
THE LEGAL CONTROVERSY SURROUNDING THE CLEAN POWER PLAN:

A History, Overview, and Analysis

BY RYAN DUFFY

In 2014, the Obama Administration unveiled the Clean Power Plan (CPP), an Environmental Protection Agency (EPA) set of regulations aimed at reducing greenhouse gas emissions by targeting power plants. Since its introduction, the plan has faced backlash from Republicans, members of Congress, states, and industry. Multiple parties have challenged the plan's legal basis on the grounds that it is unconstitutional and beyond the scope of the EPA. This paper aims to explore the legal debate surrounding the CPP, which is currently being fought in the U.S. Supreme Court and likely to be scrapped by the incoming Trump administration. The paper starts with a brief legislative and regulatory primer and then explores the verdicts of two related Supreme Court cases. Since the CPP is a directive aimed at reining in greenhouse gas emissions, the paper gives constitutional, political, and legal consideration to the issue of climate change.

Climate change is a difficult issue for the United States: it has no legal or historical precedent, there is no explicit acknowledgment or implicit reference to it in the Constitution, and the process by which empirical data is presented and debated has been politicized. Over the past half-century, as the problem has intensified, the U.S. government has taken various steps to mitigate the harmful effects of climate change.

In 1969, Congress passed the National Environmental Policy Act (NEPA) in order “to assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment.”²¹ In concurrence with NEPA, President Nixon proposed the Environmental Protection Agency (EPA), telling both houses of Congress at the State of the Union that the 1970s would be “a historic period when, by conscious choice, [we] transform our land into what we want it to become.”²² From this point forward, the EPA has promulgated rules and standards that have shaped the regulatory landscape of the United States.

Since its inception, the EPA has proposed and enacted regulations that have been constitutionally challenged as beyond its constitutional scope and statutory authority. The Clean Air Act (CAA), passed in 1970, ordered the EPA to promulgate national air quality standards:

National primary ambient air quality standards, prescribed, under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, *are requisite to protect the public health.*³

The CAA was Congress’ response to a very timely and pressing problem—the runaway release of carcinogens into the air. The higher the concentra-

tion of these carcinogens—which the CAA refers to as ‘criteria pollutants’—the worse the adverse health impacts, economic costs, and environmental consequences. The CAA had a noticeable effect on reducing criteria pollutants (seen in Figure 1); however, it has become increasingly controversial as the EPA, certain states, and environmentalist groups have used the Act to promulgate standards for Carbon Dioxide (CO₂), a greenhouse gas (GHG) the CAA was not originally designated for.



The Supreme Court is currently hearing oral arguments regarding the CPP. The decision could change how and whether the EPA can regulate hazardous air pollutants. *Photo by Duncan Lock, courtesy of Wikimedia Commons.*

A landmark Supreme Court case, *Massachusetts v. EPA*, highlights the process whereby the CAA was interpreted as a means to regulate GHGs. In 1999, a group of 19 petitioners filed a rulemaking petition asking the EPA to regulate “greenhouse gas emissions from new motor vehicles” pursuant to § 202 of the Clean Air Act. The petition asserted that GHGs contribute to the anthropogenic (man-made) warming of the planet, that 1998 was “the warmest year on record,” and “that climate change will have serious adverse effects on human health and the environment.”²⁵ Four years later the EPA entered an order denying the rulemaking petition, alleging that the CAA did not give them statutory

authority to address climate change and that even if the Agency had the right to promulgate GHG standards, “it would be unwise to do so at this time.”⁶ The Commonwealth of Massachusetts, citing its susceptibility to climate change-induced sea rise, sued the EPA and contested that the Agency’s denial was arbitrary and capricious as well as a violation of the Administrative Procedure Act (APA). The issue at hand was whether the EPA could set emission standards for new motor vehicles.

The Supreme Court sided with Massachusetts and asserted that the CAA’s “sweeping definition” of air pollutants included “all airborne compounds of whatever stripe,” thus affirming that the Agency’s behavior was at odds with the statute.⁷ Since the CAA’s “sweeping definition” statute was narrow and clear, the Court was able to find that the Agency was acting arbitrarily and capriciously, or not in accordance with the law. At the time of the case, there was broad empirical evidence that corroborated the proposition that air pollutants such as CO₂ were an endangerment to global health and that the coast of Massachusetts was at risk due to global climate change. The Court found that this constituted a redressable injury to the state of Massachusetts, and opined that the “EPA must ground its reasons for action or inaction in the statute.”⁸ The dissenting opinions are indicative of the divisive nature of the issue; Chief Justice Roberts asserted that Massachusetts’s specific injury was not sufficiently direct and that forcing the EPA to enforce automobile emissions would not have any discernible benefits, while the late Justice Scalia contended that the petitioners did not have standing. In the latter case, Scalia’s opinion referred to the decision allowing the EPA to regulate GHGs from new motor vehicles as “the single largest expansion in the scope of the [Act] in its history.”⁹

While this decision expanded the scope of the

EPA, other Supreme Court cases have greatly restricted the rulemaking capabilities of the Agency. In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Court presided over a separate issue—the EPA’s authority to set emission standards for stationary sources of GHGs. Under the Obama Administration, the EPA interpreted the ruling of the previous case to mean that it could also set new requirements for stationary sources of GHGs. The Court unanimously found that the EPA “overstepped its statutory authority when it decided that a source could become subject to PSD or Title V permitting by reason of its greenhouse-gas emissions.”¹⁰ More specifically, the Court found that the CAA’s “sweeping definition” of air pollutants does not require the EPA to regulate all GHGs, that the new standards would impose undue burdens on thousands of additional pollution emitters, and that the EPA acted beyond its authority by modifying Congress-stipulated thresholds.¹¹

Climate change is legally nebulous and complex for a variety of reasons. The legality of various initiatives to mitigate climate change are sound in certain respects: climate change poses significant health, economic, and environmental risks to the nation’s well-being and posterity. However, the government can and often does overstep its statutory authority when attempting to curb climate change. These difficulties are compounded by the issue’s scientific complexity: it is difficult for courts to attribute causation, responsibility, or direct injuries. It is also problematic to legally balance the interests and rights of industries with those of citizens. Lastly, climate change is concurrently a global, national, and local dilemma, so it often provokes difficult sovereignty and federalism disputes.

At the 2015 United Nations Climate Change

Conference (COP21), the international community turned its attention to the pressing issue of climate change. The Conference aimed to achieve cooperation among the world's biggest economies and heaviest polluters by establishing binding emission reduction commitments. The United States, as the world's largest economy and second-largest polluter, had an enormous stake in the negotiations. Without the commitment of the United States, any meaningful prospects for emission reductions were low. The Obama Administration was "at the center of negotiations, cajoling reluctant countries to adopt more ambitious goals, shaping the architecture of a new agreement and trumpeting its own ambitious commitments as an example of climate responsibility."¹² However, the key determinant of the US's ability to lead the world with ambitious emissions reductions was its domestic political environment. To uphold its commitment to the international community, the United States developed an ambitious national emissions reductions plan.

In June 2014, the EPA proposed the Clean



Power plants that emit carbon dioxide and other greenhouse gasses are the primary targets of the Clean Power Plan. *Photo by Marco Farouk Basir, courtesy of Wikimedia Commons.*

Power Plan (CPP), a set of regulations aimed at reducing CO₂ emissions from power plants by 32 percent within fifteen years relative to 2005 levels.¹³ On August 3rd, 2015, President Barack Obama unveiled the final version of the CPP and stated "the EPA is setting the first-ever nationwide standards to end the limitless dumping of carbon pollution from power plants."¹⁴ The Plan affords each state the opportunity "to put together its own plan for reducing emissions—because every state has a different energy mix."¹⁵ The CPP is a sweeping and ambitious plan that would have a significant effect on fossil fuel industries and certain states in particular—such as Kentucky and West Virginia. As such, the Plan was met with sharp criticism from the coal industry and dozens of states.

The CPP seeks to set standards and individual state targets for CO₂ emissions from existing power plants, pursuant to § 111(d) of the CAA. § 111(d) allows for states to develop their own program to reach targets for existing sources.¹⁶ According to the EPA, the CPP "will maintain an affordable, reliable energy system, while cutting pollution and protecting our health and environment now and for future generations."¹⁷

The proposed Plan's opponents have charged that it is unconstitutional and will threaten consumers, industries, and the reliability of the power grid. There have also been charges of violating the separation of powers doctrine. Sen. James Inhofe (R-Okla.) said of the Plan: "What they have attempted to do is to do through regulations what they can't do through legislation."¹⁸ With West Virginia at the helm, petitioners challenged the new regulations in an U.S. appeals court. West Virginia AG Patrick Morrissey referred to the plan as "one of the most onerous and illegal regulations coming out of Washington D.C., that we've seen in a long time."¹⁹ Lawyers for Murray Energy—a coal pro-

ducer in Ohio also challenging the regulations— chastised the initiative, noting that “transforming an entire industry cannot occur overnight.”²⁰

In the interim, the states and utilities have prevailed over the EPA and Obama Administration. In February the Supreme Court blocked implementation of the plan until a panel of judges on the D.C. Circuit hears each side’s arguments. 24 states, the U.S. Chamber of Commerce, various coal companies, and some electric utilities are among the petitioners, or parties in support of the petition. In opposition, 18 states, environmental organizations, and some power industries have filed briefs in support of the Rule.


“In order for the federal and state governments to develop an effective response, both levels must balance their own interests and considerations with those of the other.”


The controversy surrounding the CPP is a testament to the difficult and divisive nature of environmental law. There are four main legal and political difficulties that the government faces when addressing the issue of climate change: statutory and constitutional authority, federalism, the divergent rights and interests of citizens and industry, and the global nature of the problem. As climate change and the consequences it carries have intensified, the EPA has grappled with the onerous responsibility of mitigating the problem while also operating legally and within its statutory and constitutional mandate. In order for the federal and state governments to develop an effective response, both

levels must balance their own interests and considerations with those of the other. Another equilibrium that government must carefully heed is the rights and interests of industry compared to those of citizens, because the two parties often have antagonistic aims in environmental law. Finally, since the scope of climate change is global in nature and must be confronted multilaterally, the United States has struggled to take action without binding commitments or coordination with other big emitters and economies.

Constitutionally, climate change threatens Americans’ inalienable rights because of the real endangerment of “of life, liberty, and the pursuit of happiness”—safety, freedom, and well-being—that it carries. The Founders looked to protect future generations “by establishing an enduring guide to those principles most relevant to our nation’s fundamental challenges.”²¹ Countering the harmful effects of climate change is a constitutionally-stipulated requirement of the U.S. government. However, the extent to which it may act on the issue has been determined by numerous statutes: NEPA, CAA, and APA—among others. The language in these acts establishes parameters to guide the EPA and other environmental agencies. As Supreme Court decisions have shown, these statutes are a political mechanism to counter climate change (*Mass v EPA*) within specifically-enumerated limits and thresholds (*Utility Air v EPA*).

The EPA must balance the goal of its regulations with the interests and rights of the regulated. Judges and courts use discretion when balancing the interests of Petitioners and Respondents. As Scalia’s majority opinion in the *Utility Air* indicated, if the EPA was free to interpret its statutory authority however it wished, it could levy draconian restrictions on any pollution source. The effect of this would significantly cripple entire industries,





shock the American economy, and by extension, hurt U.S. consumers. Even if a judge yields to agency discretion and determines that an expansion of power such as this is within its statutory authority, this could be inequitable and do more harm—quantified by economic costs, lower GDP, and lost jobs—than good—quantified by increased air quality or reduced emissions.

Some states have embraced the federal government's ambitious environmental laws while others have been recalcitrant and non-cooperative. Historically, states have asserted that under the 10th Amendment, they have significant discretion to determine their own climate regulations. The federal government counters this claim with Article VI of the Constitution, which makes federal law "the supreme law of the land," meaning that if any conflict arises it preempts state laws.²² Moreover, Article I, Section VIII of the U.S. Constitution, gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."²³ The federal government also maintains that climate change is an issue of interstate commerce that merits national uniformity.

Climate change is a global problem that requires multilateral negotiation, collective action, and binding commitments. In 1997, as international negotiations were well underway at the Kyoto Protocol, the Clinton Administration was negotiating terms for an aggressive domestic reduction in emissions. In response, the Senate passed the Byrd-Hagel resolution unanimously, which would not support a climate change treaty that "seriously" harmed the American economy or exempted developing countries from obligations.²⁴ This law served as a declaration that the United States would not be willing to shoulder the costs unilaterally (despite being responsible for a quarter of world emissions at the time) or adopt a law that did more harm than good.

The international dynamic of climate change introduces another barrier to effective and clear lawmaking: if the U.S. has to act unilaterally it will not. However, COP21 has shown the international community's commitment to collectively tackling the problem of climate change. The success of the treaty will largely be predicated on the US's ability to ambitiously control and reduce its own domestic emissions.

The U.S. government's CPP initiative is a good-faith effort to mitigate the pressing problem of climate change and subsequently protect U.S. citizens from adverse health impacts, economic costs, and environmental consequences. Despite its admirable goal and inherent rationality, the Plan is subject to the same statutory and constitutional scrutiny as any other law of the United States. Pending further judicial review, the Supreme Court has halted the implementation of the Plan and has sided with the petitioners. In effect, the Court is insinuating that the Plan may not proceed because it has a questionable legal foundation. The dubious legitimacy of the Plan means that even if it tremendously helps the U.S. (and the rest of the world), if it is inequitable or beyond the statutory authority of the EPA, it cannot be implemented. Assuming the D.C. circuit judges rule in the petitioners' favor, the United States will have to find another method to counteract and prevent the negative effects of climate change.

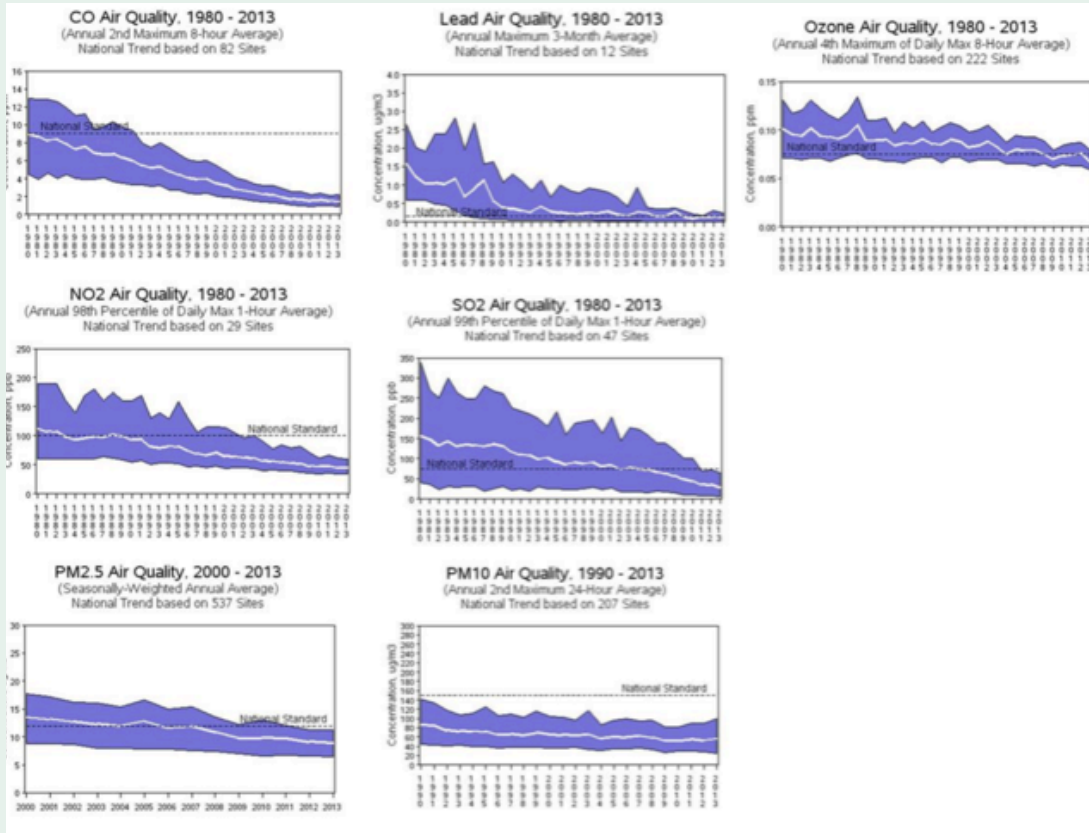


Figure 1: The Concentration of Criteria Pollutants from 1980 to 2013

Taken from 'Ambient Air Quality and Environmental Health,' *environmentalscience.org*.



TABLE OF AUTHORITIES

Cases

- Massachusetts v EPA, 549 U.S. 497 (2007).....2, 3, 7
Utility Air Regulatory Group v. Environmental Protection Agency, 573 U.S. (2014)3, 4, 7

Statutes

- Administrative Procedure Act.....2,7
Byrd-Hagel Resolution.....8
Clean Air Act.....1, 2, 7
Clean Power Plan.....5
National Environmental Policy Act.....1, 7

Constitution

- U.S. Const. amend. X.....8
U.S. Const. art. VI, cl. 2.....8
U.S. Const. art. I, § 8, cl.8

Other Authorities

- Bloomberg
Harris, Andrew: “Obama Clean-Power Initiative Under Renewed Attack by States” Oct 23, 2015.....6

Boston Globe

- Hansen, James: “The Constitutional Right to a Healthier Climate - The Boston Globe” Mar 9, 2016.....7
The Brookings Institute (Brookings.edu)
Sussman, Bob: “The U.S. Finds Its Voice on Climate Change after Two Decades of Failed Diplomacy.” Nov 24, 2015.....5

The Hill (thehill.com)

- Henry, Devin; Cama, Timothy & Fabian, Jordan: “How President Obama Picked up the pieces on climate change” Feb 10, 2016.....6

JD Supra (JDSupra.com)

- Heslin, Brian and Moore & Van Allen PLLC: “EPA & SCOTUS on GHG: U.S. Supreme Court Makes Statement on EPA Authority to Regulate Greenhouse Gases as the Public Comment Period for EPA’s Clean Power Plan Gets Underway.”.....3
Oyez (Oyez.com)
“Utility Air Regulatory Group v. EPA”.....4



United States EPA (EPA.gov)

Summary of the National Environmental Policy Act.....1

The Birth of EPA.....1

What EPA is Doing.....5





ENDNOTES

¹U.S. EPA, “Summary of the National Environmental Policy Act.”

²U.S. EPA, “The Birth of EPA.”

³The Clean Air Act, Sec. 109.2(b)(1). Pg 31.

⁴Justice Stevens, *Massachusetts v. EPA* (Justice Stevens, Opinion of the Court), U.S. (U.S. Supreme Court 2007).

⁵Id.

⁶Id.

⁷Id.

⁸Id.

⁹“EPA & SCOTUS on GHG: U.S. Supreme Court Makes Statement on EPA Authority to Regulate Greenhouse Gases as the Public Comment Period for EPA’s Clean Power Plan Gets Underway”—JD-Supra.com

¹⁰Justice Scalia, *Utility Air Regulatory Group v EPA* (Justice Scalia, Opinion of the Court), U.S. (U.S. Supreme Court 2014).

¹¹“Utility Air Regulatory Group v. EPA.” Oyez.com

¹²“The U.S. Finds Its Voice on Climate Change after Two Decades of Failed Diplomacy.” The Brookings Institute

¹³Foster, Peter (3 August 2015). “Barack Obama unveils plan to tackle greenhouse gases and climate change.” The Telegraph.

¹⁴“Remarks by the President in Announcing the Clean Power Plan.” Whitehouse.gov

¹⁵Id.

¹⁶Clean Air Act, Section 111(d)

¹⁷US EPA, “What EPA Is Doing.”

¹⁸Henry, Cama, Fabian, “How President Obama picked up the pieces on climate change.”

“Obama Clean-Power Initiative Under Renewed Attack by States.” Bloomberg

¹⁹Id.

²⁰Hansen, James, “The Constitutional Right to a Healthier Climate - The Boston Globe.”

²¹Article VI, U.S. Constitution

²²Article 1, Sec. 8, Clause 3.

²³“Byrd-Hagel Resolution.” CFR.org. Council on Foreign Relations, 25 July 1997.