

The Power to Make Law:

Can the EPA Regulate CO₂ Under the Clean Air Act?

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EXECUTIVE SUMMARY

The Environmental Protection Agency (EPA) has claimed the authority under the Clean Air Act to combat global warming by regulating carbon dioxide (CO₂). There are three types of pollution-control programs authorized in the Act. The EPA claims that it has authority to regulate CO₂ under all three programs.

The first program authorizes EPA to set standards to control “criteria pollutants”, any air pollutant that “may reasonably be anticipated to endanger public health or welfare,” with welfare defined by the Act to include considerations of weather and climate. These standards take the form of acceptable concentration levels of the pollutant, and currently regulate carbon monoxide, lead, nitrogen dioxide, ground level ozone (smog), and particulate matter.

The second type of program authorizes regulations aimed at reducing emissions of certain pollutants from specific “new point sources,” i.e., factories, power plants, etc. Examples include requirements that factories or power plants install smokestack scrubbers or other emission control equipment.

The third type of program, the “hazardous air pollutant” program, combines the approaches of the first two in that it both sets overall allowable levels of the pollutant and mandates particular technology to achieve the result. Examples include standards and procedures for the permissible level of asbestos released during demolition or removal and acceptable levels of methylene chloride and required storage and cleaning equipment used to manufacture flexible polyurethane foam products.

Controls imposed by the EPA have, to date, aimed to reduce harmful direct human exposure to the offending pollutants based on damage the pollutants might do to human physiology. They have not tried to forestall hypothetical changes in the future environment that might pose risks of physical danger from heat, storm damage, or shifting ranges of noxious insects. Does the EPA have authority to regulate CO₂ on climate change grounds?

Since the New Deal, Congress has increasingly delegated its legislative authority to executive agencies, creating a hybrid fourth branch of government — the modern administrative state — with the power both to make law and to execute it. Courts have largely acquiesced, striking down only broad delegations in which Congress failed to provide an “intelligible principle” to guide the agencies’ actions. It is unlikely that a court would strike down an entire section of the Clean Air Act as unconstitutional on delegation grounds.

There is enough room in the Clean Air Act for EPA to proceed and risk a court challenge. It has nothing to lose. There are nonetheless several grounds for a challenge to EPA regulation of CO₂.

Designation of CO₂ as a criteria pollutant is questionable because the link between CO₂ and global warming, and the contention that global warming would be harmful, have not been proven. Furthermore, CO₂ reduction in the United States, even complete elimination of U.S. emissions, would have little global impact and would not significantly affect the likelihood of future global warming.

Regulations under the point source program might fail the Act's "achievability" test. There are no currently available, or even projected, cost-effective systems of CO₂ emission control from stationary sources.

There is no scientific evidence that CO₂ constitutes a hazardous pollutant that directly endangers public health; indeed, CO₂ is necessary for life. The hazardous air pollutant program is meant to regulate "pollutants which present, or may present, *through inhalation or other routes of exposure*, a threat of adverse human health effects, . . . or adverse environmental effects, whether through ambient concentrations, bioaccumulation, deposition, or otherwise. . . ." Unlike all other pollutants that are regulated under this section of the Act, there are no adverse human health effects from direct exposure to CO₂.

In the 1998 appropriations bill, Congress acted to keep EPA from proceeding, by itself, to regulate CO₂. Congress expressly prohibited EPA from using any of its funds for "the purpose of implementation or in preparation of implementation, of the Kyoto Protocol." The current Congress clearly wants to control the process. Congress may take a different view of the issue after the next elections, and acquiesce in CO₂ regulation either through different language in an appropriations bill or through a change in the Clean Air Act.

A more lasting solution to cure the ills of delegation was introduced in Congress on June 22, 1999 by Representative J. D. Hayworth (R-AZ) and Senator Sam Brownback (R-KS). H.R. 2301, the Congressional Responsibility Act, would require all major agency rules to be positively enacted into law by Congress. This proposal embodies a much better solution than reliance on a year-by-year appropriations limitation or reliance on the courts for case-by-case action. It also gets to the heart of the issue by limiting Congress's ability to delegate legislative power to the agencies it creates and requiring Congress to take explicit responsibility for major regulations.

The Power to Make Law: Can the EPA Regulate CO₂ Under the Clean Air Act?

By Deborah Simpson and Steven Simpson***

The Environmental Protection Agency (EPA) is currently preparing to exercise its delegated power under the Clean Air Act in a manner that would profoundly impact the American economy. In a significant departure from the Act's original intent and the EPA's prior practice, the EPA has claimed the authority under the Act to combat global warming by regulating carbon dioxide (CO₂). In the past the EPA has exercised its power to address pollution in localized areas, regulating specific pollutants with proven adverse health effects. Ambient CO₂, by contrast, has no adverse effects on the health of individuals — indeed, it is a constituent element of the very air we breath — and the theory of global warming is far from accepted scientific fact.

Even more important, from the public policy standpoint, is that global warming has been the focus of a raging national debate for several years, culminating in recent battles between Congress and the Clinton Administration. On November 12, 1998, representatives of the Clinton Administration signed the Kyoto Protocol, which, if adopted, would commit the United States to reduce CO₂ emissions to 7% below 1990 levels by 2012. For its part, Congress has prohibited the EPA from spending funds for the purpose of implementing or preparing to implement the Kyoto Protocol,¹ and the Senate responded to the signing of the Kyoto Protocol by passing a resolution stating that it will not ratify the Protocol in its current form. Nevertheless, the EPA seems poised to ignore this political debate entirely and impose its own solution to the perceived problem of global warming.

This action by the EPA could have profound economic and legal consequences. Regulation of CO₂ as envisioned in the Kyoto protocol would impose substantial costs on U.S. consumers and businesses, equivalent to huge tax increases. If the EPA can bring this about by stretching the interpretation of relevant law to a far greater extent than in the past, and if the courts acquiesce, it will tilt the balance of power between Congress and the Executive Branch. In that event, individuals and businesses will have to revise their thinking on the likelihood that the cost of living and the cost of doing business in the U.S. may take a surprising turn upward. At stake is nothing less than the future business climate of the United States, and the future well-being of all who earn their living and spend their retirement years in it.

¹ Pub. L. No. 105-276, signed Oct. 21, 1998.

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I. Congress's Cop-Out: Delegating Authority

How did we reach a state of affairs in which a regulatory agency could challenge the authority of the very legislative body that created its power in the first place? Through *delegation*. Since the New Deal, Congress has increasingly delegated its legislative authority to executive agencies, creating a hybrid fourth branch of government — the modern administrative state — with the power both to make law and to execute it. This has allowed Congress to write legislation in terms of popular goals without taking responsibility for how these goals are ultimately accomplished.

The framers of the Constitution never intended this power to coexist within one branch of government. Indeed, they intended precisely the opposite, taking pains to separate power among competing branches of the federal government. Thus, the Constitution grants to Congress the exclusive authority to make the law, and to the President the independent authority to execute it. Unfortunately, though, the Supreme Court has largely acquiesced in congressional delegations of power to administrative agencies, generally striking down only the broadest delegations. So long as the law provides an “intelligible principle” by which the agency can determine what Congress intended it to accomplish, the Court will approve the delegation. In other words, so long as Congress has defined the ends, regulators can have free reign over the means. This puts Congress in a win-win situation where they can take credit for legislation with noble goals while ultimately being able to blame the executive branch for problems associated with “over regulation.”

The politics of delegation, then, are not difficult to understand. By delegating the hard choices and ultimate policy decisions to administrative agencies, Congress is able to shield itself from political fallout when something goes wrong. Unhappy voters, who cannot control the agencies themselves, must attempt to divine whom to blame from their representatives' voting records on vague enabling legislation. Meanwhile, special interests who hobnob with the bureaucrats in charge receive favorable treatment. Voter apathy and cynicism are the predictable result.

With respect to the regulatory bureaucracy, delegation creates unaccountable agencies that are very difficult to control. As recent revelations about the IRS demonstrate, it is often years before Congress reacts to public outcry and reigns in an abusive agency, which is small consolation to the citizens who have been harmed by the agency in the meantime. Courts, likewise, can do little to address these abuses. Moreover, as a quick glance at the voluminous federal register indicates, agencies can issue thousands of pages of complex, nettlesome regulations in the time it takes Congress to deliberate over one bill, with little effective input from the public or its representatives.

The purpose of this article is to analyze and illustrate one very pointed example of this principle: the EPA's push to regulate CO₂ under the Clean Air Act. Can the Administration do an end run around the Senate and the treaty ratification process by having the EPA declare CO₂ a pollutant?

II. The EPA's Authority Under the Clean Air Act of 1990²

The current structure of the Clean Air Act, including its most recent amendments in 1990, tells us much about whether Congress intended to authorize the EPA to regulate CO₂ as a pollutant. Generally, there are three types of pollution-control programs authorized in the Act. Unless CO₂ regulation falls within one of the three general categories of pollution control authorized by the act, the EPA does not have authority to regulate it.³ In a memorandum prepared by the EPA's lawyer's, the agency claims that it has authority to regulate CO₂ under all three programs.⁴

Under the first program, there are regulations aimed at reducing the amount of a specific pollutant in ambient air in a given location. These regulations are aimed at controlling what are known as “criteria pollutants.” Under the criteria pollutant program, EPA has authority to issue National Ambient Air Quality Standards (“NAAQS”) for any air pollutant that it believes “may reasonably be anticipated to endanger public health or welfare.” The term health refers to effects on humans while “welfare” refers primarily to effects on vegetation and physical structures, but also includes effects on “weather, visibility, and climate”.⁵ If the EPA determines that a substance being emitted into the air is harmful, it issues what it calls “primary” and “secondary” NAAQS to protect “health” and “welfare” respectively. These standards take the form of acceptable concentration levels of the targeted substance, i.e., the pollutant, in the atmosphere. The EPA follows this procedure for each substance that it determines to be a pollutant.⁶

The structure of this regulatory plan was created to deal with the problem of air pollution on a pollutant-by-pollutant basis. Further, its focus is on pollution levels in specific localities. Therefore, the majority of the actual work in getting the pollution reduction job done is delegated

² Unless otherwise noted, quotes and information in this section are from the Clean Air Act, Sections 111-112.

³ In addition, agency action under some provisions of the Act are also limited by two recent acts of Congress, the Unfunded Mandates Reform Act (UMRA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). UMRA requires EPA to prepare a cost-benefit analysis in advance of major regulation and to select the most cost-effective regulations. SBREFA also directs administrative agencies to consider the costs of regulations and to avoid unnecessary burdens on small business. If EPA ignores these procedures, a challenge to its action can be brought on that basis.

⁴ April 10, 1998 Memorandum of Jonathan Z. Cannon, General Counsel, EPA, “EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources,” (“Cannon Memo”).

⁵ Specifically, the Act defines welfare to include “effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate.”

⁶ The listing of a substance as a criteria pollutant is a lengthy and elaborate process involving scientific review, the production of an in-depth report called a criteria document, and the publication of that document. An independent committee of scientists is charged with reviewing and advising the EPA on the scientific work in the document. See Clean Air Act section 109(d), 42 U.S.C § 7409 (d).

to the states. To date, examples of “criteria pollutants” for which NAAQS have been established include carbon monoxide, lead, nitrogen dioxide, ground level ozone (smog), and particulate matter. With respect to the latter two, in a controversial decision, the EPA has significantly tightened its acceptable concentration levels (NAAQS).⁷

The second type of program authorizes regulations aimed at reducing emissions of certain pollutants from specific “new point sources,” i.e., factories, power plants, etc. These are referred to as “technology-based controls” because they focus on the technology used to control emissions. Under this program, the EPA has authority to establish “new source performance standards” (“NSPS”) for sources that emit pollutants. The focus of regulation here is different than that of the criteria pollutant program. NSPSs focus on emissions from particular sources rather than overall levels of the pollutant in the atmosphere. Typically these regulations require installation of emission-reducing equipment on sources emitting pollutants.⁸ Examples would include requirements that factories or power plants install smokestack scrubbers or other emission control equipment. Thus, instead of directly aiming to reduce pollutants to a specific overall level in the ambient air, these regulations are aimed at limiting the amount of pollutants that particular sources or categories of sources can emit.

In promulgating these regulations, the EPA is to take into account the cost of achieving such reductions when setting the regulatory requirements. Therefore, the agency is constrained to setting its standards to levels that are actually “achievable” and to technology whose “cost does not outweigh the benefits.”⁹

The last of the three main pollution-control programs of the Clean Air Act combines the approaches of the first two in that it both sets overall allowable levels of the pollutant in the atmosphere and mandates particular technology that is to be used to achieve the result. This program is aimed at controlling emissions of so-called hazardous air pollutants (“HAP”). These take the form of national emissions standards requiring the use of maximum available control technology. Examples of regulations that have been implemented under this program include standards and procedures for the permissible level of asbestos that can be released during demolition or removal and acceptable levels of methylene chloride and required storage and cleaning equipment to be used in the manufacture of flexible polyurethane foam products.

⁷ For an excellent discussion of these regulations see Stephen Huebner and Kenneth Chilton, “EPA’s Case for New Ozone and Particulate Standards: Would Americans Get Their Money’s Worth?” *Policy Study* No. 139 (St. Louis, Mo.: Center for the Study of American Business, June 1997). See also the discussion of the court challenge on delegation grounds to these new standards later in this article.

⁸ Clean Air Act section 111(e), 42 U.S.C. § 7411(e).

⁹ For a discussion of methodological problems associated with making such calculations when dealing with the issue of global warming, see Roy E. Cordato, “Global Warming, Kyoto, and Tradeable Emissions Permits: The Myth of Efficient Central Planning,” *Studies in Social Cost, Regulation, and the Environment*, No. 1 (Washington, DC: Institute for Research on the Economics of Taxation, September 1999).

Under this program, the EPA is to compile and periodically revise a list of “pollutants which present, or may present, *through inhalation or other routes of exposure*, a threat of adverse human health effects, . . . or adverse environmental effects, whether through ambient concentrations, bioaccumulation, deposition, or otherwise. . . .”¹⁰

III. Would the EPA's Regulations be Constitutional?

A. Non-Delegation Doctrine Analysis

Historically, the non-delegation doctrine has simply been the application of the principle of separation of powers to Congress's power to make law. As noted above, under the Constitution, Congress legislates, and the courts and the executive implement that legislation.¹¹ The non-delegation doctrine was summarized succinctly in 1892 by Justice Harlan. “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”¹² Unfortunately, what was “universally recognized” in 1892 goes almost unnoticed in 1999.

Although the non-delegation doctrine still exists in principle, its use and effect has been vastly curtailed in practice, making room for the administrative state. Modern courts will generally strike down a congressional delegation to an administrative agency only where Congress fails to provide an “intelligible principle” to guide the agency's actions.¹³ Accordingly, an agency has broad discretion to impose regulations and set policy to carry out its understanding of Congress's “intent.”

Furthermore, courts have generally accepted the delegation of power to the EPA under the Clean Air Act as valid. Thus, it is unlikely that a Court would seriously consider a challenge to EPA's overall power under the Act. It should come as no surprise, therefore, that the EPA has concluded that the Clean Air Act confers the authority to regulate CO₂.

It is likely that judicial acquiescence in Congress's delegation of authority under the Clean Air Act would be supported by an argument that emerged in Supreme Court jurisprudence around the turn of the century. It holds that in an increasingly diverse and industrialized society, where

¹⁰ Clean Air Act section 112(b)(2), 42 U.S.C. § 7412 (b)(2).

¹¹ U.S. Constitution, Article I, Section 1, “*All* legislative Powers herein granted shall be vested in a Congress” and Section 8, “Congress shall have the Power . . . To make *all* Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” (emphasis added).

¹² *Field v. Clark*, 143 U.S. 649, 692 (1892).

¹³ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *South Dakota v. United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated after the government changed its position*, 117 S.Ct. 286 (1996).

scientific expertise is often needed, some areas are too complex for Congress to regulate unaided. This doctrine has also helped lay the foundation for the vast expansion of administrative agencies allowing for broad delegations of power. It remains today as a forceful adversary of representative government.

A legitimate counter to this argument is that, with respect to global warming and EPA's authority to regulate CO₂, science and technology are not really the issue. In this case the EPA would actually be making policy decisions about how much to regulate, at what cost, and to which elements of society. These are not questions that call for scientific expertise. They are the tough decisions that the American people and the Constitution have entrusted to representative officials, not isolated unchecked administrative agencies.

The overall conclusion, however, is that it is unlikely that a court would strike down an entire section of the Clean Air Act as unconstitutional on delegation grounds. The most recent example of this was the D.C. Circuit Court's decision in the case *American Trucking Assoc. v. U.S. E.P.A.*,¹⁴ in which the court took its most aggressive position under the non-delegation doctrine in decades. Despite the Court's strong analysis, it stopped short of striking down any provision and simply remanded the challenged agency rules to the EPA, giving it another chance to get it right.¹⁵ Although this decision is an important step toward revitalizing a non-delegation doctrine with real force, it is clear that there is a long way to go before the courts are ready to use the doctrine as a test of constitutionality and as a means of enforcing the limitations of separations of powers.¹⁶ Until then, the likely outcome of any legal challenge to agency action on delegation grounds is that the court may place some limitation on the agencies power or remand certain rules to the agency for a better fit with what Congress intended in the statute, but the statutes themselves will survive.

B. Challenging EPA CO₂ Regulation Under the Non-Delegation Doctrine

As just noted, it is no longer typical for courts to strike down legislation based on the idea that the legislature did not have the constitutional authority to delegate certain decision making powers. Modern non-delegation challenges to regulatory decisions tend to revolve around whether a regulatory agency is acting within the boundaries of the statute that it is being invoked.

¹⁴ 1999 U.S. App. Lexis 9064 (May 14, 1999).

¹⁵ The court in *American Trucking* heard delegation challenges to two major rules promulgated by the EPA under the Clean Air Act that would have dramatically reduced the allowable levels of ozone and particulate matter in the air. The court held that the EPA construed the relevant Clean Air Act provisions “so loosely as to render them unconstitutional delegations of legislative power.” *American Trucking*, 1999 U.S. App. Lexis 9064, *7. But instead of striking down those provisions of the Act as unconstitutional delegations, the Court remanded the rules to the EPA to give it — rather than Congress — a chance to articulate an interpretation of the agency's power under those provisions that would pass muster.

¹⁶ Moreover, on June 28, 1999, the EPA and intervening environmental parties petitioned for a rehearing of the case by the entire D.C. Circuit Court, leaving the future of this decision in doubt.

In other words, the non-delegation doctrine has devolved from constitutional analysis to simple statutory analysis. Modern courts tend to look at whether the statute in question conveys the powers being invoked and not whether the legislature has the constitutional right to convey these powers. If the EPA decided to list CO₂ as a pollutant under one of the three sections of the Clean Air Act discussed above, how might legal challenges to their authority be considered?

1. CO₂ As a Criteria Pollutant

In deciding to list CO₂ as a “criteria pollutant” (see section II above) on the basis of its effect on climate (EPA’s strongest argument), the EPA would impose regulations that would require reductions of CO₂ when accumulated levels reached a certain threshold. One possibility that has been discussed would be to establish a CO₂ tradeable permit program similar to the existing emissions permit program for sulfur dioxide, which was established as part of the 1990 Clean Air Act Amendments.¹⁷ If a legal challenge to such an action by the EPA were filed, the court's analysis would need to include consideration of many questions, including, 1) whether there was sufficient scientific evidence to support the listing of CO₂ as a criteria pollutant, 2) whether CO₂ is a substance that endangers public health or welfare, and 3) whether there is any science to support the level of CO₂ emissions that would be set by the agency,¹⁸ or more fundamentally, whether there is evidence that there is a specific level of CO₂ at all that, if met, would reduce the likelihood of global warming. In other words, does CO₂ promote global warming, is global warming harmful, and would the EPA regulations prevent the harm?

The answers to all of these questions involve scientific expertise and are beyond the scope of this paper. However, there are certain fundamental questions that underlie all of these. Global warming involves a number of so-called greenhouse gases, of which CO₂ is only one, whose collective effect, after reaching a certain level, is alleged to cause an excessive warming of the Earth. These gases are produced and emitted throughout the world. Opponents of potential CO₂ regulations argue that CO₂ reductions in certain locations, even if they were to consist of the complete elimination of U.S. emissions, would not result in global “attainment.” In other words, unilateral action on the part of the U.S., even if the science behind the Kyoto agreement is accepted, would not change the outcome in terms of the likelihood of future global warming.¹⁹ This would go to the issue of whether there exists certain technology or other mechanisms for

¹⁷ See Cordato, *supra* n. 9.

¹⁸ On this issue, it is likely that the EPA would be guided by the targets of the Kyoto Protocol. The science behind these targets is controversial and would have to be considered.

¹⁹ Many of the references to arguments made by opponents to EPA's claimed authority to regulate CO₂ were taken from the Brief of the National Mining Association, *The Authority of EPA to Regulate Carbon Dioxide Under the Clean Air Act*, at 26, Oct. 12, 1998.

reducing U.S. CO₂ emissions enough to affect global levels.²⁰ In addition, in a recent study in *Science*, it has been argued that the U.S. and Canada are net absorbers of CO₂, meaning that vegetation in these two countries actually use up more CO₂ than is emitted.²¹ It seems from these facts alone that a court could conclude that EPA does not have authority to regulate CO₂ under this program, i.e., Congress did not intend for the agency to address global environmental issues when it delegated power to regulate substances that “endanger human health.”

This raises other questions that may cloud the issue even further. The first is whether the EPA has the scientific support to establish that CO₂ endangers public health. While there may be some evidence to show that CO₂ may affect climate and weather (but whether for good or ill is unclear), or affect other things considered under the broad definition of “welfare,”²² opponents contend that there is no scientific evidence to show that CO₂ endangers public health.²³ As a general proposition, CO₂ is essential for the existence of life itself, and many scientists argue that increased levels of CO₂ in the atmosphere may enhance social welfare by encouraging increased crop yields.²⁴

All of these questions are complex and scientific in nature. They are not pure legal questions but mixed questions of law and fact that the courts are not necessarily equipped to answer. As noted above, this fact alone could lead the courts to rule in favor of the EPA. When faced with such questions, courts often defer to the “expertise” of the agency unless there is evidence of arbitrariness in its decision making.²⁵ Therefore, the outcome of a legal challenge could be that the court upholds the EPA’s action or at best merely restricts it to some degree by

²⁰ For this reason, EPA itself has recognized that the criteria pollutant regulatory structure does not apply to global atmospheric issues. Section 40 C.F.R. § 50.1 (e) defines “ambient air” — the area over which the EPA has authority to regulate under this section — as “ that portion of the atmosphere, external to buildings, to which the general public has access.”

²¹ S. Fan, M. Gloor, et.al., “A Large Terrestrial Carbon Sink in North America Implied by Atmospheric and Oceanic Carbon Dioxide Data and Models,” *Science*, No. 282, October 16, 1998, pp. 442-446.

²² The evidence supporting CO₂’s role in the global warming scenario is hotly debated. There is hardly a consensus on the issue. In fact, the mounting evidence over the most recent years demonstrates that the forecasts for global warming were greatly exaggerated. This new evidence suggests that global warming may not even be occurring. See S. Fred Singer, *Hot Talk, Cold Science: Global Warming’s Unfinished Debate*, (Oakland, CA: The Independent Institute, 1997).

²³ Gerald H. Yamada, *EPA Lacks Authority to Regulate Carbon Dioxide Emissions*, Legal Opinion Letter, (Washington Legal Foundation, October 30, 1998).

²⁴ Elizabeth Cullota, “Will Plants Profit from CO₂?” *Science*, Vol. 268, May 1995, p. 654 and Graham D. Farquhar, “Carbon Dioxide and Vegetation,” *Science*, Vol. 278, November 21, 1997, p. 1411.

²⁵ *Chevron v. NRDC*, 467 U.S. 837, 843 (1984).

perhaps requiring a more specific finding of harmful effects.²⁶ However, even if the court reached what seems to be the clear conclusion that EPA cannot regulate CO₂ as a “criteria pollutant under this provision of the Act, the agency can continue its fight. As noted, it has claimed authority under all three provisions discussed above.

2. Regulation Under Emission Control Program

EPA could decide to regulate CO₂ under the emissions control program in Section 111 of the Clean Air Act. Recall, regulations under this program mandate the use of specific emission-reducing technology. The EPA could state that all sources of CO₂ emissions must use available technology to reduce CO₂ levels.

In challenging this decision, opponents could point out that there are no cost-effective systems of emission control, either commercially available at the present time or even projected to be commercially available in the foreseeable future, for controlling carbon dioxide emissions from stationary sources. This argument is based on the language of the Act that places limits on EPA's power by requiring that the level of emissions to be obtained must be achievable.²⁷ That means the technology has to have been shown to be reasonably reliable and to serve the purposes of emission control without being “exorbitantly” costly.

The problem here, as with an attempt by EPA to regulate CO₂ emissions as a criteria pollutant, is that any court asked to review such actions would be faced with very complex scientific issues. Whether certain technology can adequately achieve reduction of emissions without exorbitant costs is bound to be a highly specific and science-based inquiry. So even though it seems that the above analysis favors striking down the regulation, a court could uphold the regulation in deference to the agency's expertise.

3. Regulation Under Hazardous Air Pollutant Program

Part of any challenge to EPA's authority under the two programs just discussed is that neither approach can address the alleged environmental harm posed by CO₂. Since the hazardous air pollutant program is, in large part, a combination of the first two approaches, it is also unlikely to encompass CO₂ regulation. But an additional and more direct challenge to EPA's authority can be made based on the statutory language of this section of the Clean Air Act.

The purpose of this section of the act is to regulate “pollutants which present, or may present, *through inhalation or other routes of exposure*, a threat of adverse human health effects,

²⁶ See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (“Benzene case”) (recognizing a finding of “significant risk” as a limitation on the agency's discretion under the Clean Air Act).

²⁷ *National Lime Association v. EPA*, 627 F.2d 416, 429-33 (D.C. Cir. 1980).

. . .”²⁸ Unlike all other pollutants that are regulated under this section of the act, there are no adverse human health effects from direct exposure to CO₂. The only suggested health problems that are associated with increases in atmospheric CO₂ are related to increases in tropical diseases that may occur if global warming occurs.²⁹ But this would not be an effect from direct exposure to CO₂. To the contrary, the alleged adverse effect of CO₂ would only result by way of a route that is circuitous: The reaction of CO₂ and other greenhouse gases in the atmosphere, could warm the climate, possibly making areas of the U.S. more conducive to insects carrying tropical diseases, which might lead to an increase in those diseases. This is in marked contrast to the direct and scientifically supported health effects caused by the other hazardous air pollutants listed in section 112, i.e., carcinogenic, mutagenic, teratogenic, and neurotoxic substances. The legislative history discussing this section of the Act describes hazardous air pollutants as those “that pose serious health risks. . . . They may reasonably be anticipated to cause cancer, neurological disorders, reproductive dysfunctions, other chronic health effects, or adverse human health effects.”³⁰ No credible argument can be made that any health risk associated with CO₂ even approaches any of the types of effects that Congress made clear it was authorizing EPA to control. Given that the clear language and focus of this section is to reduce adverse human health effects from direct exposure to pathogenic or otherwise toxic substances, regulation of CO₂ within that rubric simply does not fit. Regardless, EPA specifically claims that it has authority to regulate CO₂ under this program.³¹

IV. Restoring Accountability

A. Congress, Not The Courts, Must Act

In light of the above analysis, it would appear that the EPA would be hard pressed to defend itself against legal challenges to its authority to regulate CO₂ under any part of the Clean Air Act. On the other hand, the most realistic conclusion that can be drawn is that it is not at all clear how a court will interpret the various statutory language or whether a court will simply defer to the agency's claimed expertise in scientific areas. What is important to recognize is that the EPA has a strong enough argument for authority that it could gamble on instituting CO₂ regulations and see what happens in court if a challenge is brought. The agency has little to lose by taking that chance.

²⁸ Clean Air Act section 112(b)(2); 42 U.S.C. § 7412(b)(2).

²⁹ Ironically it is also being argued that a warmer climate will bring about social benefits in terms of a healthier population. See Thomas Gale Moore, *Climate of Fear: Why We Shouldn't Worry About Global Warming*, (Washington: DC, The Cato Institute, 1998).

³⁰ Report of the House Committee on Energy and Commerce on H.R. 3030, H. Rep. No. 101-490 Part 1, 101st Cong. 2d Sess. (1990) at 350.

³¹ See Cannon memo, *supra* n. 4.

As described, allowing the EPA to set global warming policy by promulgating CO₂ regulations does not adhere to the constitutional separation-of-powers mandate that elected officials make the laws. Instead, that power is shifted to an unchecked part of the government, i.e., administrative agencies. Our elected officials are charged with making the hard political, economic, and moral decisions that are the core of any policy decision. Nonetheless, Congress has chosen in many instances to delegate this responsibility to government agencies whose power tends to be left unchecked. The harm is even worse when those elected officials have made their contrary position on the issue abundantly clear, as is the case with implementation of the Kyoto agreement. When policy decisions are left up to unelected regulators, many levels removed from any entity accountable to the people, the protection of representative government fails and the people are left at the mercy of whoever is in charge of the regulatory agency. Thus, reform is necessary to restore our freedoms and return our government to the balanced course set by the founding fathers.

B. Some Legislative Possibilities

1. Federal Appropriation Law: A Stop Gap Measure

EPA's authorization for appropriations under the Clean Air Act ended on September 30, 1998. Without money, there is very little that the agency could do to implement any new regulations, not to mention maintain existing programs. However, the agency is allowed to continue current programs through annual appropriations from Congress. That presented an opportunity for Congress to directly address issues like the possible regulation of CO₂. In its appropriation to the EPA, which was passed last fall, Congress expressly prohibited EPA from using any of its funds for “the purpose of implementation or in preparation of implementation, of the Kyoto Protocol.”³² While there could be an argument raised as to specifically what this language prohibits,³³ at bottom it clearly expresses Congress's intent to bar the EPA from implementing any program designed to accomplish the goals of Kyoto, one of which is reducing CO₂ levels. This is a very powerful first step toward shackling EPA in this area. But, it is at best a stop gap measure.

What steps may come next is uncertain. Congress may take a different view of the issue after the next elections. The Presidency will soon change hands and the federal judiciary is facing a potential shift as well. There is no guarantee that the Congress will be willing to place similar restrictions on EPA's authority in the future.

Furthermore, the Clean Air Act could be sent to the floor some day for full re-authorization. Depending on the inclinations of Congress at the time, the Act could be rewritten

³² Pub. L. No. 105-276, signed October 21, 1998.

³³ The EPA could argue that performing research and investigation activities regarding CO₂ regulations, or other such carefully crafted programs, would not be aimed at the same goals as Kyoto, or some other creative interpretation of Congresses language, but its efforts to regulate CO₂ are drastically hampered by this language.

to expressly include authority to address global warming. This would certainly be encouraged in a Gore administration. In addition, Governor George W. Bush has recently expressed a belief that global warming is occurring. Consequently, it is not certain that the next Administration would favor a less zealous approach by the EPA, whichever party wins the White House. While it seems that global warming regulations are dead for this current appropriation year, and possibly the remainder of this Congress, all bets are off for 2001.

2. Congressional Responsibility Act

A more lasting solution to cure the ills of delegation was introduced in Congress on June 22, 1999 by Representative J. D. Hayworth (R-AZ) and Senator Sam Brownbeck (R-KS). H.R. 2301, known as the Congressional Responsibility Act, would require all major agency rules to be positively enacted into law by Congress. The bill provides expedited procedures for the passage of such laws and requires the agency to provide a concise statement of its basis and purpose for the proposed regulation. Under the procedures suggested, a vote on the final passage of the bill must be taken on or before the 60th calendar day after the date of its introduction.

This proposal embodies a much better solution than reliance on a year-by-year appropriations limitation or reliance on the courts for case-by-case action. It also gets to the heart of the issue by limiting Congress's ability to delegate legislative power to the agencies it creates and requiring Congress to take explicit responsibility for major regulations. It is unclear what the chances are that this bill will get the support it needs to become law, but it stands as the most hopeful method of limiting the power of administrative agencies.

3. State Laws Declaring Non-compliance with Kyoto CO₂ Regulations

Another way that opponents of global warming regulation are attempting to combat the specter of EPA CO₂ regulations is by urging individual states to pass laws declaring that they will not comply with Kyoto regulations that are not approved by Congress. Such state actions have the effect of increasing the political costs to EPA and politicians who would support the agency's efforts. Hence, the EPA is warned before it even decides to start down the path of CO₂ regulation that it will be in for a real fight with the states when it tries to enforce those regulations. Since much of the Clean Air Act's regulatory structures relies on the states to do the work of enforcement, states' refusal to comply would present a serious obstacle for the EPA.

However, the force of this state opposition would be lost if Congress re-authorizes the Clean Air Act to include global warming authority. At best, under the current non-delegation doctrine, opponents would be left with only a statutory challenge to address the extremes of agency action. The broad delegation of authority would likely be here to stay.

V. Conclusion

The situation with the Kyoto Treaty demonstrates how politicians can benefit by delegating unpopular decisions to regulatory agencies. If the political winds blow against strong

action on global warming, Congressmen can stand on their voting record against ratification of the treaty. If the winds shift, they can announce support for the EPA's potential CO₂ regulations, claiming that their objection to the treaty was to the specifics of the Kyoto Protocol itself. The only way to shake-up their comfortable win-win situation is to make our representatives accountable again for the regulations that flow from the laws they enact.

As in many other areas, prevention of costly regulatory excesses with respect to global warming depends on the people and the courts taking a principled stand, namely, that a broad delegation of authority to regulatory agencies is a perversion of our representative system of government and will not be tolerated. The costs of allowing unchecked delegation of authority to regulatory agencies are huge and pervasive. They will touch every one of us. In the particular case of global warming regulation by the EPA, the costs would be in the hundreds of billions of dollars annually, and involve significant reductions in employment and income as well as personal freedom.

It is time to correct the errors of procedure and structure that have been allowed to creep into government operations, and to restore a healthy, responsible governmental system.³⁴ These ills can be corrected by keeping elected officials accountable to the people for the laws that they make to govern us. The best chance for doing that is by reinvigorating the doctrine of non-delegation of legislative authority into a real test of constitutionality for the administrative authority of the Executive branch.

³⁴ For a bold and insightful treatment of the delegation problem and possible solutions, see David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven, CT: Yale University, 1993).

ABOUT IRET

IRET was founded in 1977 as a 501(c)(3) public policy research organization dedicated to the belief that constructive, free-market economic policies are essential for the nation's economic progress. To this end, IRET conducts research and analysis of the economic effects of tax, budget, and regulatory public policy initiatives. IRET is a leader in offering guidance to policy makers regarding fundamental tax reform that would eliminate the bias against saving and investment in the current tax system, including elimination of the estate tax, taxation of capital gains, and the double taxation of corporate income. IRET is also researching ways to replace Social Security with personal saving for retirement.

IRET has a reputation as a no nonsense resource for policy makers and opinion leaders. IRET relies on contributions from individuals, foundations, and corporations to perform its work. It accepts no government funding. IRET is the leading public policy institute in Washington focusing realistically on the growth aspects and economic consequences of federal policy changes.

IRET's founder, Norman B. Ture, was a distinguished tax advisor to Congress and served as Under Secretary of the Treasury for Economic Affairs in the Reagan Administration. Dr. Ture played a central role in the development of the Economic Recovery Tax Act of 1981. IRET's current President and Executive Director is Stephen J. Entin. Mr. Entin was Deputy Assistant Secretary for Economic Policy at the Treasury Department in the Reagan Administration. He prepared economic forecasts for the President's budgets, and the development of the 1981 tax cuts, including the "tax indexing" provision that keeps tax rates from rising due to inflation. Mr. Entin represented the Treasury Department in the preparation of the Annual Reports of the Board of Trustees of the Social Security System, and conducted research into the long run outlook for the system. He advised the National Commission on Economic Growth and Tax Reform (the Kemp Commission), assisted in the drafting of the Commission's report, and was the author of several of its support documents.

Prior to joining Treasury, Mr. Entin was a staff economist with the Joint Economic Committee of the Congress, where he developed legislation for tax rate reduction (the Kemp-Roth bill) and incentives to encourage saving. Mr. Entin is a graduate of Dartmouth College and received his graduate training in economics at the University of Chicago, majoring in macroeconomics, monetary policy, and international economics.