



FEDERALISM ISSUE: SHOULD THE FEDERAL GOVERNMENT IMPOSE STRICT CARBON STANDARDS ON STATES?



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In August 2015, President Obama and the Environmental Protection Agency presented the Clean Power Plan, a plan aimed at reducing carbon pollution from power plants.¹ According to the EPA, the Clean Power Plan is “fair, flexible and designed to strengthen the fast-growing trend toward cleaner and lower-polluting American energy” by providing “strong but achievable standards for power plants, and customized goals for states to cut the carbon pollution that is driving climate change.”² This plan sets mandates from the federal government to be implemented by each state.³ States are required to create plans that regulate power plants in their borders such that they achieve CO₂ performance rates set by the federal government in an approach called “cooperative federalism.”⁴ These plans vary by state, according to each state’s energy needs and current energy use, and plans are established both for the interim from 2022 to 2029 and for the long term by 2030.⁵ This framework claims to account for states’ conditions in order to ensure that each can meet the ultimate goal of reducing carbon dioxide emissions by 32% from 2005 baseline by 2030.⁶ In practice, this plan gives states the autonomy to reduce carbon pollution as they see fit so long as

they meet the criteria set by the federal government.⁷ Each state must submit its own individual plan to the federal government demonstrating how it will meet the federally assigned goals.⁸ Thus, each state provides its own path for achieving these standards, allowing flexibility and the ability to work around its own system.⁹ Furthermore, states may work with other states in order to achieve goals, so long as each state meets its own federal requirements.¹⁰ Through this program, Obama hopes to combat climate change in an affordable, efficient, and effective way.

However, many have seen this plan as, in effect, costing the country jobs and money by reducing the productivity of power plants. Furthermore, many constitutional experts have claimed that this plan is an unconstitutional violation of the Tenth Amendment.¹¹ Constitutional scholar Laurence Tribe has cited several Supreme Court cases to support his argument against the constitutionality of the Clean Power Plan.¹² Tribe has cited both *New York v. United States (1992)* and *NFIB v. Sebelius (2012)* to contend that “such federal commandeering of state governments defeats political accountability and violates principles of federalism that are basic to our constitutional order.”¹³ The EPA can

constitutionally impose federal plans for the states so long as it has statutory authority to do so; however, the Obama administration has not gotten legislative authority to do this and thus the Clean Power Plan does not have this legal foundation.¹⁴ Moreover, Tribe has denounced the EPA's extension of power that "Congress never delegated to it in the first place" and has cited *Utility Air Regulatory Group v. EPA (2014)* and *New Jersey v. EPA (2008)* to further demonstrate the unconstitutionality of this extension of power.¹⁵ Defenders of the Clean Power Plan rebut this claim with the argument that the Clean Power Plan gives enough flexibility to the states that it will not force the states to do anything; rather, it "will require only that power plants meet their targets."¹⁶ Thus, experts Jody Freeman and Richard J. Lazarus argue "the proposed rule allows States to step aside and leave the federal government to implement its regulation without any help. By providing states such a choice, the proposal does not 'commandeer' the states, and so it cannot violate the 10th Amendment."¹⁷ Thus, the constitutionality of this plan is still disputed.

Many states have tried to opt-out of the Clean Power Plan or have sued over this plan. However, some experts have argued against non-compliance, explaining that, "refusing to write a state plan would invite the EPA to impose its own system for reducing emissions, denying state officials the ability to craft rules in a way that best fits the state's unique circumstances."¹⁸ To underscore this claim, EPA Administrator Gina McCarthy stated that if states do not provide necessary plans, "there will be a federal system in place to allow us to move forward." Thus, while the consequences of not following this rule are ambiguous, there could be consequences detrimental to the state's wellbeing with a likely default to a federal carbon plan.¹⁹

THE CANDIDATES

Views on Obama's Clean Power Plan split on party lines. Republican candidate Donald Trump has repeatedly released statements questioning climate change. He has, for example, tweeted about climate change as a concept "created by and for the Chinese in order to make U.S. manufacturing non-competitive" and has claimed that "global warming is a total, and very expensive, hoax!"²⁰ Although he has said in general that he does believe that regulatory

policies to diminish climate change would "imperil the companies in our country," he has not spoken specifically about the Clean Power Plan.²¹

Republican Ted Cruz has repeatedly advocated against the Clean Power Plan. Cruz argues against the constitutionality of Obama's CPP, claiming it is "utterly lawless."²² It is not connected, in any way, shape, or form, to federal statutes." Similarly, in August, Cruz released a statement in response to the proposed plan, claiming, "the President's lawless and radical attempt to destabilize the Nation's energy system is flatly unconstitutional."²³ As a result, Cruz has repeatedly voted to restrict the legislation from taking effect. This year, Cruz voted for two joint resolutions which attempted to block the CPP, and he also co-sponsored two Congressional Review Acts that aimed to prevent the Clean Power Plan from coming to fruition.²⁴ Furthermore, Cruz has questioned climate change in general, and in a speech to California conservative donors, Cruz stated, "if you look at satellite data for the last 18 years, there's been zero recorded warming. The satellite says it ain't happening."²⁵

Similarly, Republican Marco Rubio co-sponsored the same two pieces of legislation that acted to block the CPP.²⁶ Rubio has denounced the Clean Power Plan on the basis that it will hurt the American economy and enhance the "power of unelected regulators" without significant benefit.²⁷ In the September 2015 CNN Republican presidential debate, Rubio stated, "every proposal they [the Obama administration] put forward will be proposals that make it harder to do business in America, that will make it harder to create jobs in America." In response to Obama's Clean Power Plan, Rubio released his own energy plan, which promises to restrict "government bureaucracy," "optimize America's resources," and "maximize private innovation," primarily by turning over energy policy to the states.²⁸ In sum, he has stated, "as president, I will work with Congress to ensure that states and tribes – and not the federal government – have the primary role in oversight of energy development within their borders."²⁹ Thus, Rubio hopes to reduce the role of the federal government while bolstering that of the states.

Republican Chris Christie contends that climate change is not only real but also that humans contribute to it. At an event in Keene, New Hampshire this May, Christie stated, "I think global warming is real. I don't think that's deniable. And

I do think human activity contributes to it.”³⁰ At the same time, Christie remains “totally opposed” to the Clean Power Plan, calling it an “overregulation of the Obama administration,” and a plan that will “kill American businesses and jobs.”³¹ Christie has voiced his concern repeatedly over this “overregulation” of the federal government, and on December 19, 2015, Christie stated, “We’ve sent our refusal to comply with the president’s Clean Power Plan in New Jersey. This is a federal government that wants to be in every single part of your life.”³² Christie continued by stating, “They’re going to tell everybody how each state should be generating electricity and heat for all of you,” demonstrating his concerns for the overreach of federal power over the states.³³

Republican presidential candidate Ben Carson has not spoken much publicly about the Clean Power Plan, though he does seem opposed to the EPA regulations. Carson has stated, “there’s always going to be either cooling or warming going on.”³⁴ He argues that federal agencies “should be told to work in conjunction with business, industry, and universities to find the most eco-friendly ways of developing our energy resources.” Thus, Carson does see a role for the federal government to support private businesses and state entities in the creation of energy policy. Overall, Carson’s campaign has stated that Carson “certainly has spoken out against the rule,” citing cyclical change in global temperature as the cause of higher temperatures not carbon emissions.³⁵

Republican presidential candidate Jeb Bush has repeatedly vowed that he would rescind the Clean Power Plan. Bush claims that Obama’s carbon plan is “irresponsible and overreaching,” leading to unemployment and increased prices.³⁶ Bush has denounced the extension of federal government with Obama’s carbon plans. At a Freedom Partners Policy Leaders Forum in August 2015, Bush spoke of Obama’s Clean Power Plan as “a disaster. It’s typical of the Obama administration – taking executive power he doesn’t have...they’ve extended this to require states, in a very coercive way, in a very confusing, convoluted way, to deal with this issue.” Like Christie, Bush has argued that humans do influence climate change, though he believes fighting it successfully will depend on “American ingenuity – not federal regulations.”³⁷ Thus, his energy plan revolves around reducing federal regulations while increasing states’ power to develop energy technology and resources to “unleash this American potential.”³⁸

Republican Candidate John Kasich has denounced the Clean Power Plan as an “extreme proposal.” In October 2015, Kasich released a fact sheet of his energy plans, in which he said the Clean Power Plan, “must be scrapped and not replaced.”⁴³ Furthermore, earlier that year, Kasich sent a letter to President Obama, in which he asked the president “to suspend implementation of the final rule until all legal appeals are resolved.”³⁹ In particular, Kasich spoke about “the significant legal uncertainty surrounding this plan,” and he cited the U.S. Environmental Protection Agency’s Mercury and Air Toxic Standards Supreme Court Case decision. Yet, even more than the legality of Obama’s plan, Kasich, as governor of Ohio, has expressed his concern that the Clean Power Plan would reduce “access to reliable, abundant, and low-cost electricity,” which he claims is vital to Ohio’s economic wellbeing.⁴⁰ Furthermore, Kasich has stated that placing “costly and unnecessary control on remaining plants” will “drive up electricity costs and make entire economic sectors uncompetitive.”⁴¹ Thus, Kasich has vocalized his concern for the economic ramifications of the Clean Power Plan as well as doubts about the legality of the plan.

On the other side of the partisan divide, Democratic presidential candidates universally support Obama’s Clean Power Plan, but none have spoken about the role of federalism in the Plan. Democratic presidential candidate Hillary Clinton has defended the Clean Power Plan and has supported aggressive regulatory climate action. In response to the Clean Power Plan, Clinton released a statement calling the plan “a significant step forward in meeting the urgent threat of climate change... It’s a good plan, and as President, I’d defend it.”⁴² Furthermore, Clinton went on to say, “the Clean Power Plan standards set the floor, not the ceiling. We can and must go further.”⁴³ Thus, Clinton has proposed a plan for her presidency that would not only include the Clean Power Plan, but it would also include a Clean Energy Challenge, which would “give states, cities and rural communities that are ready to lead the tools and resources to succeed.”⁴⁴ In September, Clinton went on to release an energy plan that further expanded upon her plans, calling for major investments in energy infrastructure, “as part of a continent-wide strategy that ensures safe, reliable, and affordable energy delivery, unlocks economic opportunity for American businesses and workers,

and accelerates the transition to a clean energy economy across the North American continent.”⁴⁵ While Clinton has said on several occasions that she would “defend” the Clean Power Plan, she has not spoken on the actual legality of the plan’s mandated reach of the federal government over the states.

Democratic candidate Bernie Sanders has not only voiced his support for the Clean Power Plan, but he has also claimed broader commitment to climate action. In response to the Clean Power Plan, Bernie Sanders tweeted “Pres Obama knows climate change is the great planetary crisis facing us & we must move boldly to transform our energy system #CleanPowerPlan.”⁴⁶ In regard to climate action, Sanders has stated, “climate change is real, it is caused by human activity, and it is already causing harm here in the United States, and to people all around the globe,” thus he plans to “move our energy system away from fossil fuels, towards energy efficiency and sustainable energy sources like wind, solar, and geothermal.”⁴⁷ Sanders has proposed a comprehensive plan to combat climate change and has even cited climate change as a major threat to national defense. Like Clinton, Sanders has not spoken about the legality of the Clean Power Plan, and he has not made statements on the role federalism plays in the Plan.

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- ¹"Clean Power Plan for Existing Power Plants." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ²"Clean Power Plan for Existing Power Plants." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ³"Clean Power Plan for Existing Power Plants." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ⁴Cama, Timothy. "What If States Just Say 'no' to Climate Rule?" TheHill. N.p., 08 Mar. 2015. Web. 27 Jan. 2016.
- ⁵"Clean Power Plan for Existing Power Plants." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ⁶White House. Office of the Press Secretary. Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants. N.p., 3 Aug. 2015. Web. 27 Jan. 2016.
- ⁷"Clean Power Plan for Existing Power Plants." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ⁸"FACT SHEET: Clean Power Plan and the Role of States." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ⁹"FACT SHEET: Clean Power Plan and the Role of States." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ¹⁰"FACT SHEET: Clean Power Plan and the Role of States." EPA. Environmental Protection Agency, n.d. Web. 27 Jan. 2016.
- ¹¹Loyola, Mario. "Federal Coercion and the EPA's Clean Power Plan." The Atlantic. N.p., 17 May 2015. Web. 27 Jan. 2016.
- ¹²Tribe, Laurence. "The Clean Power Plan Is Unconstitutional." Wall Street Journal. N.p., 22 Dec. 2014. Web. 27 Jan. 2016.
- ¹³Tribe, Laurence. "The Clean Power Plan Is Unconstitutional." Wall Street Journal. N.p., 22 Dec. 2014. Web. 27 Jan. 2016.
- ¹⁴Loyola, Mario. "Federal Coercion and the EPA's Clean Power Plan." The Atlantic. N.p., 17 May 2015. Web. 27 Jan. 2016.
- ¹⁵Tribe, Laurence. "The Clean Power Plan Is Unconstitutional." Wall Street Journal. N.p., 22 Dec. 2014. Web. 27 Jan. 2016.
- ¹⁶Freeman, Jody, and Richard J. Lazarus. "Larry Tribe and Mitch McConnell's Flagrant Constitutional Error." POLITICO. N.p., 25 Mar. 2015. Web. 27 Jan. 2016.
- ¹⁷Freeman, Jody, and Richard J. Lazarus. "Larry Tribe and Mitch McConnell's Flagrant Constitutional Error." POLITICO. N.p., 25 Mar. 2015. Web. 27 Jan. 2016.
- ¹⁸Cama, Timothy. "What If States Just Say 'no' to Climate Rule?" TheHill. N.p., 08 Mar. 2015. Web. 27 Jan. 2016.
- ¹⁹Cama, Timothy. "What If States Just Say 'no' to Climate Rule?" TheHill. N.p., 08 Mar. 2015. Web. 27 Jan. 2016.
- ²⁰Trump, Donald J. "Ice Storm Rolls from Texas to Tennessee - I'm in Los Angeles and It's Freezing. Global Warming Is a Total, and Very Expensive, Hoax!" Twitter. Twitter, 06 Dec. 2013. Web. 27 Jan. 2016.
- ²¹Trump, Donald J. "The Concept of Global Warming Was Created by and for the Chinese in Order to Make U.S. Manufacturing Non-competitive." Twitter. Twitter, 06 Nov. 2012. Web. 27 Jan. 2016.
- ²²Haddon, Heather. "Donald Trump: 'I Don't Believe in Climate Change'." Wall Street Journal. N.p., 24 Sept. 2015. Web. 27 Jan. 2016.
- ²³Senator Ted Cruz Town Hall in Council Bluffs, Iowa. Perf. Ted Cruz. C-SPAN. N.p., 23 Oct. 2015. Web. 27 Jan. 2016.
- ²⁴Cruz Statement on President Obama's EPA Regulations | Cruz for President. Cruz for President. N.p., 3 Aug. 2015. Web. 27 Jan. 2016.
- ²⁵Plautz, Jason. "Republicans Attack Climate Rules to Send Message to UN." National Journal. N.p., 26 Oct. 2015. Web. 27 Jan. 2016.
- ²⁶Cama, Timothy. "Senate Votes to Strike down Obama's Climate Rules." The Hill. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.
- ²⁷United States. Cong. Senate. United States Senate. 114 Cong., 1st sess. S. Doc. S.J. Res 24. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.
- ²⁸United States. Cong. Senate. United States Senate. 114 Cong., 1st sess. S. Doc. S.J. Res 23. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.
- ²⁹United States. Cong. Senate - Environment and Public Works. Congress.gov. By Shelley Moore Capito. 114 Cong. Cong Res. S.J. Res 24. N.p., 1 Dec. 2015. Web.
- ³⁰United States. Cong. Senate - Environment and Public Works. Congress.gov. By Shelley Moore Capito. 114 Cong. Cong Res. S.J. Res 23. N.p., 1 Dec. 2015. Web.
- ³¹Elliot, Philip. "Ted Cruz Rejects Climate Change As Science." Time. N.p., 2 Aug. 2015. Web. 27 Jan. 2016.
- ³²Plautz, Jason. "Republicans Attack Climate Rules to Send Message to UN." National Journal. N.p., 26 Oct. 2015. Web. 27 Jan. 2016.
- ³³Cama, Timothy. "Senate Votes to Strike down Obama's Climate Rules." The Hill. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.
- ³⁴United States. Cong. Senate. United States Senate. 114 Cong., 1st sess. S. Doc. S.J. Res 24. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.
- ³⁵United States. Cong. Senate. United States Senate. 114 Cong., 1st sess. S. Doc. S.J. Res 23. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.
- ³⁶United States. Cong. Senate - Environment and Public Works. Congress.gov. By Shelley Moore Capito. 114 Cong. Cong Res. S.J. Res 24. N.p., 1 Dec. 2015. Web.
- ³⁷United States. Cong. Senate - Environment and Public Works. Congress.gov. By Shelley Moore Capito. 114 Cong. Cong Res. S.J. Res 23. N.p., 1 Dec. 2015. Web.
- ³⁸Marco Rubio for President. Marco Rubio: A New American Century. Powering the American Century. Marco Rubio for President. N.p.,

2015. Web. 27 Jan. 2016.

³⁹League of Conservation Voters. IN THEIR OWN WORDS 2016 PRESIDENTIAL CANDIDATES ON THE CLEAN POWER PLAN. League of Conservation Voters. N.p., 15 Jan. 2015. Web. 27 Jan. 2016.

⁴⁰League of Conservation Voters. IN THEIR OWN WORDS 2016 PRESIDENTIAL CANDIDATES ON THE CLEAN POWER PLAN. League of Conservation Voters. N.p., 15 Jan. 2015. Web. 27 Jan. 2016.

⁴¹Brody, Ben. "Trump Shrugs Off Appearance in Somali Terrorist Recruitment Video." Bloomberg.com. Bloomberg, 3 Jan. 2016. Web. 27 Jan. 2016.

⁴²Yachnin, Jennifer. "Carson Opposes Clean Power Plan, Contrary to Industry Criticism." Environment & Energy. N.p., 3 Nov. 2015. Web. 27 Jan. 2016.

⁴³"Jeb Bush Statement on Obama's Clean Power Plan." Jeb 2016. N.p., 02 Aug. 2015. Web. 27 Jan. 2016.

⁴⁴"Jeb Bush Statement on Obama's Clean Power Plan." Jeb 2016. N.p., 02 Aug. 2015. Web. 27 Jan. 2016.

⁴⁵Zito, Salena. "Policy Viewed as GOP Candidate Jeb Bushs Route to Relevance." TribLIVE.com. TribLive, 29 Sept. 2015. Web. 27 Jan. 2016.

⁴⁶"FBN/WSJ GOP Debate Part 5." YouTube. YouTube, 10 Nov. 2015. Web. 27 Jan. 2016.

⁴⁷United States. Cong. Senate. United States Senate. 114 Cong., 1st sess. S. Doc. S.J. Res 24. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.

⁴⁸United States. Cong. Senate. United States Senate. 114 Cong., 1st sess. S. Doc. S.J. Res 23. N.p., 17 Nov. 2015. Web. 27 Jan. 2016.

⁴⁹United States. Cong. Senate - Environment and Public Works. Congress.gov. By Shelley Moore Capito. 114 Cong. Cong Res. S.J. Res 24. N.p., 1 Dec. 2015. Web.

⁵⁰United States. Cong. Senate - Environment and Public Works. Congress.gov. By Shelley Moore Capito. 114 Cong. Cong Res. S.J. Res 23. N.p., 1 Dec. 2015. Web.

⁵¹Dokoupil, Tony. "Rand Paul Veers to the Right on Climate." Msnbc.com. NBC News Digital, 11 Nov. 2015. Web. 27 Jan. 2016.

⁵²"Sen. Rand Paul Appears on Fox's Your World with Neil Cavuto - June 3, 2014." YouTube. YouTube, 3 June 2015. Web. 27 Jan. 2016.

⁵³Kasich for President. Kasich Action Plan. Www.johnkasich.com. Kasich for President, n.d. Web. 27 Jan. 2016.

⁵⁴Kasich, John R. "Request to Suspend Implementation of the Clean Power Plan." Letter to President Barack Obama. 28 Aug. 2015. Count on Coal. N.p., n.d. Web. 27 Jan. 2016.

⁵⁵Kasich, John R. "Request to Suspend Implementation of the Clean Power Plan." Letter to President Barack Obama. 28 Aug. 2015. Count on Coal. N.p., n.d. Web. 27 Jan. 2016.

⁵⁸Kasich for President. Kasich Action Plan. Www.johnkasich.com. Kasich for President, n.d. Web. 27 Jan. 2016.

⁵⁹"Statement from Hillary Clinton on President Obama's Clean Power Plan." Statement from Hillary Clinton on President Obama's Clean Power Plan. Hillary for America, n.d. Web. 27 Jan. 2016.

⁶⁰"Statement from Hillary Clinton on President Obama's Clean Power Plan." Statement from Hillary Clinton on President Obama's Clean Power Plan. Hillary for America, n.d. Web. 27 Jan. 2016.

⁶¹"Statement from Hillary Clinton on President Obama's Clean Power Plan." Statement from Hillary Clinton on President Obama's Clean Power Plan. Hillary for America, n.d. Web. 27 Jan. 2016.

⁶²Hillary for America. Hillary Clinton's Vision for Modernizing North American Energy Infrastructure. N.p., n.d. Web. 27 Jan. 2016.

⁶³Sanders, Bernie. "Pres Obama Knows Climate Change Is the Great Planetary Crisis Facing Us & We Must Move Boldly to Transform Our Energy System #CleanPowerPlan." Twitter. Twitter, 2 Aug. 2015. Web. 27 Jan. 2016.

⁶⁴Sanders, Bernie. "Combating Climate Change to Save the Planet." Bernie Sanders. Bernie 2016, n.d. Web. 27 Jan. 2016.