

Clean power plan done and dusted

UNITED STATES

NOAH FELDMAN

Several state attorneys general have announced they will sue to block the Environmental Protection Agency's rollback of former president Barack Obama's signature Clean Power Plan. Can they win? And should they? The answer to both questions is no, but not because of anything inherently wrong with the plan to cut greenhouse-gas emissions from power plants. Although administrative decisions must be rational, they are permitted to reflect the president's political priorities and beliefs. Donald Trump won the election, and now he gets to impose his pro-coal environmental vision. That may be terrible for the earth, but it's good for democracy.

The Clean Power Plan has been enmeshed in litigation from the start. After it was promulgated by Mr Obama's EPA, the US Supreme Court blocked it from going into operation. The order came on Feb 9, 2016. The four liberal justices voted against it. The five conservatives voted in favour — less than a week before Justice Antonin Scalia's death.

The order blocking the plan was a big deal, legally speaking. Never before had the Supreme Court frozen a regulation before the courts of appeals had had the chance to weigh in on its legality. And the US Court of Appeals for the DC Circuit, which was going to review the regulation, had refused a similar stay.

The conservative justices were sending an unusually strong signal that they sided with the 29 states and industry groups that were challenging the plan as exceeding the EPA's

authority. As a consequence, the Clean Power Plan didn't go into effect. What's more, once the Senate blocked Mr Obama's pick to fill Scalia's seat, Judge Merrick Garland, and Justice Neil Gorsuch ended up confirmed, it was highly likely that the plan was never going to go into effect. Even had Mr Trump left it in place, the Supreme Court would almost certainly have struck it down, barring a conversion by Justice Anthony Kennedy.

That political fact helps explain why Mr Trump's EPA is within its legal authority to repeal the Clean Power Plan.

To attack the rollback, Democratic attorneys general will have to argue that the decision to reverse the earlier regulation was irrational — "arbitrary and capricious", under the language of the Administrative Procedure Act.

As a matter of law, regulatory rollback is treated the same as the initial promulgation of a regulation. That means the government must articulate a rational reason for its decision-making.

In the case of the Clean Power Plan rollback, the government's main argument will apparently be that the original plan was itself unlawful because it exceeded the EPA's authority to regulate emissions under Section 111(D) of the Clean Air Act.

“

Trump gets to impose his pro-coal vision. That may be terrible for the earth, but it's good for democracy.



Bangkok Post

บางกอกโพสต์ ครอบคลุม

Circulation: 70,000

Section: National

วันที่: Thursday 12 October 2560

ปีที่:

Col.Inch: 56

ฉบับที่:

ADValue: (B/W): 68320

PRValue(x3.5): (B/W): 239120

หน้า: 8

(FC) : 3360000

(FC) : 11760000

Technically, the issue is whether the “best system of emission reduction” that the EPA is empowered to impose must relate only to the specific technology used to regulate emissions at a single power plant or “source”. The Clean Power Plan imposed broader limits on emissions that would likely have required not just improvements in emissions technology but also reduction of coal use to meet emissions targets.

When adopted by the Obama administration, this was, in my opinion at least, quite a reasonable interpretation of the federal law. And under the so-called Chevron doctrine, the courts are supposed to defer to an agency’s reasonable interpretation of an ambiguous federal statute.

Thus, had the issue actually gone to the courts, the right answer — not necessarily the one the courts would have adopted, of course — was that the Obama plan was lawful.

But the Trump administration is entitled to offer its own interpretation of the statute that differs from Obama’s. And since Scott Pruitt as attorney general of Oklahoma was one of the leading critics of the plan, it’s not surprising that the EPA under his leadership has adopted his view of the law.

That’s all right — but more than that, it’s

actually good. Democracy dictates that newly elected presidents should have the ability to change regulatory policy so that it matches the vision that got them elected.

That isn’t as obvious as it may sound. The adoption of regulation is supposed to be rational and logical. Mere political motive isn’t enough to make a regulation rational.

But in an important dissenting opinion in a 1982 case involving the Ronald Reagan administration’s rollback of air-bag regulation, then-Justice William Rehnquist argued that “a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”.

A regulatory agency was therefore entitled to “evaluate priorities in light of the philosophy of the administration”.

Mr Rehnquist was correct to reason that the administrative process must ultimately be responsive to the democratic process.

Agencies like the EPA are part of the executive branch. The election of a president is a referendum on the regulatory policies that the public would like to see enacted.

The presidential election isn’t a perfect mechanism, to be sure. Mr Trump was elected with fewer votes than Hillary Clinton. But he won the Electoral College, and in a functioning democracy, that election must have consequences.

Repeal of the Clean Power Plan is a policy defeat for environmentalists. But it’s a win for democracy — and a reminder that the only way to fix the environment is to elect politicians who believe in doing just that. ©2017 BLOOMBERG VIEW

Noah Feldman is a Bloomberg View columnist. He is a professor of constitutional and international law at Harvard University.