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Climate Policy by Judicial Fiat: How Global Warming Lawsuits Subvert the Democratic Process

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Abstract: *The recent spate of global warming lawsuits is an attempt to circumvent the political process and implement public policy by judicial fiat. Unable to advance their policies through Congress, global warming activists have turned to the judiciary to implement their agenda. Although this legislation-through-litigation violates the Constitution's separation of powers principles, some federal judges are receptive to such lawsuits. Therefore, it is up to the Supreme Court to affirm that global warming is a political issue that must be left to the elected branches of the U.S. government, not a tiny minority of unelected federal judges.*

> *The era of big government may be over, but the era of regulation through litigation has just begun.*
>
> —Robert B. Reich, U.S. Secretary of Labor, *USA Today*, February 11, 1999

Even if the scientific debate over the existence of global warming was affirmatively resolved, many difficult public policy questions would remain: Are the benefits of trying to prevent a rise in global temperatures worth the costs? What policies and/or technologies would best forestall that warming if it is really occurring? And who should bear the costs of those policies?

These are inherently political questions that can be answered only through the democratic political process—by the two branches of the U.S. government that are entrusted with making policy. The judicial branch is *not* one of these branches. Yet global warm-

Talking Points

- Recent decisions by federal courts allowing global warming lawsuits to proceed violate separation of powers principles, usurping the responsibilities and prerogatives of the legislative and executive branches—as granted by the U.S. Constitution—to set public policy.
- Unable to convince Members of Congress to pass global warming legislation, activists are now trying to circumvent the political process and implement public policy by judicial fiat.
- Litigation does not lead to the effective development of regulatory policy based on proper considerations of science, economics, health, safety, and national security. Sympathy for the plight of those bringing suit can often lead to unjust damage awards that amount to disastrous regulation.
- The Supreme Court should affirm that climate change, if it even exists, is a political issue that must be left to the elected branches of the U.S. government, not a tiny minority of unelected federal judges.

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ing activists, impatient with the political process and unsatisfied with the results, have called on the courts to intercede and fashion a global warming policy through the litigation process.

Regrettably, some courts are willing to oblige: In two separate cases, decisions by federal courts of appeal allowed lawsuits to proceed against various utility, oil and gas, and chemical companies. These cases, filed under public nuisance laws, claim injuries from "global warming" due to the release of carbon dioxide by the defendant industries.

These decisions violate separation of powers principles, usurping the responsibilities and prerogatives of the legislative and executive branches and striking at the democratic process in what amounts to a judicial *coup d'etat*. They are based on questionable legal principles, disputed science, and unproven and flimsy claims of causation. Fortunately, an unusual procedural development resulted in one of these decisions being overturned, while the other was granted review by the U.S. Supreme Court. The Supreme Court will, hopefully, issue a ruling that stymies such unwarranted global warming lawsuits from going forward.

Making Environmental Policy Is Not the Judiciary's Job

Under the governmental structure enshrined in the U.S. Constitution, there is a clear separation of powers among the legislative, executive, and judicial branches of the federal government. As James Madison explained in *The Federalist* No. 48, the Framers of the Constitution feared that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands" would lead to tyranny. In order to prevent such tyranny, they created three separate branches of government with distinctly different functions. While the judiciary is tasked with interpreting the law, the elected Members of Congress are responsible for determining U.S. public policy and implementing that policy by passing laws that are then enforced by the executive branch.

However, there are many liberals (and plaintiffs' lawyers) who advocate using the judicial branch to bypass the legislative branch. When they are unable to convince legislators to pass the laws they want on specific public policy problems, these activists view the courts as a way to implement public policy by judicial fiat. Such legislation-through-litigation violates the core principle of America's constitutional system: adherence to the rule of law and the democratic process.

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Although in the past three decades Congress has passed various laws addressing climate change, no legislation regulating climate change has been enacted—a critical distinction. Statutes such as the National Climate Program Act of 1978, the Global Climate Protection Act of 1987, and the Energy Policy Act of 1992 all provide only for research and planning to "improve understanding of global climate change."[1] President Bill Clinton signed the Kyoto Protocol, which would have required substantial carbon dioxide reductions by the United States, but the U.S. Senate never ratified that treaty. In fact, Congress passed a series of bills that barred the Environmental Protection Agency from implementing the Kyoto Protocol.[2]

There is also a certain element of greed driving climate change litigation. The plaintiffs' bar earned literally billions of dollars in attorneys' fees in the court fight against tobacco companies, and the latest generation of plaintiffs' attorneys sees the current battle over climate change as an opportunity for another legal fee bonanza—one that could easily eclipse the windfall from tobacco lawsuits. The personal injury bar is interested only in deep-pocket American energy and utility companies,

1. Connecticut v. American Electric Power Co., Inc., 406 F.Supp.2d 265, 269 (S.D. N.Y. 2005).
2. *Id.* at 269.

even though any of the many producers of "greenhouse gasses" like carbon dioxide could be a target. Plaintiffs' attorneys and certain attorneys general "are attempting to move public nuisance theory far outside its traditional boundaries…in an effort to circumvent the well-defined" limits of liability law.[3]

Recent Global Warming Rulings: The Second Circuit

The fall of 2009 brought two victories for activists who favor legislating global warming through the courts. On September 21, 2009, in *Connecticut v. American Electric Power Company, Inc.*,[4] the Second Circuit Court of Appeals resurrected lawsuits filed by Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, the City of New York, and a number of private land trusts against utility companies including the Southern Company and the Tennessee Valley Authority—the agency started by President Franklin Roosevelt to bring electrical power to the Appalachian region of the southern United States. The states asserted that these utilities—the five largest emitters of carbon dioxide in the country, accounting for one-quarter of the U.S. electric power sector's emissions—are a "public nuisance" and responsible for global warming. Global warming, in turn, will supposedly cause irreparable harm to property in those states while threatening the health, safety, and well-being of their residents.

The claim was based in part on the dubious Intergovernmental Panel on Climate Change report that has been the subject of widespread criticism for its errors, gross exaggerations, and possible outright fraud by a number of the scientists who contributed to the report. However, the states claimed that there was a "'clear scientific consensus' that global warming had already begun to alter the natural world" and would "accelerate over the coming decades unless action is taken to reduce emissions of carbon dioxide."[5]

A New York federal district court initially dismissed these lawsuits, properly concluding that even if the claims being made by the states were correct, the question presented to the court—whether to take action in response to global warming—was a political question and therefore outside the judiciary's jurisdiction.[6] According to the court, under America's separation of powers doctrine, it is the elected branches of the U.S. government "to which our system commits such policy decisions."[7] Resolution of this issue "requires identification and balancing of economic, environmental, foreign policy, and national security interests"[8]—precisely the type of policy determination that is not intended for the courts.

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However, a two-judge panel of the Second Circuit Court of Appeals overturned this well-reasoned decision (the third judge on the panel, Sonia Sotomayor, took no part in the decision because of her elevation to the U.S. Supreme Court). The panel held that the states and private organizations could bring a "claim under the federal common law of nuisance,"[9] despite the fact that it would be virtually impossible for the plaintiffs to show any causal connection between the actions of the utilities and any damages supposedly suffered by the plaintiffs, particularly given the questionable nature of the scientific theory underlying the claims.

3. Victor E. Schwartz and Phil Goldberg, "The Law of Public Nuisance: Maintaining Rational Boundaries of a Rational Tort," 45 WASHBURN L. J. 541, 542 (2006).
4. 582 F.3d 309 (2d Cir. 2009).
5. *Id.* at 314.
6. Connecticut v. American Electric Power Co., Inc., 406 F.Supp.2d 265.
7. *Id.* at 272.
8. *Id.*
9. Connecticut v. American Electric Power Co., Inc., 582 F.3d at 392.

The political nature of this litigation was especially evident in the press release issued by then-Connecticut Attorney General (and current Democratic U.S. Senator) Richard Blumenthal. A driving force behind the litigation, Blumenthal praised the Second Circuit's decision as setting a precedent against "all who threaten our planet."[10]

Although a petition requesting a review of the panel's decision by the entire Second Circuit Court was denied, the U.S. Supreme Court accepted this case for review on September 21, 2010.[11] The Supreme Court will now have an opportunity to reverse the Second Circuit panel's decision and to dismiss global warming claims being brought under federal common law in the absence of a federal statute creating a cause of action. Indeed, not only is there no cause of action, but the Clean Air Act assigns responsibility for regulating carbon dioxide emissions to a federal agency, not the courts.

Recent Global Warming Rulings: The Fifth Circuit

Less than a month after the Second Circuit's decision in *American Electric Power Co., Inc.*, a three-judge panel of the Fifth Circuit Court of Appeals reinstated a lawsuit that a Mississippi federal district court had dismissed for the same reason the district court in New York had dismissed the *American Electric Power Company* case: because the question before the court was a nonjusticiable political question. In *Comer v. Murphy Oil USA*, plaintiffs' lawyers filed a class action lawsuit against energy, fossil fuel, and chemical companies on behalf of residents of Mississippi who had suffered damage from Hurricane Katrina.[12] The plaintiffs claimed that Hurricane Katrina was a direct and proximate result of the defendants' greenhouse gas emissions. According to the plaintiffs, the defendants' emission of greenhouse gases contributed to global warming, which in turn caused a rise in sea levels. This rise in sea levels, the plaintiffs argued, added to the ferocity of Hurricane Katrina, thereby increasing the property damage suffered by residents during that storm.

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Additionally, the lawsuit claims that the emissions constitute a public and private nuisance, as well as trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. In their complaint, the plaintiffs even admitted that they were in court because there had been no "meaningful political action" to address global warming and that "the political process" had failed.[13]

They also asserted that the defendants had been aware of the dangers of greenhouse gas emissions for years, but that "they unlawfully disseminated misinformation about these dangers in furtherance of a civil conspiracy to decrease public awareness of the dangers of global warming."[14] Such frivolous conspiracy claims are so absurd that they are almost comical—at least until one realizes that these claims were given credence by federal judges and cost the defendants enormous amounts of money in litigation costs.[15]

The district court correctly concluded that making a decision on this issue would exceed its consti-

10. Press Release, Attorney General Praises Appeals Court Ruling Reinstating Global Warming Lawsuit (Sept. 21, 2009), *available at* http://www.ct.gov/AG/cwp/view.asp?A=3673&Q=447400.
11. Connecticut v. American Electric Power Co., Inc., 582 F.3d 309 (2d Cir. 2009), *appeal docketed*, No. 10-174 (U.S. Aug. 4, 2010).
12. Comer v. Murphy Oil USA, 585 F.3d 855 (2d. Cir. 2009).
13. Complaint at 5, 15, Comer v. Murphy Oil USA, 585 F.3d 855 (2d. Cir. 2009).
14. Comer, 585 F.3d at 861.
15. Although the three-judge panel of the Fifth Circuit held that the plaintiffs did not have Article III standing to bring such civil conspiracy claims, it did hold that they had standing to bring nuisance, trespass, and negligence claims.

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tutional authority and usurp the roles of the legislative and executive branches. It observed that courts are "simply ill-equipped or unequipped" to deal with this issue and, consequently, that the debate over global warming "has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this court can measure conduct…and develops standards by which…juries can adjudicate facts and apply the law."[16]

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As in the Second Circuit, however, the court's dismissal was reversed, this time by a three-judge panel of the Fifth Circuit Court of Appeals. In issuing its reversal, the appellate court misread applicable Supreme Court precedent on political questions and held that the plaintiffs' nuisance, trespass, and negligence claims under state law could proceed in federal court.

One of the most ridiculous aspects of the Fifth Circuit's decision was its finding that the plaintiffs could satisfy the requirement that they show a connection between their injuries and the defendants' actions.[17] Indeed, the claim that the defendants' emissions of carbon dioxide either caused Hurricane Katrina in 2005 or enhanced its strength is scientifically dubious at best. There is no evidence that greenhouse emissions have caused an increase in the intensity or number of hurricanes; in fact, as Ben Lieberman of The Heritage Foundation pointed out, "[t]he 2006 through 2008 hurricane seasons were at or below average, and the 2009 season went down as the weakest in more than a decade."[18]

Other experts have also disputed the purported link between extreme weather and greenhouse gases. For example, the Director of the National Hurricane Center told Congress that Katrina was "due to natural fluctuations/cycles of hurricane activity" and wrote in a paper that the connection between hurricanes and global warming is inconsequential compared to natural variability.[19] And William Gray, one of the world's foremost experts on hurricanes, told Congress in 2005: "It is also mystifying to me how global warming advocates are able to get away with the argument that extreme weather events have become more prevalent in recent years and that they likely have a human-induced component. *Such assertions are factually wrong*."[20]

Even if such evidence existed, greenhouse emissions come from hundreds of millions of sources, man-made and natural. Contrary to the Fifth Circuit panel's conclusion, it would be next to impossible for the plaintiffs to show a chain of causation between the defendants' specific emissions and the specific climate event—Hurricane Katrina—that supposedly caused the plaintiffs' injuries. As noted attorney David Rivkin recently pointed out, "[g]iven the near-infinite number of emitters over the centuries, no court could find a substantial likelihood that any defendant, even a major [greenhouse gas]-emitting industry, caused the plaintiffs' alleged global warming-related injuries to any quantifiable extent."[21]

Fortunately, this decision, made by a three-judge panel, was vacated and scheduled for an *en banc* review by a quorum of the Fifth Circuit (nine

16. Comer, 585 F.3d at 860, footnote 2.
17. Id. at 865–866.
18. Ben Lieberman, *The Late Great Global Warming Scare*, THE HERITAGE FOUNDATION, Feb. 12, 2010, *available at* http://www.heritage.org/Research/Commentary/2010/02/The-Late-Great-Global-Warming-Scare.
19. Quin Hillyer, "No Butterfly Caused Katrina," WASHINGTON TIMES, March 18, 2010, *available at* http://www.washingtontimes.com/news/2010/mar/18/no-butterfly-caused-katrina.
20. Statement of Dr. William Gray, "The Role of Science in Environmental Policy-Making," U.S. Senate Committee on Environment & Public Works, September 28, 2005 (emphasis added), *available at* http://epw.senate.gov/hearing_statements.cfm?id=246768.

members). However, in a very unusual procedural twist, "new circumstances arose that caused the disqualification and recusal of one of the nine judges," so the *en banc* court lost its quorum and the case could not proceed.[22] The erroneous panel decision was vacated when *en banc* review was initially approved, and with the *en banc* case dismissed, the district court decision that had properly dismissed the lawsuit was reinstated and the flawed panel decision remains vacated.

Recent Global Warming Rulings: The Ninth Circuit

The conclusion reached by the two federal district courts in *Comer* and *American Electric Power Company*—that climate change is a political question—was echoed by a federal district court in California in a third case, which was decided on September 30, 2009. In *Native Village of Kivalina v. ExxonMobil Corporation*, the district court dismissed a public nuisance lawsuit by an Eskimo village against oil, energy, and utility companies. This suit claimed that the defendant's emissions contributed to global warming, which caused the Arctic sea ice to melt, which in turn flooded the village.[23] Yet, as the court held:

> [T]here is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time. Plaintiffs essentially conceded that the genesis of global warming is attributable to numerous entities which individually and cumulatively over the span of centuries created the effects they now are experiencing.[24]

To try to hold individual entities responsible for specific injuries under such circumstances does not make sense; even assuming that global warming not only exists, but also is caused by carbon dioxide emissions, "it is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—'caused' Plaintiffs' alleged global warming related injuries."[25]

Native Village of Kivalina also addressed another issue present in each of these global warming lawsuits: the unjustified and untenable expansion of public nuisance law in an attempt to create a cause of action for global warming. These lawsuits are significantly different from prior water or air pollution cases based on nuisance claims where there were a discrete number of identifiable polluters who caused specific injuries to a specific area. No such factors are present in the three climate change cases discussed in this paper. In fact, the *Native Village of Kivalina* court noted that the plaintiffs offered no "guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving" such claims and sought to "impose liability and damages on a scale unlike any prior environmental pollution case."[26]

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The *Native Village of Kivalina* decision was appealed to the Ninth Circuit Court of Appeals, the most liberal appeals court in the nation. However, the Supreme Court's acceptance of the *American Electric Power Co*. case for review may moot the Ninth Circuit's review.

21. David B. Rivkin, Jr., Carlos Ramos-Mrosovsky, and Matthew S. Raymer, "'Complaints' About the Weather: Why the Fifth Circuit's Panel Decision in Comer v. Murphy Oil Represents the Wrong Approach to the Challenge of Climate Change," The Federalist Society, Jan. 29, 2010, p. 8.
22. Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. May 28, 2010).
23. 663 F.Supp.2d 863 (N.D. Cal. 2009).
24. *Id.* at 880.
25. *Id*. at 881.
26. *Id*. at 876.

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Judicial Tyranny Ahead?

Litigation does not lead to the effective development of regulatory policy based on considerations of science, economics, health, safety, and national security. Sympathy for the plight of those bringing suit can often lead to unjust damage awards that amount to disastrous regulation. Environmental regulation should be implemented though appropriate political action by Congress and the executive branch as required by the United States constitutional system.

Tort law, selectively applied by individual judges or juries, is not equipped to make broad policy judgments and determinations on important issues facing this nation. Hopefully, the Supreme Court will affirm that climate change is a political issue that must be left to the elected branches. If the Second Circuit's decision is upheld, then a tiny minority of unelected federal judges, as opposed to the elected representatives of the people, will determine not only the environmental policy of the entire country, but the economic future of millions of Americans.

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