

Crazy on Carbon Dioxide

Lewis Op-ed in National Review Online (Revised)

Op-Eds & Articles

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April 21, 2005

On April 8, 2005, the D.C. circuit court of appeals heard oral arguments in *Commonwealth of Massachusetts et al. v. U.S. Environmental Protection Agency*. Petitioners, who include the attorneys general (AGs) of 12 states, are suing the EPA for rejecting an October 1999 petition by the International Center for Technology Assessment (ICTA) and several other environmental groups to regulate carbon dioxide (CO₂) emissions from motor vehicles. In effect, petitioners demand that EPA impose the Kyoto Protocol — a non-ratified treaty — on U.S. automakers. They hope via litigation not only to regulate millions of Americans out of the market for large, safe, high-performance vehicles, but also to substitute their will for that of the people's elected representatives.

Economy in the Balance

Carbon dioxide is the inescapable combustion byproduct of gasoline and other carbon-based fuels. Larger, heavier vehicles use more fuel per mile driven, and consequently emit more grams of CO₂ per mile. If petitioners prevail, EPA will have to require automakers to downsize and/or restrict production of SUVs, large passenger cars, and other high-CO₂-emitting vehicles — the very vehicles that are Detroit's biggest sellers. So at a minimum, a victory for petitioners will restrict consumer choice and further erode the competitiveness of U.S. automakers.

Even more damaging is the precedent that the petitioners hope to set. If the court compels the EPA to classify CO₂ as a regulated pollutant, it will unleash a torrent of copycat lawsuits. Future suits will demand that the EPA both curb CO₂ emissions from other sectors and continually tighten the controls. Even though President Bush, significant congressional majorities, and most voters oppose the Kyoto treaty, the flood of litigation would establish a national energy-rationing system indistinguishable from Kyoto.

The good news is that petitioners are going to lose, because CO₂ regulation is patently illegal under both the CAA and the Energy Policy and Conservation Act (EPCA).

Usurpation by Litigation

To see why petitioners' suit is without merit, it suffices to ask two simple questions: Why was the McCain-Lieberman Climate Stewardship Act, which seeks to cap CO₂ emissions from all U.S. economic sectors, arguably the most controversial piece of legislation to come to a vote in the 108th Congress? And why is the Kyoto Protocol on climate change, which would require more stringent CO₂ emission reductions, arguably the most controversial treaty to be debated by U.S. policymakers in the past nine years?

The answer is that both Kyoto and McCain-Lieberman would fundamentally alter U.S. law and regulatory policy on the production and use of energy. The federal government has never regulated CO2 emissions — and for good reason. Carbon dioxide is the *intended* combustion byproduct of the carbonaceous fuels — coal, oil, and natural gas — that supply roughly 85 percent of all the energy Americans use. The power to restrict CO2 emissions is literally the power to cripple U.S. productivity, competitiveness, and growth.

The Senate preemptively rejected Kyoto as too costly and unfair to the United States when, in July 1997, it passed the Byrd-Hagel resolution by a 95-0 vote. The Senate similarly rejected McCain-Lieberman by 55-43 on October 30, 2003. Yet the AGs and their allies claim that EPA has a mandatory duty to regulate CO2. Their lawsuit implies that Kyoto and McCain-Lieberman, in substance if not detail, are already the law of the land — a preposterous opinion. What the petitioners are really trying to do is usurp Congress's lawmaking power. They are attempting, through not-very-clever legalisms, to install an energy-rationing regime that Congress never approved. And many of the petitioners are AGs, sworn to uphold and defend the U.S. Constitution.

Defying Common Sense

The petitioners' suit is an affront to common sense. The CAA provides distinct grants of authority to administer specific programs for specific purposes. It authorizes the EPA to administer a national ambient-air-quality standards program, a hazardous-air-pollutant program, a stratospheric-ozone-protection program, and so on. Nowhere does it even hint at establishing a climate-change-prevention program. There is no subchapter, section, or even subsection on global climate change.

Indeed, the terms "greenhouse gas" and "greenhouse effect" do not appear anywhere in the Act. The terms "carbon dioxide" and "global warming potential" do appear — but only once, in the context of non-regulatory provisions. Moreover, the provision mentioning "carbon dioxide" — section 103(g) — admonishes the EPA not to infer authority for "pollution control requirements." Similarly, section 602(e), the provision discussing the "global warming potential" of ozone-depleting substances, admonishes the EPA not to infer authority for "regulation."

Congress and its committees have examined and debated climate-policy proposals on hundreds of occasions during the past two decades. Whenever Congress has legislated in this area, it has authorized the executive branch to do one of three things: engage in research, conduct international negotiations, or administer voluntary programs. Congress has consistently either declined to adopt or explicitly rejected regulatory climate policies.

For example — and most tellingly — when Congress last amended the CAA, the Senate version of the CAA Amendments, S. 1630, initially contained a provision requiring the EPA to set performance standards for CO2 emissions from new motor vehicles — exactly what petitioners assert the EPA must do now. The Senate dropped this language before voting on the bill. Further, House and Senate conferees did not include in the final version of the CAA Amendments Senate-passed language to make "global warming potential" a basis for regulating "manufactured substances" and to establish CO2 reduction as a national goal. When Congress last amended the CAA, it considered and rejected regulatory climate policies.

In *Food and Drug Administration v. Brown and Williamson* (529 U.S. 120, 2000), the Supreme Court struck down the FDA's attempt to bootstrap the Food, Drug, and Cosmetic Act — a law authorizing the FDA to regulate medical drugs and devices — into an authority to regulate cigarette sales and advertising. The Court held that in assessing assertions of regulatory authority, courts should be guided by "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." It is unlikely, the Court held, that Congress would delegate to the FDA the power to regulate tobacco products without ever once saying so in the text of the pertinent statute. But, as the EPA pointed out when it rejected the ICTA petition, it is even more unlikely that Congress would authorize the EPA to ration and suppress carbon-based fuels "in so cryptic a fashion." Whereas regulating tobacco would affect just one industry, regulating CO₂ would affect several economic sectors.

The Mantra of Preexisting Authority

To belittle the common sense of the issue, petitioners repeatedly invoke, like a mantra, the EPA's alleged "pre-existing" authority. It does not matter, they contend, that Congress has repeatedly rejected regulatory climate proposals, including in the context of its deliberations on the CAA Amendments. Nor does it matter that the CAA's only provisions mentioning "carbon dioxide" or "global warming" admonish the EPA not to infer new or additional regulatory authority. These actions and provisions do not repeal or otherwise impair the EPA's "preexisting" authority under section 202(a).

Section 202(a) states that EPA "shall" control emissions of any "air pollutant" from motor vehicles that in the agency's judgment, "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." According to petitioners, CO₂ is an "air pollutant" within the meaning of CAA section 302(g), and the EPA has on various occasions held that CO₂-induced global warming may endanger public health and welfare. Therefore, the petitioners conclude, the EPA has a mandatory duty under section 202(a) to regulate vehicular CO₂ emissions.

Aside from the fact that EPA musings about global warming do not constitute a "judgment" for regulatory purposes unless presented in the context of an official rulemaking, the petitioners' argument fails on three counts.

CO₂ Is Not an Air Pollutant

First, the petitioners assume rather than demonstrate that CO₂ is an "air pollutant." Section 302(g) defines "air pollutant" as "any air pollution agent or combination of such agents...which is emitted into or otherwise enters the ambient air." Note that to be an "air pollutant," it is not enough for a substance to be emitted into the ambient air (oxygen and water vapor fit that description). The substance must also be an air-pollution "agent." The text does not define this term, but it does not have to. An air-pollution agent is obviously something that pollutes the air. According to Webster, "pollute" means to "make impure," "make unclean," "dirty," "befoul," or "contaminate." Carbon dioxide simply does not pollute the air in any recognized sense of the word.

A clear, odorless gas that is non-toxic to humans at 20 times ambient concentrations, CO₂ neither impairs visibility, fouls the air, or contributes to respiratory disease. Plants raised in CO₂-enriched environments are able to survive and even thrive despite exposure to bona fide air pollutants such as sulfur dioxide that would otherwise damage or kill them. Carbon dioxide is plant food, and experimental data indicate that the rise in the air's CO₂ content from 280ppm to 380ppm over the past 150 years has increased average wheat yields by roughly 60 percent. Were it not for CO₂ emissions, either many people now living might not exist or many forests now standing might have been cleared to make room for crops. The air's rising CO₂ content helps almost all plants grow larger, faster, and more profusely, and all animals depend on plants, directly or indirectly, as a food source. Thus, CO₂ emissions are greening the planet, contributing to biodiversity and global food security. Carbon dioxide is fundamentally unlike any substance EPA has ever regulated as an "air pollutant."

Thus, the AGs' criticism that when EPA rejected the ICTA petition it did not clarify whether, in its judgment, CO₂ emissions do or do not endanger public health or welfare, misses the point. EPA makes such judgments only after it first determines that the emissions in question are "air pollutants" that "cause or contribute to air pollution." CO₂ is not an air pollutant.

[No Automatic Regulatory Trigger](#)

Second, the phrase "may reasonably be anticipated to endanger public health or welfare" is not the automatic regulatory trigger the AGs claim it is. The phrase applies to many substances that the EPA does not regulate under section 202(a). For example, the EPA regulates 53 ozone-depleting substances under Title VI of the CAA. Such substances are emitted into the ambient air, and are believed to endanger public health and welfare. Ozone-depleting chemicals were at one time common refrigerants in automobile air conditioning systems. By the AGs' logic, the EPA did not need new and distinct authority to regulate vehicular use of ozone-depleting substances; it could have just used its "pre-existing" authority under section 202(a).

That is silly. Congress twice added distinct new provisions — Title I Part B in 1977 and Title VI in 1990 — partly because such substances too are not "air pollutants" (they do not dirty the air or make it unhealthy to breathe), and partly because the EPA's "pre-existing" authorities, including section 202(a), do not provide for coordination with the international community — a prerequisite for effective action on global atmospheric issues. Congress would have to amend the Act again, and expressly authorize the EPA to regulate greenhouse gases in coordination with the international community, before the agency could lawfully develop and adopt mandatory controls on CO₂ emissions.

[Begging the Key Question](#)

Third, the AGs beg the key question of congressional intent. When Congress enacted and amended the CAA, did it delegate to the EPA the power to regulate CO₂? The phrase "air pollutants...which may reasonably be anticipated to endanger public health or welfare" in section 202(a) provides no evidence that Congress intended for EPA to administer a regulatory climate program. In fact, it provides evidence to the contrary.

The identical phrase occurs in section 108(a). That provision directs the EPA to develop and adopt national ambient-air-quality standards (NAAQS) — allowable emission concentrations —

for “air pollutants,” which in EPA’s judgment “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” EPA could not make a judgment of endangerment about CO₂ under section 202(a) without simultaneously obligating itself to regulate CO₂ under section 108(a). But, as the EPA and other experts persuasively argue, any attempt to set a NAAQS for CO₂ would be a bizarre exercise in futility. Absent express language to the contrary, Congress cannot be presumed to have intended EPA to pursue a course of regulatory folly.

Here’s why. The NAAQS regulatory structure, with its state-by-state implementation plans and county-by-county attainment and non-attainment designations, is designed to address gases that cause or contribute to local or at most regional air-pollution problems. In contrast, because of CO₂’s long residence time (50-200 years), CO₂ levels are nearly uniform throughout the global atmosphere. Consequently, the NAAQS system has no rational application to a well-mixed global gas such as CO₂.

Consider the possibilities. If the EPA set a NAAQS for CO₂ above current atmospheric levels, then the entire country would be in “attainment,” even if U.S. emissions suddenly doubled. Conversely, if the EPA set a NAAQS for CO₂ below current levels, the entire country would be in “non-attainment,” even if all power plants, factories, and cars were to shut down. If the EPA set the NAAQS exactly at current CO₂ levels, the entire country would be in attainment — but only temporarily. As soon as global emissions measurably increased global concentrations, the whole country would be in non-attainment, even if U.S. emissions miraculously fell to zero.

Moreover, since even full implementation of the Kyoto Protocol would only barely slow projected increases in CO₂ levels, it is inconceivable how any state implementation plan (SIP) could pass muster under CAA 107(a), which requires each SIP to “specify the manner in which national primary and secondary air quality standards will be achieved and maintained within each air quality control region in each State.” To “achieve and maintain” a CO₂ NAAQS within each of its air quality control regions, Massachusetts, for example, would have to be able to control CO₂ emissions everywhere on earth.

In short, when Congress created the NAAQS program, it did not delegate to EPA the power to regulate CO₂. And since EPA could not make a judgment of endangerment regarding CO₂ under section 202(a) without obligating itself to set a NAAQS for CO₂ under section 108(a), Congress did not intend for EPA to regulate CO₂ under section (202)(a) either.

The AGs ask the court to ignore the question of “how the NAAQS system might work in regulating greenhouse gases,” and just examine the question of whether EPA is obligated to adopt CO₂ emission standards under section 202(a). But this is asking the court to treat the CAA as a jumble of parts rather than as a coherent whole. Petitioners are asking the court to believe that the same finding of endangerment expressed in the identical triggering language could simultaneously obligate EPA to regulate CO₂ under section 202(a) but not under section 108(a). But they give no examples of pollutants that EPA regulates under 202(a) that it does not also regulate under 108(a).

To put the point somewhat differently, if EPA were to regulate CO₂ under section 202(a), Congress would have to amend the NAAQS program so that section 108(a) did not saddle the

EPA with the impossible task of integrating CO2 into a regulatory framework designed to apply place-specific remedies to place-specific air pollution problems.

Fuel Economy by another Name

The petitioners acknowledge that the Energy Policy and Conservation Act (EPCA) authorizes the National Highway Traffic Safety Administration (NHTSA) — not the EPA — to set corporate average fuel-economy (CAFE) standards for automobiles. They further acknowledge that CO2-emission standards might increase average new-car fuel economy. But, they contend, the EPCA in no way prohibits the EPA from regulating vehicular CO2 emissions, because "Congress understood that emission standards would sometimes affect fuel economy."

Here the petitioners gloss over the fundamental difference between the EPA's setting emission standards that "affect" fuel economy and the EPA's setting emission standards that are in fact sub-rosa fuel-economy standards. The EPA hit the nail on the head in its rejection of the ICTA petition: "No technology currently exists or is under development that can capture and destroy or reduce emissions of CO2, unlike the emissions from other motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO2 is to improve fuel economy." Regulation of vehicular CO2 emissions is fuel economy regulation by another name.

Indeed, CO2 emissions are so directly a function of fuel economy that, although NHTSA rules express CAFE standards in terms of miles per gallon, the EPA monitors and enforces automakers' compliance with those standards via emission tests that measure CO2 grams per mile. The EPA cannot set vehicular CO2 standards without setting de facto fuel-economy standards — something it has no authority to do.

A victory for petitioners in the CO2 litigation would be a public-policy disaster for consumers, the U.S. auto industry, and, more important, our constitutional system. Courts are in a bad odor today, because they too often legislate from the bench and follow ideological agendas rather than the letter and spirit of the laws. The CO2 litigation offers the presiding judges a golden opportunity to rebuke those who would aggravate the prevailing disorder in the court.