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## The EPA's regulatory terrorism

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By a 5-4 vote, the Supreme Court recently stayed implementation of the Environmental Protection Agency's (EPA) Clean Power Plan, a set of regulations that would have required the states to come up with plans designed to drastically reduce the use of coal as a source of energy for electric power generation.

Since first proposed in the summer of 2014, many and perhaps most lawyers looking at the issue have concluded that the Clean Power Plan would likely never survive judicial review on the substantive question of whether it was a reasonable interpretation of an ancient and seldom-used provision of the Clean Air Act (Section 111(d)).

Why would the EPA have ever taken the time and trouble to promulgate a regulation with such a low chance of ever being upheld by the courts? In persuading the U.S. Court of Appeals for the D.C. Circuit not to stay the Clean Power Plan, the EPA itself provided the answer. The agency proclaimed proudly that even though its earlier 2013 regulations requiring reductions in mercury emissions from coal-burning power plants had been struck down by the Supreme Court in 2015, the mere threat that those regulations might be upheld had shut down many coal-burning facilities and caused others to spend up to \$10 billion on compliance. Thus, the EPA argued, since unlawful regulations terrorize regulatory targets into compliance, there is no need to hurry in declaring those regulations officially unlawful when the targets have already suffered irreparable loss.

The cynical and strategic attitude underlying this argument is that the legality of regulation doesn't matter. What matters instead is that by threatening regulation, the EPA can accomplish its ultimate goal of putting coal-burning electric-generating facilities out of business.

Climate change legal activists would likely argue that such use of regulatory power is far from cynical, but a heroic attempt to "stop" or "fix" global warming in the face of congressional failure to pass comprehensive climate change legislation. Indeed, after returning to Harvard Law School, former Obama administration climate change czarina Jody Freeman argued in some detail that when Congress fails to act to address pressing problems, regulatory agencies such as EPA should be free to creatively interpret old statutes, such as the Clean Air Act, to address new problems like climate change.

This argument rests on the explicit assumption that congressional failure to enact comprehensive climate change legislation represents another failure by a dysfunctional Congress. Less explicitly, it assumes that most intelligent people must agree that climate change is a problem

demanding federal legislation designed to decarbonize the American economy, and that climate change is a bad problem requiring a fix, however costly and disruptive it might be.

The economics of climate change are much more complicated than this. The EPA has used Obama administration estimates of the total harm from future climate change (the so-called social cost of carbon) to justify its regulations under the Clean Air Act. However, buried in the technical support document used to generate those estimates (and a recent National Academies of Science review), one finds clearly that the EPA's estimated harm from future climate change depends on a whole series of, at best, questionable assumptions. For example, the economic models used to estimate harm assume that even developed countries have very limited ability to adapt to changing climate, an assumption that if true would mean the Netherlands would not be a country, but a shoal in the North Atlantic. And Arizona would not be home to millions of people nor California's San Joaquin Valley the most productive agricultural area on earth. Instead, they would be uninhabited deserts.

Another big part of the estimated harm from future climate change is the potentially catastrophic type depicted in the movie "The Day After Tomorrow," in which the North Atlantic Ocean's meridional circulation shuts down, causing an almost instantaneous Ice Age over the entire Northern Hemisphere.

As laughable as that scenario may be, no less laughable is the way that climate economists have come up with their estimates for the cost of such future climate change: asking other climate economists for their best guesses. And all estimates of future potential harm from climate change rest on estimates of future temperature change, even as University of Alabama's John Christy has repeatedly testified before Congress that the warming forecast by the computer models is breathtakingly high.

A body of recent economic work (which I survey in an article forthcoming in the Cato journal Regulation) shows that whether one considers agricultural productivity, human health, or virtually any other determinant of human well-being, climate became less and less important over the course of the 20th century. It is poorer societies that suffer differentially from the vagaries of weather and climate. If the future will be different and people will lose their ability to cope with climate, it will be primarily due to populations becoming poorer and devoid of the capital required for investment in technological innovation.

In this light, it is hardly astounding that many people, including members of Congress, would decide against incurring now the enormous economic costs of decarbonizing the American economy in order to prevent highly uncertain and indisputably distant harm from climate change. Others are of the opposite view and believe that now is the time for ending the use of fossil fuels to generate power.

Those holding this view tend to be from states such as California, Washington and Oregon, which get very large fractions of their electricity from hydropower or nuclear. Members of Congress from such states know full well that the EPA's Clean Power Plan and other steps to decarbonize electricity supply would confer a sizable competitive benefit on their constituents by forcing fossil fuel-reliant states to adopt more expensive energy sources.

Congressional failure to enact comprehensive climate change legislation is not a manifestation of a dysfunctional Congress, but of a Congress that is representative, in which the views of those who would lose a lot from immediate steps to decarbonize the American economy have prevailed over the views of those who would be net winners.

The EPA's attempt to coerce decarbonization by promulgating regulations without regard to their legality is not only a cynical use of regulatory power, but an attempt to override a Congress that is not dysfunctional, but representative.

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