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Op/Ed

## Draconian Energy Regulation Will Never Die

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Sure, global warming policy seems off of the political radar, but it is still in the air, homing fast and true on your pocketbook via the stealth technology of the courts and the EPA. It will never be shot down.

Many would like to believe that cap-and-trade, carbon dioxide taxes, or simple command-and-control regulation went into a coma when the Senate failed to pass any

companion legislation to the House's American Clean Energy and Security (ACES) Act, which squeaked through 219-215 on June 26, 2009. And then, the myth goes, it died in the House blowout last November.

The reasoning in support of this is pretty straightforward. Almost every close House race in 2010 was won by a Republican. In the Senate, the dogfights all went Democrat. The difference between the two? The House passed ACES while the Senate twiddled down the clock.

This would all be correct if we were true to our Constitution, which established a federal government of profoundly limited power, granted great authority to the states, and, perhaps most important, limited the executive branch to mainly to "take Care that the Laws be faithfully executed" (Article II). But, as my Cato Institute colleague Roger Pilon so eloquently points out, we live in a modern "Executive State" where a massive amount of power has been delegated from Congress to myriad agencies (such as EPA) where unelected, lifelong careerists, with the approval and support of the Executive Branch regulate our lives where legislators fear to tread, or, more accurately, are too chicken-bleep to tread.

And, thanks to the judicial tradition of deference to the expertise of these agencies, the courts have actually encouraged the growth of this constitutional miscarriage.

And so it goes with global warming. When ACES was under consideration, two inconvenient truths became apparent: it was the most draconian, intrusive piece of non-wartime legislation ever passed, and, even if dozens of nations that had commitments under the U.N.'s Kyoto Protocol on global warming adopted and fulfilled it, the amount of global warming that would be prevented would be, within any reasonable time horizon, too small to even measure.

Draconian? How about, a mere 38 years from today, ACES would grant the average american the per capita carbon dioxide emissions of 1867? Futile? How about reducing global warming by about 0.07°C per 50 years, even with the participation of all those Kyoto nations?

And so, as carbon dioxide regulation died in the Senate, it was reborn via the Supreme Court and the EPA.

In its 2007 decision, *Massachusetts v. Environmental Protection Agency* the Court reversed its policy of deference to agencies and instead inserted itself smack in the middle of the political debate on global warming. The majority (5-4) opinion, authored by Justice Stevens, did so in its first words: "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related."

From that statement, which is devoid of any policy implications, the Court went on to command the EPA to move forward. The court could have also stated that there are

plenty of “respected scientists” who believe that the future warming trend, while likely, has been grossly overestimated in magnitude and impact.

Specifically it directed the EPA to determine whether or not carbon dioxide was a “pollutant,” endangering human health and welfare, and, if it found that to be the case, then it must regulate it under the Clean Air Act Amendments of 1990. Forget that the authors of that law, such as Michigan’s John Dingell, have stated that the Act was never intended to regulate greenhouse gases.

And so, not surprisingly, on Dec. 7, 2009, the EPA found indeed that carbon dioxide is a pollutant, endangering our health and welfare, and soon after began to propose regulations, beginning with fuel economy standards, but certainly not ending until it is no longer “endangering.” They based this largely on two reports on climate change, one from the United Nations’ Intergovernmental Panel on Climate Change and the other by the U.S. Climate Change Science Program. Both claim to be authoritative and comprehensive.

Ah, but can’t Congress simply tell the EPA that it cannot regulate greenhouse gases? Sure, but the Senate fell 10 votes short on this last week. And even if it did pass, the president would surely veto it. It will be a hot day at the South Pole when there are 67 votes to override.

Of course, we could change presidents, right? In that eventuality, the EPA will have to somehow undermine the authority of our own Climate Change Science Program in order to reverse its endangerment finding.

Fat chance of that not winding up in court—the same courts that got us into this mess in the first place. Regulations will stand until scientists stand up, which will be never, as long as there is such funding gold in them thar hills of global warming.

Do not kid yourself. Draconian regulation of energy—which touches almost every aspect of our daily lives—is not dead. It is, in fact, immortal.