should not apply to the novel category of "carbon pollution."

But the Court has held otherwise. In *Massachusetts v. EPA*, a 5-4 Court concluded that the statute's sweeping definition of "pollutants" encompassed anything that it is emitted into the air.[12] Anything ranging from "Frisbees to flatulence," as Justice Scalia complained in dissent, and without contradiction by the majority.[13] The opponents of the CPP did not challenge the Court's holding that greenhouse gases are within the scope of the CAA.

3. EPA MAY RELY ON THE MORE ADVANTAGEOUS OF THE TWO DUPLICATIVE STATUTORY PROVISIONS WHICH CONGRESS ACCIDENTALLY ENACTED

The House and the Senate drafted alternative versions of the section of the CAA on which the CPP relies, and somehow Congress included both of them in the final bill that it enacted. It is generally accepted that the Senate's version supports the CPP, but it is less certain that the House's version does. Others have parsed the competing texts and the history of the legislative process that produced them. One judge has likened this interpretive exercise as "a hall of mirrors" which requires "a stiff drink" to navigate.[14] Suffice to say that the CPP would be in trouble if it had to rely on the House version of the CAA that is codified in the U.S. Code, whereas the CPP would be on stronger footing if it may rely on the Senate provision or if a court defers to the agency's choice between the two provisions.

4. A COURT SHOULD DEFER TO EPA'S REASONABLE INTERPRETATION OF THE AMBIGUOUS PROVISIONS OF THE CAA

Nothing in the CAA says that EPA has the power to regulate greenhouse gases in the manner described in the CPP. On the other hand, nothing in the CAA says that EPA lacks such power, either. In the ordinary case, a court

11. Cass R. Sunstein, *Nondelegaton Canons*, 67 U. CHI. L. REV. 315, 322 (2000).
12. 549 U.S. 497 (2007).
13. *Id.* at 558 n.2 (Scalia, J., dissenting).
14. *See* Transcript of Oral Argument, *supra* note 6 at 110 (statement of Judge Kavanaugh).

would plumb the depths of other sources of statutory meaning to determine whether Congress meant to include such regulation within the regulatory powers granted to EPA. Those sources would include congressional debates, congressional hearings, previous cases, and other materials that could shed additional light on the meaning of a statute. But in *Chevron*, the Supreme Court held that a court should defer to an agency's reasonable interpretation of an ambiguous statutory provision, rather than trying to discern the statute's meaning itself.[15]

Chevron deference has faced withering criticism of late from politicians, judges, and scholars alike. And *Chevron* does not apply when a statute raises a "major question," which may be the best line of attack on EPA's interpretation of the CAA, and thus on the legality of the CPP.[16] The status of the major question rule is unsettled, though, and a narrow application of it could have allowed EPA to secure the judicial deference that it may have needed to sustain the CPP.

5. NEITHER CONSTITUTIONAL FEDERALISM PRINCIPLES NOR THE CAA'S COOPERATIVE FEDERALISM REGIME PREVENT EPA FROM DISPLACING THE TRADITIONAL STATE AUTHORITY OVER ELECTRICITY GENERATION

Energy regulation has traditionally been the province of the states. That is especially true with respect to decisions regarding the mix of energy sources within a state. The CPP would disrupt that arrangement. It would reach "beyond the fence line" by not only regulating the emissions from a power plant, but also regulating the types of power plants that may be employed. Thus, opponents of the CPP have argued that it violates principles of federalism.

But the Court has been reticent to enforce the Constitution's federalism constraints. Whether the tenth amendment merely states a truism,[17] or whether federalism disputes are best left to the political process,[18] there are not many federal actions that the Court has struck down on federalism grounds. The CPP is unlikely to add to that list.[19]

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15. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

16. The major questions doctrine "holds that judicial deference is out of place with regard to hugely significant policy questions—the sort of issues that Congress should, or must, or can be presumed to, decide." Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1868–69 (2015); *see also* Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014) (judging EPA's interpretation of the CAA as "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.") Many of the D.C. Circuit judges struggled with the application of the major questions rule. *See* Transcript of Oral Argument, *supra* note 6.

17. *See* United States v. Darby, 312 U.S. 100, 124 (1941).

18. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

19. *See EPA's Proposed 111(d) Rule For Existing Power Plants: Legal and Cost Issues: Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 114th Cong. 36

In addition to the Constitution, the CAA itself divides power between the state and federal governments. Indeed, it expressly says that state and local governments are to retain the primary responsibility for regulating air pollution.[20] More generally, the CAA embraces "cooperative federalism." The CPP's opponents decry the rule as not very cooperative at all.[21] By contrast, the CPP's supporters see it as a model of cooperative federalism. More importantly, EPA gets to decide the meaning of cooperative federalism in the first instance when it crafts regulations, and the courts have extended similar deference to EPA's understanding of federalism as they have to EPA's other judgments.

6. EPA MAY REGULATE EVEN THOUGH CONGRESS REFUSED TO ENACT SPECIFIC LEGISLATION THAT WOULD HAVE MADE THE CPP UNNECESSARY

For years, members of Congress and environmental activists insisted that new comprehensive federal legislation was necessary to address the emerging problem of climate change. They were especially insistent that such legislation was needed to reduce emissions from existing coal-fired power plants that had been grandfathered in by the CAA's provisions related to traditional pollutants. The CAA was characterized as incapable of achieving the desired regulations. Nonetheless, Congress declined to enact comprehensive climate change legislation. Instead, since 2010, Congress has considered several bills that would strip EPA's authority to regulate greenhouse gas emissions under the CAA. At least one of those bills passed the House. None of them ever became law because of the threat of a filibuster in the Senate and a veto by President Obama. To the extent that one tries to glean whether the current Congress supports the CPP, the answer is almost certainly "no."

The opponents of the CPP thus see it as an end run around the constitutional lawmaking process. President Obama lent some support to that claim by suggesting that he could act because Congress wouldn't. But the fact that Congress carefully considered comprehensive climate change legislation and then decided not to enact it is not disqualifying as a matter of statutory interpretation. Rather, "arguments from legislative inaction are speculative at best."[22]

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To recap, *the CPP rests on the understanding that a statute enacted 47 years ago to reduce air pollution that is harmful to breathe also delegates lawmaking power to an agency that did not exist at the time to choose between*

(2015) [hereinafter House CPP hearing] (testimony of Richard Revesz) (objecting to the "extreme and unsupported interpretation of the Tenth Amendment" advanced by the CPP's opponents).

20. *See* 42 U.S.C. § 7401(a)(4) (1990).

21. *See* Jason Scott Johnston, *The False Federalism of EPA's Clean Power Plan* (Virginia Law and Economics Research Paper No. 16 2015), https://ssrn.com/abstract=2604308.

22. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2426 (2014) (Thomas, J., concurring in the judgment).

two conflicting statutory provisions to regulate emissions of a categorically different kind of pollutant even though such regulations displace traditional state authority over energy generation and even though Congress refused to enact a statute specifically authorizing such such regulations. That may be correct as a matter of existing legal doctrine. But something in that line of reasoning is wrong.

The daisy chain of legal doctrines needed to support the CPP raises three types of problems. First, it would enable EPA to use the CAA to impose all sorts of questionable regulations. EPA could regulate such sacrosanct equipment as barbecue grills and lawnmowers.[23] It could regulate nuclear energy even though Congress has established a separate statutory scheme, and a separate agency, to perform that task.[24] Indeed, EPA could "take these same arguments and use them to restructure every industrial sector in this country."[25] The point is not that these examples, or others like them, represent bad environmental policy. The point is that EPA would enjoy a virtually boundless power to decide what is good environmental policy if all of the legal doctrines needed to sustain the CPP are correct.

Second, the legal justification of the CPP is representative of a more general expansion of executive power. The Obama Administration's relied on controversial assertions of executive power to address immigration, gun control, and Iranian armaments, as well as climate change. That, in turn, provoked a backlash from members of Congress, legal scholars, and others who complained that the Administration was exceeding the scope of its legal authority. And the backlash prompted earnest defenses of the Administration's actions and the legal basis for them. Tellingly, the debate raged during a particular political moment, when a Republican Congress thwarted many of the goals of a Democratic President. The election of President Trump along with a Republican Congress portends a very different moment when concerns about gridlock dissipate and partisans view a broad understanding of executive power much differently than they did before. Perhaps the election of a uniquely controversial President will encourage a much needed reconsideration of entrusting vast executive powers.[26]

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23. 160 CONG. REC. S1372 (daily ed. Mar. 10, 2014) (statement of Sen. Sessions) (asserting that *Massachusetts v. EPA* "gave these unelected bureaucrats . . . the power to regulate an individual American's barbecue grill, their lawnmower, and every major business in America").

24. *See Legal Implications of the Clean Power Plan: Hearing Before the Subcomm. On Clean Air and Nuclear Safety of the S. Comm. On Environment and Public Works*, 114th Cong. 24 (2015) (Oklahoma Attorney General E. Scott Pruitt's written response to a question from Sen. Whitehorse) (explaining that "there is really going to be almost no limit to how [EPA] can look beyond an individual source to bring in other sources . . . like a nuclear facility, like this building and energy efficiency, bring them into EPA's regulatory regime").

25. *Implications of The Supreme Court Stay of the Clean Power Plan: Hearing Before the S. Comm. On Environment and Public Works*, 114th Cong. 3 (2016) (statement of Sen. Inhofe).

26. I made this argument before the results of the election were known. *See* John Copeland Nagle, *What We Don't Want a New President To Do*, N.Y. TIMES (Nov. 8, 2016), http://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016?module=ConversationPieces&region=Body&action=click&pgtype=article.

The third lesson of the CPP is a reminder that even the most desirable policy ends do no justify questionable legal means. Environmental *law* exists precisely to constrain the passionate impulses of climate activists and climate deniers, and President Obama and President Trump. Judge Kavanaugh noted this concern during the oral argument in the D.C. Circuit, likening the CPP to the Bush Administration's efforts to combat terrorism. We had already "lived this issue where the most urgent need of our country was identified as a reason to use old statutes that weren't squarely on point to jam new urgent needs into" them, and just as the Supreme Court admonished that "war is not a blank check, global warming is not a blank check either for the President."[27] Or as Professor Laurence Tribe put it, "Burning the Constitution should not become part of our national energy policy."[28] There is a temptation to think otherwise, that the potentially apocalyptic consequences of climate change justify the displacement of legal constraints. That is what motivated Thomas Friedman to propose that the United States should become "China for a day" so that we could "simply order top-down the sweeping changes in prices, regulations, standards, education, and infrastructure."[29] But the attraction to the opportunities available to a cohort of unelected leaders is contrary to the humility undergirding the selection of environmental goals via extensive public debate and voting. Instead, it is the ultimate ends-justify-the-means argument.

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The CPP is likely dead, but it behooves us to figure out what went wrong. Any action the Trump Administration chooses will affirm that environmental policy that lives by executive action may also die by executive action. Federal climate change policy will be more robust, and environmental law will be more effective, if it is built on a better foundation. The demise of the CPP gives us an opportunity to begin, perhaps reluctantly, to lay that foundation anew.

27. Transcript of Oral Argument, *supra* note 6, at 100 (statement of Judge Kavanaugh).

28. House CPP hearing, *supra* note 19, at 25 (statement of Laurence H. Tribe).

29. THOMAS FRIEDMAN, HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION — AND HOW IT CAN RENEW AMERICA 371–94 (2008) (chapter entitled "China for a day – but not for two").