Pulling the Plug on Obama's Power Plan

By David B. Rivkin Jr. And Andrew M. Grossman

President Obama's Clean Power Plan is dead and will not be resurrected. The cause of death was hubris. As a result, the plan's intended victims—including the national coal industry, the rule of law and state sovereignty—will live to fight another day.

On Tuesday the Supreme Court put President Obama's signature climate initiative on hold while a lower court considers challenges brought by industry opponents and 27 states. That stay will remain in effect through the end of Mr. Obama's presidency, until the Supreme Court has a chance to hear the case—in 2017 at the earliest. The stay sends the strongest possible signal that the court is prepared to strike down the Clean Power Plan on the merits, assuming the next president doesn't revoke it.

Not since the court blocked President Harry Truman's seizure of the steel industry has it so severely rebuked a president's abuse of power.

The dubious legal premise of the Clean Power Plan was that Congress, in an all-but-forgotten 1970s-era provision of the Clean Air Act, had empowered the Environmental Protection Agency to displace the states in regulating power generation. The EPA, in turn, would use that authority to mandate a shift from fossil-fuel-fired plants to renewables. The effect would be to institute by fiat the "cap and trade" scheme for carbon emissions that the Obama administration failed to push through Congress in 2009.

The legal defects inherent in this scheme are legion. For one, in a ruling two years ago the court held that the EPA couldn't conjure up authority to make "decisions of vast economic and political significance" absent a clear statement from Congress. Thus, the EPA may have the authority to require power plants to operate more efficiently and to install reasonable emissions-reduction technologies. But nothing authorizes the agency to pick winners (solar, wind) and losers (coal) and order generation to be shifted from one to the other, disrupting billion-dollar industries in the process.

The agency also overstepped its legal authority by using a tortured redefinition of "system of emission reduction." That statutory term has always been taken to give authority to regulate plant-level equipment and practices. Instead the EPA contorted the term to apply to the entire power grid. That redefinition, while necessary for the EPA to mount its attack on traditional power sources, violates the rule that federal statutes must be interpreted, absent a clear indication to the contrary, to maintain the existing balance of power between the federal government and the states. Federal law has long recognized states' primacy in regulating their electric utilities, the economic aspects of power generation and transmission, and electric reliability.

The Supreme Court sent a clear message: Your clean-energy strong-arming campaign must stop.

Worse, the Clean Power Plan commandeers the states and their officials to do the dirty work that the EPA can't. The agency seeks to phase out coal-fired plants, but it lacks any ability to regulate electric reliability, control how and when plants are run, oversee the planning and construction of new generators and transmission lines, or take any other of the many steps necessary to bring the plan to fruition.

Only the states can do those things, and the plan simply assumes that they will: Because, if they refuse, and the federal government forces coal-plan retirements, the result would be catastrophic, featuring regular blackouts, threats to public health and safety and unprecedented spikes in electricity prices.

The EPA defended this approach before the Supreme Court during legal arguments leading up to Tuesday's stay order as a "textbook exercise of cooperative federalism." But the textbook—our Constitution as interpreted by the court in case after case—guarantees that the states can't be dragooned into administering federal law and implementing federal policy. Their sovereignty and political accountability require that they have the power to decline any federal entreaty. The Clean Power Plan denies them that choice.

No doubt the court was swayed by evidence that the states already are laboring to accommodate the plan's forced retirement and reduced utilization of massive amounts of generating capacity. Given the years that it takes to bring new capacity online, not even opponents of the plan could afford to wait for the conclusion of judicial review to begin carrying out the EPA's mandate.

By all appearances, that was the Obama administration's strategy for forcing the Clean Power Plan, legal warts and all, into effect. After the court ruled last term that the EPA's rule regulating power plants' hazardous air emissions was unlawful, the agency bragged that the judgment wouldn't make a difference because the plants had already been forced to comply or retire during the years of litigation. The Clean Power Plan doubled down on that approach.

It's one thing for a rule to be unlawful—which happens, and rarely merits a stay—but another for it to be lawless. This one was lawless. That is why the court had to act: to reassert the rule of law over an executive who believes himself above it.

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