

Apr 21

[Administration Concedes Global Warming is a Policy Question](#)

Posted by: [Carter Wood](#) under [Briefly Legal](#), [Economy](#), [Energy](#), [Regulations](#) on April 21, 2011 @ 10:05 am

Writing at the Cato Institute's blog, Cato@Liberty, Walter Olson gives us a single paragraph that captures why the Supreme Court should reject the Second Circuit's ruling that Connecticut and other states could sue five electric utilities for contributing to global warming. From "[AEP v. Connecticut: Global Warming as Political Question](#)":

By its nature, global warming is exactly the sort of policy question traditionally entrusted to the political branches: it is wholly unsuited to individualized justice based on links between particularized emissions and particularized effects, its proposed remedies are much disputed and likely to be the result of inevitably arbitrary compromise, sovereign negotiations with foreign actors play a crucial role, and so forth. As the courts have long recognized, one does not generate a case for judicial action simply by piling atop each other the propositions "something needs to be done" and "the political branches have not done it." Indeed, the Obama administration itself has more or less invited the Supreme Court to dismiss the action on political-question grounds.

The media coverage of Tuesday's oral arguments we read highlighted the Administration's argument that the need for the public nuisance suit by the states and environmental groups had been obviated by the Environmental Protection Agency's regulation of greenhouse gases. As [Greenwire framed it](#): "[The] Obama administration maintains that U.S. EPA, through its recent efforts to regulate greenhouse gas emissions, has "spoken directly to the question plaintiffs ask the courts to resolve."

Many accounts also cited Justice Ruth Bader Ginsburg's comment: "Asking a court to set standards for emissions sounds like the kind of thing that EPA does. I mean, Congress set up the EPA to promulgate standards for emissions, and . . . the relief you're seeking seems to me to set up a district judge, who does not have the resources, the expertise, as a kind of 'super-EPA.'" "

That analysis was certainly a big part of the story, but we struck by the comments from Acting Solicitor General Neal Kumar Katyal, arguing for the Obama Administration. Responding to questions from Justice Alito, Katyal conceded that the Court would be hard pressed to justify taking up a federal public nuisance complaint based on global warming, even if the EPA were not acting.

From [Page 30 of the transcript](#), Supreme Court oral arguments:

KATYAL: And, so, it would at least require this Court to extend quite dramatically Federal common law to cover this type of situation in which everyone is a potential perpetrator and everyone is a potential victim. And it would require the Court, in fashioning relief, to think through a number of things that the Federal courts haven't ever had to grapple with from the nature ...

JUSTICE ALITO: So, if there were — if there were no Clean Air Act, you would still say that this suit, a suit like this, would — would fail prudential standing, but you don't have a position as to whether there would be a claim under Federal common law?

GENERAL KATYAL: That is correct. We think it would still fail prudential standing because of the quantity and quality of the nature of the problem here, and the multitude of different policy judgments that would be required — that this Court would be required to undertake to adjudicate a Federal common law cause of action in the absence of a statute.

The Legal Information Institute's [Annotated Constitution explains prudential standing](#) thusly: “Even when Article III constitutional standing rules have been satisfied, the Court has held that principles of prudence may counsel the judiciary to refuse to adjudicate some claims.”

In embracing the “multitude of different policy judgments” as a rationale against court involvement, the Justice Department is explicitly calling greenhouse gas emissions and global warming matters of policy, which in the U.S. system of government are the purview of Congress.

The Administration should follow its own arguments, back off the EPA's regulation and leave the policy — and political — issues to Congress. Only the elected, legislative branch of government is able to resolve the multitude of competing policy questions.

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