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The 'Clean Power' Putsch

A watershed case about democratic consent and the separation of powers.

Environmental Protection Agency (EPA) Administrator Gina McCarthy *PHOTO: AGENCE FRANCE-PRESSE/GETTY IMAGES*

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The D.C. Circuit Court of Appeals hears arguments Tuesday in a challenge to President Obama's use of unilateral federal and executive power to impose his climate agenda. The case is a watershed for the Constitution's separation of powers that will echo well beyond this Administration.

In the name of reducing carbon emissions, the Environmental Protection Agency's so-called Clean Power Plan, or CPP, requires states to reorganize their energy economies across electric plants, energy-intensive industries and even households. In February the Supreme Court stayed enforcement of the CPP—an extraordinary rebuke—after some 28 states sued, arguing the plan usurps their authority under the Constitution.

The EPA asserted such authority under a brief and heretofore inconsequential backwater of the 1970 Clean Air Act known as section 111(d). No one who supported that law voted to, and the statutory text does not, empower the EPA to address climate change. But the CPP requires the states to carry out federal policy instructions even if they refuse to submit their own compliance plans.

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In the American system of cooperative federalism, the federal government is supreme and can pre-empt state laws, and it often does. The EPA has the power, for example, to impose efficiency improvements or air-quality standards on existing power plants. But with the CPP it is stretching this power to unprecedented levels and commandeering state resources.

At the heart of cooperative federalism is the right of refusal—states must retain the power to opt out of any federal scheme. If that scheme is grounded in a law passed by Congress, the feds can take over and regulate themselves. In this case the EPA has no authority to do anything of the kind.

Even if the CPP explicitly banned coal-fired power, the EPA cannot mandate that states switch to solar panels and wind turbines. The agency can destroy but it cannot create. Here the EPA is expecting that states will undertake the extensive and costly preparation and regulation to compensate for lost carbon power because they have no other choice to keep the lights on. The EPA is happy to let states take responsibility for problems the EPA is creating.

The Supreme Court has often policed and struck down such commandeering. In 1992's *New York v. United States*, the High Court invalidated a command to states related to low-level radioactive waste, while 1997's *Printz v. United States* overturned a provision on background checks for gun purchasers. As recently as the ObamaCare cases of 2012, the Court ruled that the law's Medicaid expansion was an unconstitutionally coercive "gun to the head" and gave states the right to opt out.

The CPP is far more bullying than any of these examples. Redesigning state-based energy systems to replace fossil fuels is a capital-intensive and decades-long transition, to the extent it is possible. It requires power-plant retirements and upgrades, restructuring transmission lines, building new natural-gas pipelines. States must avoid blackouts and service disruptions to protect public safety and the economy. (David Rivkin and Andrew Grossman have more legal details nearby.)

The EPA says the CPP is run-of-the-mill pollution regulation, but Mr. Obama held an East Room ceremony calling it historic and the rule is the heart of the U.S. commitment to the Paris climate accord. Both claims can't be true. The EPA also claims the CPP "shows a deep respect for states' sovereignty by giving them the opportunity to design an emissions-reduction plan that makes sense for their citizens." In other words, as long as they are willing to suffer, they can suffer in their own way.

Climate change has become religious faith on the left, and Mr. Obama and Senate Democrats have packed the D.C. Circuit with liberals precisely to bounce cases like this one. The court is hearing *West Virginia v. EPA* en banc because of its extraordinary importance, and the 10-member panel is stocked with more liberals than conservatives. But liberal judges who care about the rule of law should also worry about the danger to the constitutional order and democratic consent from the EPA's breathtaking power grab.