

Massachusetts v. the Environmental Protection Agency
The United States Supreme Court, April 2, 2007
No. 05-1120, 127 S.Ct. 1438, 2007 U.S. Lexis 3785, 75 U.S.L.W. 4149

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On October 20, 1999, a group of private organizations filed a rulemaking petition asking EPA to regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act." Petitioners maintained that greenhouse gas emissions have significantly accelerated climate change; and that the Intergovernmental Panel on Climate Change (IPCC)1995 report warned that "carbon dioxide remains the most important contributor to [man-made] forcing of climate change."¹ The petition further alleged that climate change will have serious adverse effects on human health and the environment.

As to EPA's statutory authority, the petition observed that the agency itself had already confirmed that it had the power to regulate carbon dioxide. In 1998, Jonathan Z. Cannon, then EPA's General Counsel, prepared a legal opinion concluding that "CO₂ emissions are within the scope of EPA's authority to regulate," even as he recognized that EPA had so far declined to exercise that authority.² Cannon's successor, Gary S. Guzy, reiterated that opinion before a congressional committee in 1999 just two weeks before the rulemaking petition was filed.³

Massachusetts and a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked the Supreme Court to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.⁴

In response, EPA, supported by 10 intervening States and six trade associations, correctly argued that the Supreme Court could not address those questions unless at least one petitioner has standing to invoke its

¹ Slip opinion p. 22, 23.

² Id.

³ Id.

⁴ Id. , p. 14, 15

jurisdiction under Article III of the Constitution.⁵ Standing generally requires parties before the court to have suffered some type of injury that was caused by the party being sued and that can be redressed in the action brought before the Court.⁶

Section 202(a)(1) of the Clean Air Act provides:

"The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare"⁷

The Act defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." § 7602(g). "Welfare" is also defined broadly: among other things, it includes "effects on . . . weather . . . and climate." § 7602(h).

When Congress enacted the Clean Air Act, the study of climate change was in its infancy. In the late 1970's, the Federal Government began devoting serious attention to the possibility that carbon dioxide emissions associated with human activity could provoke climate change. In 1978, Congress enacted the National Climate Program Act, 92 Stat. 601, which required the President to establish a program to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications."⁸ President Carter, in turn, asked the National Research Council, the working arm of the National Academy of Sciences, to investigate the subject. The Council's response was unequivocal: "If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible A wait-and-see policy may mean waiting until it is too late."⁹

In 1987, Congress next addressed the issue when it enacted the Global

⁵ Id. p.15

⁶ Id. p.34.

⁷ Id. p.15,16.

⁸ Id. p.18

⁹ Id. p.18, 19

Climate Protection Act, Title XI of Pub. L. 100-204 finding that "manmade pollution – the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere -- may be producing a long-term and substantial increase in the average temperature on Earth," § 1102(1).

Congress directed EPA to propose to Congress a "coordinated national policy on global climate change, §1103(b), and ordered the Secretary of State to work "through the channels of multilateral diplomacy" and coordinate diplomatic efforts to combat global warming, § 1103(c). Congress emphasized that "ongoing pollution and deforestation may be contributing now to an irreversible process" and that "necessary actions must be identified and implemented in time to protect the climate." § 1102(4).

Meanwhile, the scientific understanding of climate change progressed. In 1990 the IPCC, a multinational scientific body organized under the auspices of the United Nations, published its first comprehensive report on the topic. Drawing on expert opinions from across the globe, the IPCC concluded that "emissions resulting from human activities are substantially increasing the atmospheric concentrations of . . . greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface." ¹⁰

Responding to the IPCC report, the United Nations convened the "Earth Summit" in 1992 in Rio de Janeiro. President George H. W. Bush attended and signed the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of "preventing dangerous anthropogenic interference with the [Earth's] climate system."¹¹ The Senate unanimously ratified the treaty.

The IPCC subsequently issued a second comprehensive report in 1995 concluding that "the balance of evidence suggests there is a discernible human influence on global climate"¹² The UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol. President Clinton did not submit the protocol to the Senate for ratification.¹³

¹⁰ Id. p. 20.

¹¹ Id. p. 21

¹² Id. p. 21, 22

¹³ Id. p. 22.

In 2001, EPA requested public comment on "all the issues raised in [the] petition," adding a "particular" request for comments on "any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA's consideration of this petition."¹⁴ EPA received more than 50,000 comments over the next five months.

Before the close of the comment period, the White House sought "assistance in identifying the areas in the science of climate change where there are the greatest certainties and uncertainties" from the National Research Council, asking for a response "as soon as possible." The result was a 2001 report titled *Climate Change: An Analysis of Some Key Questions* (NRC Report), which, drawing heavily on the 1995 IPCC report, concluded that "greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising."¹⁵

On September 8, 2003, EPA entered an order denying the rulemaking Petition and giving two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.¹⁶

In concluding that it lacked statutory authority over greenhouse gases, EPA observed that Congress "was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990," yet it declined to adopt a proposed amendment establishing binding emissions limitations.¹⁷ Congress instead chose to authorize further investigation into climate change. EPA further reasoned that Congress' "specially tailored solutions to global atmospheric issues," in particular, its 1990 enactment of a comprehensive scheme to regulate pollutants that depleted the ozone layer, see Title VI, 104 Stat. 2649, 42 U.S.C. §§ 7671-7671q -- counseled against reading the general authorization of § 202(a)(1) to confer regulatory authority over greenhouse gases.¹⁸

EPA reasoned that climate change had its own "political history".¹⁹ Congress designed the original Clean Air Act to address "local" air pollutants rather than a substance that "is fairly consistent in its

¹⁴ Id. 24, 25.

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¹⁶ Id. p.25

¹⁷ Id. p.26

¹⁸ Id.

¹⁹ Id. 27

concentration throughout the "world's" atmosphere;" declined in 1990 to enact proposed amendments to force

EPA to set carbon dioxide emission standards for motor vehicles and addressed global climate change in other legislation. Because of this political history, and because imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco, EPA was persuaded that it lacked the power to do so.²⁰ In essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it.²¹

Even assuming that it had authority over greenhouse gases, EPA explained in detail why it would refuse to exercise that authority. The agency began by recognizing that the concentration of greenhouse gases has dramatically increased as a result of human activities, and acknowledged the attendant increase in global surface air temperatures. EPA gave controlling importance to the NRC Report's statement that a causal link between the two "cannot be unequivocally established."²² Given that residual uncertainty, EPA concluded that regulating greenhouse gas emissions would be unwise.²³

The agency furthermore characterized any EPA regulation of motor-vehicle emissions as a "piecemeal approach" to climate change and stated that such regulation would conflict with the President's "comprehensive approach" to the problem, such as support for technological innovation, the creation of non-regulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change.²⁴ According to EPA, unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions.²⁵

Petitioners, now joined by intervenor States and local governments, sought review of EPA's order in the United States Court of Appeals for the District of Columbia Circuit.²⁶ Although each of the three judges on the panel wrote a separate opinion, two judges agreed "that the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rule making." 367 U.S. App. D.C. 282, 415 F.3d 50, 58 (2005). The court therefore denied the petition for review.

²⁰ Id. p.27,28.

²¹ Id. p.28.

²² Id. p.28, 29.

²³ Id. p.29

²⁴ Id.

²⁵ Id.p.29,30.

²⁶ Id. p.30.

The principal legal question in this case involves the question whether the state of Massachusetts had standing to bring this petition for review of EPA's refusal to act on greenhouse gas emissions from new cars. If Massachusetts did not have standing then the case was over as far as Massachusetts was concerned. The 2007 USSC decision devoted considerable time and effort to explaining the majority and minority's divergent views on this question.

Suffice it to say that a slim majority of court members found Massachusetts did have standing and the majority went on to consider EPA's justification for refusing to act.²⁷ A strong minority took issue with the finding of standing and attacked the majority's reasoning on the standing question in vigorous fashion.²⁸ While this discussion of standing requirements is enough to make the case an important one, there are a variety of other points discussed in the decision that give rise to other considerations that will affect Congress, policy makers, agencies and the regulated community. The remaining portion of this paper is about these "other" considerations.

The first point is that neither the majority nor the minority discussed the science of climate change in any direct way, other than perhaps to note that there is disagreement about the state of that science today. Scientists can debate science surrounding an issue, but judges generally will not do so. Those who support a science perspective on climate change will have to accept the risk of frustration when Courts do not share that view or more readily accept it without question.

To many, including the dissenting justices, the degree of concrete particularized injury that global warming causes to any single individual is uncertain. Global climate change as we know it is going to have fairly wide spread effects across the world. On an individual basis, however, these effects may be quite minimal. Is a minimal impact enough on which to base standing to move this litigation forward? While proponents of the need for regulation believe a catastrophe is likely if no regulation is enacted, there are many others who believe this concern is unfounded. Anyone who has a genuine concern for these issues must confront the fact that these conflicts are filled with emotion that can be used either to support the need to act or criticize taking action when concrete impacts are not known.

Who controls the environmental agenda in this country? EPA among its reasons for refusing to take regulatory action stated that taking such action would interfere with the President's international agenda. Congress also has a role as it wrote the laws which the court was interpreting. The public has a clear interest in seeing that the environmental agenda moves forward. The Supreme Court was generally unimpressed by the argument that the President's agenda should have priority over Congress or the public.

Executive agency officials are often cloaked with discretionary authority to act in specific situations. If discretion is involved, overturning a decision based on discretion is

²⁷ Id. p.35.

²⁸ Id. p.75-88.

generally considered difficult to do. But, discretion can not support a wholesale turning away from the problems and issues within the agency's purview. More is needed than simply saying the agency official decided not to act. So, if an agency uses discretion and decides not to act, what evidence must it establish to support its discretionary decision not to take action? The majority in this case found the agency's justification lacking in what it believed the agency needed to justify its action while the dissent asked the question, "What more could the agency have done to satisfy the majority justices?"

If any agency official decides that it would not be wise to regulate a specific problem at this time, is that an exercise of official discretion to manage the regulatory agenda or is it an abdication of agency responsibility?

What will be the net impact of this litigation on the problem to be redressed? What if that impact is slight? What if it will have no positive impact at all? What if we simply do not know what this impact will be? Assuming there are positive impacts what if these positive impacts can be easily offset by the actions of others who cannot be controlled? Should the case proceed in any or all of these situations?

Environmental law and regulation has been in place for about forty years. In more than one instance problems have been recognized that were not recognized when the laws were written. Should existing law cover "new developments" if the language of the law is reasonably broad enough and clear enough to address these new developments? Is it desirable for laws and regulations to be flexible, or should they be rigid in their scope and interpretation? Regulation of air emissions from agricultural facilities is a key example of this type of situation. How will this decision affect efforts to amend laws, such as CERCLA and EPCRA, to exempt animal manure as a source of regulated air emissions on grounds that these emissions were not intended to be covered when the law was written? If courts interpret laws in a broad fashion to incorporate these new developments under existing laws are the courts demonstrating the flexibility that Congress intended the law to have or are they overstepping their judicial authority by "making law" in areas where Congress did not explicitly intend to go?

Perhaps the most telling result of this decision is to reinforce the philosophical divisions among the Court's current members. As another 5-4 decision, movement of one vote could make the dissent's position the majority position. Some may disagree with the value to be gained from reading dissenting opinions, but in this context, the dissent may well be the law some day and understanding its philosophical foundation is worth the effort to read and understand what the dissenting justices said and thought about the issues in the case. The dissent has a stronger argument than the majority decision, but limited its focus solely to an attack on the legal requirements of standing. While the three elements of standing, viz. injury, causation and redress ability, are legitimate questions to ask in any lawsuit, the divergence in legal philosophy among the justices is most apparent in how the majority and dissenting justices staked out their positions.

