

Professor Tribe Takes Obama to School

The liberal lion blasts the EPA's climate rule as an illegal power grab.

“In his Harvard days, Barack Obama studied under law professor Laurence Tribe. Perhaps the future President spent too much time at the law review and missed the part about limited powers. We say that because Professor Tribe delivered a constitutional rebuke this week to the Obama Administration that is remarkable coming from a titan of the liberal professoriate.

Mr. Tribe joined with the world's largest private coal company, Peabody Energy, to criticize the ‘executive overreach’ of the Environmental Protection Agency's proposed rule to regulate carbon emissions from existing power plants. In joint comments filed with the EPA, the professor accuses the agency of abusing statutory law, violating the Constitution's Article I, Article II, the separation of powers, the Tenth and Fifth Amendments, and in general displaying contempt for the law.

The Clean Air Act doesn't give the Administration the authority the EPA claims to impose its climate crackdown on existing power plants by effectively eradicating coal power. The EPA instead uses—in Mr. Tribe's words—‘a hitherto obscure provision’ of the Clean Air Act, known as Section 111, to justify its actions. Such legal scavenging is a characteristic of this Administration, and rarely has it been so thoroughly dismantled.

‘The Proposed rule rests on a fatally flawed interpretation of Section 111. According to EPA . . . Congress effectively created two different versions of Section 111, and the agency should be allowed to pick and choose which version it wishes to enforce,’ writes Mr. Tribe. ‘According to EPA, since 1990 the U.S. Code has reflected the wrong version of Section 111, and EPA has discovered a mistake [made by Congress]. According to EPA, both the D.C. Circuit and the U.S. Supreme Court have previously misinterpreted Section 111. According to EPA, the two different versions of Section

111 have created ‘ambiguity’ triggering deference to the agency’s [interpretation]. Every part of this narrative is flawed.’

We quote Mr. Tribe at length because the Administration likes to dismiss concerns about its extralegal exertions as partisan or political. But Mr. Tribe shows that there are genuine issues about the law and democratic process at stake.

He writes that even if EPA’s theory of two versions of Section 111 were correct, the agency’s ‘claim that it is entitled to pick and choose which version it prefers represents an attempt to seize lawmaking power that belongs to Congress. Under Article I, Article II, and the separation of powers, EPA lacks the ability to make law.’ Mr. Tribe adds, icily, that a ‘presidential speech’ is insufficient to claim such authority.

The liberal icon also explains how the EPA rule likely violates the Fifth Amendment’s Takings Clause with its ‘palpable unfairness of imposing all the costs on a small subset of entities [coal] within the agency’s cross-hairs. The Proposed Rule represents a radical shift in federal policy that upsets settled, investment-backed expectations, with no attempt by EPA to quantify the climate or environmental benefits from the Proposed Rule.’ Mr. Tribe urges Democrats and Republicans to resist the rule and ‘stand in strong support of the rule of law.’

None of this is likely to deter the EPA, which is determined to impose its climate agenda without having passed a single new act of Congress. But once the agency issues its final rule, the courts will get their say—and they may pay more attention to Professor Tribe than to his wayward student.” - *WSJ, December 5, 2014*