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A Constitutional Challenge To EPA's 'Clean Power Plan'

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In recent months, state officials have complained that the U.S. Environmental Protection Agency's proposed Clean Air Act Section 111(d) rule compels states to reduce greenhouse gas emissions by regulating functions not under the EPA's authority.

In their Sept. 9 letter to President Obama, 15 governors criticized the EPA for "coerc[ing] states to adopt compliance measures that would not reduce emissions at the entities the agency has set out to regulate."[1] State commentators have lodged similar protests in filed comments to the EPA, asserting that the rule requires states to assume accountability for enforcement beyond the bounds of the CAA, and thus "commandeers significant state resources."[2] The governors did not elaborate on the legal basis for their challenge, nor have the states been expansive in their analysis, but each have tapped in to a strong strain of precedent.

Four decades earlier, in District of Columbia v. Train,[3] the D.C. Circuit blocked a very similar rulemaking by the EPA, marking an important milestone in the evolving constitutional doctrines prohibiting "commandeering," "entrenchment" and "coercion." This article analyzes the implication of those principles on the implementation of the EPA's proposed Section 111(d) existing source power plant rule — the engine of what the agency has termed the Clean Power Plan.

In 1970, Congress passed the Clean Air Amendments, ushering in vast environmental reforms. A year later the EPA issued the first rule requiring state air quality plans under the new amendments. On Dec. 6, 1973, the EPA promulgated regulations to reduce motor vehicle emissions through tailpipe controls, but also mandated outside-the-vehicle conservation measures, such as express bus lanes, bicycle concourses, inspection programs and commuter surcharges. The EPA required states to commit in their CAA state plans to the enactment of laws and the appropriation of funds to guarantee enforcement of these regulations.

The D.C. Circuit, in Train, rejected the EPA's rule. In doing so, the court found that Congress did not delegate to the EPA the power to require states to adopt and enforce the legal changes the agency wanted to implement, and that the EPA could not achieve its purposes by requiring states to lend their police power under pain of federal penalty.

In 2014, the EPA's proposed Clean Power Plan is similar to the 1973 pollution control rule in that it ventures "outside the fence" in an attempt to curb emissions. This latest effort began in 2009, after the Obama administration was unable to enact comprehensive climate change legislation. The EPA issued an endangerment finding instead and began regulating GHGs in vehicle exhaust as a pollutant, claiming authority under the CAA as interpreted by Massachusetts v. EPA.[4] From there, the EPA moved to regulate GHGs from stationary sources, seeking, however, to apply prevention of significant deterioration and Title V requirements only to large emitters, even though Congress had set a relatively low statutory numeric emissions threshold for those programs. Although claiming authority to regulate all facilities, the EPA "tailored" the congressional thresholds upward to the level of large manufacturer emissions, to protect the permitting system from inundation by every dry cleaner and school boiler. Industry challenged the EPA's claim of authority.

In the ensuing decision, UARG v. EPA,[5] the U.S. Supreme Court read Massachusetts as authority for CAA-wide regulation of CO2, but not necessarily for programmatic regulation, accepting that the EPA may, under certain circumstances, use best available control technology to force improvements in energy efficiency at the plant level. The Supreme Court agreed the EPA may generally "resolve some questions left open by Congress that arise during a law's administration," but drew the line at allowing the EPA to revamp "clear statutory terms which turn out not to work in practice." Id. at 2446. The Supreme Court expressed suspicion of a GHG program unguided by a specific statutory text. Put colorfully, the Supreme Court refused to "stand on the dock and wave goodbye as the EPA embarks on this multiyear voyage of discovery." Id.

With UARG as a backdrop, the next big issue to face the courts will be the Section 111(d) Existing Source Rule. Because of enormous interest and pressure, the EPA has extended the rule's comment period to Dec. 1, 2014. Even so, industry and the states will undoubtedly litigate the final rule. Already, private coal producer Murray Energy Corp. and 12 states are challenging the EPA's threshold authority to regulate at all, given that the agency is already regulating electricity generating units under Section 112 of the CAA, an express barrier to Section 111(d) regulation.

Challengers are preparing to attack the Clean Power Plan over the requirement that states meet federally decreed "state goals" for overall emissions from EGUs. The EPA may, of course, regulate under the CAA "end-of-stack controls such as 'catalytic converters or particle collectors.'"[6] However, such measures could never get the EPA to its ambitious new goal of reducing CO2 emissions by up to 30 percent below 2005 levels by 2030.

As a consequence, the EPA proposes four "building blocks" as the means for achieving these reductions: (1) plant-based heat rate improvements at coal-fired EGUs; (2) decreased use of coal-fired and oil-fired EGU's at the state level through increased gas use; (3) increased use of renewable fuels to achieve state-level generation targets; and (4) increased state-level energy conservation savings.

Collectively, the EPA has defined these programs as a best system of emission reduction. The legal question is whether Congress ever empowered the EPA to regulate anything but the first building block — stationary source emissions. Put another way, does the EPA have the authority to impose the other BSER categories on unwilling states, or to hold initially cooperating states to their initial decision to regulate? The answer is wrapped up in the jurisprudence governing federalism, a system which helps "protect the liberty of the individual from arbitrary power."[7]

EPA's BSER Quandary

No federal agency may exercise regulatory jurisdiction not delegated to it by Congress, delegated instead to another federal agency or reserved by the Constitution to the states.[8] With respect to electricity, the question is which sovereign controls, the state or federal government?

After decades of refinement, the lines of authority are clear. The regulation of utilities "is one of the most important functions traditionally associated with the police power of the states."[9] Moreover, "States retain the exclusive authority to regulate the retail market."[10] Although there is a federal role in regulating the transmission of wholesale power, Congress has delegated that to the Federal Energy Regulatory Commission, not the EPA. Accordingly, the EPA has no authority over the generation, transmission and dispatch of electricity.

For the EPA to impose the last three building blocks on the states, therefore, the agency must either entice them to take political ownership of the rigid, federally prescribed emissions targets, or the EPA must convince a skeptical Supreme Court that the agency has the power to force state governments to implement a national, top-down emissions reduction program that compels the use of renewables, consumer conservation measures and the virtual elimination of coal as a fuel.

Knowing the tightrope it is walking, the EPA has drafted its proposed Section 111(d) rule shrewdly, utilizing terms like "flexible," "goals," "targets" and "guidelines" to suggest deference to the states. At the center of the proposed ruled, however, is an inflexible mandate. The EPA declares that "because the state goals are an integral part of the emission guidelines the framework regulations authorize the EPA to establish, the goals are binding, and the states, in their CAA Section 111(d) plans, must meet those goals."[11]

In its State Plan Considerations Technical Support Document, issued in June, the EPA declares on page 13 that state plans "will need to ... [p]rovide a mechanism(s) for legal action if affected EGUs are not in compliance." The EPA directs that these enforcement schemes could include "legislation directing state executive branch agencies or independent state authorities to follow through on obligations under a state plan."[12] The rule contains other similar directives.[13]

In sum, the EPA believes it can regulate outside the EGU's fence line, compel states to exercise their legislative power and subject their executive officials to legal actions to compel enforcement. The law, however, is otherwise.

The Law of "Commandeering," "Entrenchment" and "Coercion"

Commandeering

To protect federalism, the Supreme Court has barred the federal government from usurping the authority of the states,[14] and has prohibited state officers from being forced to administer federal programs.[15] In short, the federal government may not "compel the states to enact or administer a federal regulatory program."[16]

The Supreme Court traces this "anti-commandeering" doctrine back to Train, when the high court, for the first time, had to face EPA overreach of constitutional proportions.[17] Following on the heels of decisions from the Fourth and Ninth Circuits, which separately struck down the EPA's vehicle emissions rules on statutory grounds[18] in order to avoid resolving what the Supreme Court has described as "grave constitutional problems,"[19] the D.C. Circuit invalidated the EPA's auto regulations on both

statutory and constitutional grounds. That court rejected the EPA's attempt "to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program."[20]

The Train Court further repudiated "the novel approach of empowering a federal agency to order unconsenting states to enact state statutes and regulations, thereby converting state legislatures into arms of the EPA."[21] When the EPA admitted the unsoundness of the auto emissions rule, the Supreme Court vacated and remanded it for consideration of mootness.[22]

Since Train, the anti-commandeering doctrine has grown in salience and significance. In 1997, the Supreme Court ruled that "[t]he federal government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[23] In 2012, the Sixth Circuit applied anti-commandeering principles to hold that state officials could not be enjoined to enforce, or penalized for nonenforcement of, the provisions of a state implementation plan that the state elected to no longer enforce, despite the EPA's rejection of its request to amend.[24]

Entrenchment

Even for states that initially choose to implement the Clean Power Plan, there are constitutional limitations. In Train, the D.C. Circuit panned efforts by the EPA to seek "assurances" in state plans that states would appropriate funds and conform their law to the federal plan, noting that a "governor, or even a present session cannot make commitments on behalf of their successors, nor would such binding commitments seem to be enforceable."[25] If a state proposes a compliant SIP, for example, but later alters its actions, the EPA can only induce state compliance through noncoercive means.[26]

Moreover, just because a current state administration opts to commit its state to the achievement of federal emissions goals does not end the issue. As a general rule, a law "is not binding upon any subsequent legislature."[27]

The EPA has directed states to incorporate into state plans assurances that the states will alter their laws to provide for enforcement under state police power. The EPA pursues this route because it cannot itself promulgate the Clean Power Plan as a federal implementation plan since Congress has given the agency no authority over power generation or distribution. The Clean Power Plan relies completely on leveraging state authority it cannot command. Because the EPA lacks state police powers and because one state legislature cannot bind future state legislatures, the rule cannot work nationally as intended, and thus runs the risk of being regarded as inherently arbitrary and capricious.[28]

Coercion

The federal government may entice states to cooperate with federal programs, but only if that partnership preserves true choice for the states. Of course, Congress could use its power under the Commerce Clause to preempt state law with federal law that is federally administered, but it has not done so with respect to state authority over retail power.

The developing legal issue — soon to be starkly presented — is whether the EPA's mandate that states implement the BSER building blocks amounts to lawful, "relatively mild encouragement,"[29] or rather is a coercive invasion of state sovereignty.[30] Any "'outright coercion' violates the Constitution."[31]

The Clean Power Plan Is Deficient

In upcoming comment response and litigation, the EPA might claim it is merely offering states the foundation for a new wholly voluntary federal/state partnership. But, in so doing, the EPA would be conceding the opposite of what the proposed Section 111(d) rule declares about the binding nature of the state goals.

Unless the EPA disclaims any intent to usurp state police power — and freely admits that states are at liberty to adopt or reject the Clean Power Plan — then a constitutional challenge will be ripe for review in the D.C. Circuit. According to the precedents of the D.C. Circuit and the Supreme Court, an EPA rulemaking founded on principles of commandeering, entrenchment and coercion will struggle under judicial review.[32]

On the other hand, if the EPA admits it must permit states to choose whether to alter their law to include state enforcement of the existing source rule, then the existing source rule will not operate nationally as intended because of the nonparticipation of unwilling states. This will render it arbitrary and capricious. Either way, the Section 111(d) existing source rule seems headed for a constitutional showdown.

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[1] Letter of Sept. 9, 2014 to President Obama by the governors of Alabama, Alaska, Arizona, Idaho, Indiana, Mississippi, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Utah, Wisconsin and Wyoming.

[2] See, e.g., Comments of the Staff of the Virginia State Corp. Comm'n on the Proposed Clean Power Plan (EPA-HQ-OAR-2013-0602) at 38 & n.72 (Oct. 14, 2014) (unlawful commandeering).

[3] 521 F.2d 971, 974 (D.C. Cir. 1975).

[4] 549 U.S. 497 (2007).

[5] 134 S. Ct. 2427 (2014).

[6] Id. at 2447.

[7] Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

[8] Niagara Mohawk Power Corp. v. FERC, 452 F.3d 822, 824 (D.C. Cir. 2006).

[9] Arkansas Elec. Coop. Corp v. Arkansas Pub. Serv. Com., 461 U.S. 375, 377 (1983).

[10] Electric Power Supply Ass'n v. FERC, 753 F.3d 216, 222 (2014).

[11] 79 Fed. Reg. at 34898 (emphasis added).

[12] State Plan Considerations Technical Support Document (EPA-HQ-OAR-2013-0602-0463) at 17 (June 18, 2014).

[13] See e.g., 79 Fed. Reg. at 34837 ("In this action the EPA is proposing state-specific, rate-based goals that state plans must be designed to meet."); id. at 34833 ("While this proposal lays out state-specific goals that each state is required to meet, it does not prescribe how a state should meet its goals."); id. at 34835 ("On the other hand, [o]nce the final goals have been promulgated, a state would no longer have an opportunity to request that the EPA adjust its CO2 goal.").

[14] See Printz v. United States, 521 U.S. 898, 925 (1997).

[15] New York v. United States, 505 U.S. 144, 188 (1992).

[16] Id. at 144.

[17] See Printz, 521 U.S. at 925.

[18] See Maryland v. EPA, 530 F.2d 215, 226 (4th Cir. 1975); Brown v. EPA, 521 F.2d 827, 838-42 (9th Cir. 1975).

[19] Printz, 521 U.S. at 925.

[20] Train, 521 F.2d at 974, vacated and remanded as moot sub nom. EPA v. Brown, 431 U.S. 99 (1977) (per curiam).

[21] Id. at 984.

[22] EPA v. Brown, 431 U.S. 99 (1977).

[23] Printz, 521 U.S. at 935.

[24] Sierra Club v. Korleski, 681 F.3d 342, 348–50 (6th Cir. 2012).

[25] Train, 521 F.2d at 985 n.20 (citing NRDC v. EPA, 478 F.2d 875, 883-84 (1st Cir. 1973)).

[26] Korleski, 681 F.3d at 352–53.

[27] United States v. Winstar Corp., 518 U.S. 839, 873 (1996).

[28] Independent Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."); see Public Serv. Co. of N. Mex. v. Federal Energy Regulatory Comm'n, 653 F.2d 681, 692-93 (D.C. Cir. 1981) ("Indeed, uniform application of a properly established principle is often the means by which

an agency avoids arbitrary and capricious action.").

[29] South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding a five percent reduction in highway funds as a non-coercive sanction).

[30] NFIB v. Sebelius, 132 S. Ct. 2566, 2601-04, 2656-66 (2012) (Medicaid expansion was coercive because it threatened withdrawal of all existing Medicaid funds and was too radical a shift in program obligations).

[31] Virginia v. Browner, 80 F.3d 869, 881 (4th Cir. 1996).

[32] Train, 521 F.2d at 983 n.19 (commandeering claims ripe for review).
