



Written by [Warren Mass](#) on October 6, 2016

Nation Awaits Court Decision on Obama “Clean Power Plan”

The nation awaits a decision from the U.S. court of appeals for the District of Columbia circuit in the case *West Virginia v. Environmental Protection Agency* — a lawsuit filed by 27 states and hundreds of companies and industry groups against the Obama administration’s “Clean Power Plan.” The court heard seven hours of oral arguments from both sides on September 27.



A report on the case in the *New York Times* noted that the Obama administration launched its Clean Air Plan after Congress refused to pass the emissions controls it asked for, falling back on amendments to the Clean Air Act passed in 1970.

The *Times* quoted D.C. appeals court judge Brett Kavanaugh, who expressed a mixed take on the Obama Clean Air Plan, agreeing with its objectives but not its methodology of bypassing Congress. “The policy is laudable,” said Kavanaugh. “The earth is warming. Humans are contributing. I understand the international impact and the problem of the commons. The pope’s involved. And I understand the frustration with Congress.” But, he continued: “If Congress does this, they can account for the people who lose their jobs. If we do this, we can’t.”

“It’s not just a technicality. It’s rooted in the separation of powers,” Kavanaugh was quoted as saying by the *Washington Post*. “Congress should be making the big policy decisions.”

Among those testifying against the administration’s plan was Laurence Tribe, a respected professor of constitutional law at Harvard Law School who once taught Obama. Veterans in the decades-long battle against the establishment of a constitutional convention will recall that Tribe has long been an ally in that fight. He once said convening a convention would amount to “putting the whole Constitution up for grabs.”

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“This action by the EPA is impermissible,” Tribe told the court.

Tribe charged that the EPA is inappropriately stepping in where Congress has failed to act on climate change and by so doing, has created fundamental concerns about overreach by the executive branch. “There’s a reason 27 states are on the petitioners’ side and 19 are on the other,” Tribe maintained.

A report in Britain’s *Guardian* newspaper quoted Thomas Donohue, president of the U.S. Chamber of Commerce, who said the EPA plan was a “power grab” that will “drive up electricity costs for businesses, consumers and families, impose tens of billions in annual compliance costs, and reduce our nation’s global competitiveness — without any significant reduction in global greenhouse gas emissions.”

The arguments presented against the administration’s “Clean Power Plan” at the court session were based mostly on constitutional grounds and on the power grab by the EPA in areas where Congress



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refused to act. While these arguments were quite valid, the matter of whether or not so-called greenhouse gas emissions actually have any impact on global warming was not discussed. If it had been, a good case might have been made that global warming, if it is occurring at all, is a natural meteorological phenomenon that is not attributable to human activity.

In analyzing the likely outcome of the court's decision on the case, the *Times* writer noted that the 10-judge panel's makeup of six judges appointed by Democratic presidents and four by Republicans suggests an advantage for the Obama administration, because even a five to five tie would allow the regulation to stand.

In that event, an appeal to the Supreme Court by the plaintiffs would almost certainly occur. The D.C. court is expected to decide the case by late February, but if the case is appealed to the Supreme Court, it is likely to continue into 2018.

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