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# Cornhusker Economics

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## SCOTUS Invalidates Obama Clean Power Plan

On June 30, 2022, the Supreme Court of the United States (SCOTUS) ruled in the case of *West Virginia v. EPA* that the US Environmental Protection Agency (EPA) could not implement the 2016 Obama administration Clean Power Plan (CPP). This newsletter discusses the CPP, the CPP litigation, the Court's opinion in *West Virginia v. EPA*, and what the decision means for Biden administration climate policy.

*The Clean Power Plan.* In 2014 the Obama administration proposed the Clean Power Plan or CPP. Under the CPP proposal, emissions from existing coal-fired power plants would have been reduced by about 30% from 2005 levels. This could be accomplished (1) by converting coal-fired electrical generating units (EGUs) to natural gas-powered; (2) by installing expensive and unproven (then and today) carbon sequestration and storage (CCS) systems to reduce coal-fired EGU greenhouse gas (GHG) emissions; and (3) to replace some coal-fired EGU electricity with wind or solar power and/or utility energy efficiency (EE) electricity consumption savings. Renewable energy and EE would have been the least expensive ways to comply with the proposed CPP. Natural gas EGUs would have been more expensive and would have been challenged to find sufficient supply during cold weather when most available natural gas would be (and still is) used for heating. CCS would have been the most expensive and has not yet proven to be commercially viable in the US. The final 2015 version of the CPP proposed a system where coal-fired EGUs could offset a portion of their GHG emissions through the purchase of renewable energy credits (RECs), which would be supplied by new wind and solar generating facilities.

*West Virginia v. EPA.* The CPP was “stayed” by SCOTUS in early 2016, meaning that SCOTUS issued a court order delaying program implementation until

the CPP's ultimate legal fate could be fully litigated in court. This was the first time in its history that SCOTUS had issued a stay for a proposed federal regulation. The CPP litigation was postponed after President Trump was elected in November 2016. The Trump EPA withdrew the CPP regulation and replaced it with the Affordable Clean Energy (ACE) rule. ACE was quickly tied up in court litigation. After the 2020 election, the Biden EPA withdrew the Trump ACE rule but has yet to announce a replacement rule regulating GHG emissions from existing coal-fired EGUs.

After the 2020 election, SCOTUS agreed to hear West Virginia's legal challenge to the 2015 CPP regulation. Because the CPP was not an active proposal of the Biden administration, many observers were surprised that SCOTUS agreed to hear the CPP case. However, SCOTUS reasoned that because there was a possibility the Biden EPA or some future EPA could again propose the CPP (or something very similar to it), the Court would go ahead and rule on the CPP's constitutionality.

In summary, the court ruled that by “requiring” coal-fired EGUs to go “outside the EGU's fence line” to develop renewable energy facilities (or to help pay for off-site renewable energy facilities through the purchase of RECs), EPA went beyond its authority under the Clean Air Act. Under the “major question” doctrine, SCOTUS ruled that when an administrative agency did not have clear legislative authority for its regulation, and when that regulation would have major national economic impacts, the agency did not have sufficient legal authority to implement the regulation. In other words, the legal authority for adopting administrative regulations having major national economic impacts must be clear in the authorizing federal legislation, not something that can only be suggested. In this case, the Court concluded that Congress needed to be unequivocal in its grant of au-

thority to EPA to change the US electricity generation system from fossil-fuel based to more renewable energy-based, or at least give a strong indication that Congress recognized that EPA's implementing clean air policies could have that fairly dramatic outcome.

*Decision implications.* The *West Virginia v. EPA* decision will restrict administrative agency action when the agency is attempting to push its legal authority to the limit in order to deal with a pressing public policy issue (e.g. COVID, climate change, lung cancer from tobacco, etc.) unless Congress has clearly shown its intent that it expects the agency to address such major threats to public health, safety or welfare. In the age of Congressional political gridlock, it seems unlikely that Congress will find meaningful common ground on these types of contentious political issues before it is too late. So, an unmistakable legacy of *West Virginia v. EPA* is to limit federal administrative agency action when bumping up against some of our nation's most urgent issues, unless Congress clearly intends such administrative action.

*Biden climate policy.* Some have suggested that the *West Virginia v. EPA* decision is the end of Biden administration climate policy. But that is premature. First, the Biden administration has not proposed or adopted a CPP-type regulation, so the *West Virginia* decision did not invalidate any Biden EPA climate regulations. Second, some of the CPP could have occurred "within the fence line," e.g. replacing coal EGUs with natural gas EGUs. However, since that was part of the Obama CPP, EPA will in the absence of new legislation be understandably reluctant to invite additional legal rebuke from SCOTUS. However, coal is a very dirty fuel and generates a lot of dangerous emissions aside from GHGs, including mercury, arsenic, nickel, chromium, nitrogen oxides and sulfur oxides, as well as coal ash waste disposal. EPA could, under well-established environmental law, regulate these non-GHG emissions and solid waste disposal to protect public health, and would be on firm legal ground doing so. Reduced GHG emissions might be a side effect of such a policy, but it is more likely that the prospect of installing new, expensive clean air technology could tip the economic balance towards coal-fired EGU closure rather than retrofitting. Finally, if the objective – stated or unstated – is to reduce coal-fired EGU emissions, promoting more wind and solar power development has already led to the early retirement of aging coal-fired EGUs in the past dozen or so years, and will likely continue to do so. Indeed, candidate Hillary Clinton made the cornerstone of her climate policy ramping up deployment of wind and solar power rather than regulating coal-fired EGUs, and I believe she was shrewd to do so. The Biden administration appears to have learned that lesson.

In recent decades, Democratic presidents have wanted the US to be a global climate leader, while Republican presidents have instead retained a strong commitment to continued fossil fuel consumption. The CPP was the Obama administration's attempt to demonstrate to the rest of the world that the US could be an international climate leader because it was willing to regulate coal-fired EGU GHG emissions, the single most difficult and controversial step in becoming carbon neutral. The CPP succeeded in that regard, leading to Obama's persuading China to agree to reduce its GHG emissions over time, arguably the single most important breakthrough in climate diplomacy to date. Since then, there has been little US progress on becoming climate neutral, beyond increasing wind and solar power development. Progress is likely to remain slow (too slow in my opinion) as long as those who care most about slowing and reversing climate change fail to realize that failing to vote will guarantee continued slow progress. As the noted American philosopher Pogo said, "we have met the enemy and he is us."

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