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EPA's War on American Industry

The Senate is set to make a crucial vote to stop the EPA's unprecedented power grab.

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This Wednesday, the Senate is likely to vote on a measure from Senate minority leader Mitch McConnell to stop the Environmental Protection Agency from regulating greenhouse gases as pollutants. The vote will be among the most consequential of this decade.

The regulation of greenhouses under the Clean Air Act was triggered by EPA's determination that such gases pose a danger to human health. This is not because they actually pose any danger to human health, like real pollutants, but rather because their accumulation in the upper atmosphere could contribute to "dangerous warming" by 2050. Carbon dioxide is a ubiquitous product of all economic activity and of everything that breathes.

Giving EPA the power to regulate it is tantamount to letting it control virtually the whole economy. And unlike other pollutants, no effective, commercially practicable control technology exists. Where economic activity is found to produce too much CO₂ for EPA standards, that activity will simply have to stop. Hidden deep inside thousands of pages of technocratic jargon is a fact that should focus the attention of everybody. If not stopped this week, EPA's regulation of greenhouse gases risks an economic catastrophe.

According to some estimates, just in the next two years the new regulations could cost 1.4 million jobs and decrease U.S. business investment by 15 percent. One study estimates that GDP will be half a trillion dollars less by 2030. Another concluded the cost of gasoline will rise by 50 percent, electricity by 50 percent, and natural gas by 75 percent over the next 20 years. Transportation costs are the primary variable in food prices – so food prices will be affected. Low income Americans, who are particularly vulnerable to spikes in energy and food prices, will be hardest hit.

And all for what? EPA's own highly speculative estimates are that its regulations will have a nearly negligible impact on global temperatures. Indeed, given the many industries that will relocate to countries with more lax environmental controls, EPA regulations may actually hurt the global environment in the long run.

The Clean Air Act was designed to regulate emissions of pollutants that cause direct harm to human health. It was not meant to regulate atmospheric levels of gases that are produced by all biological process and which are part of the air we breathe. In order to find the power to regulate these gases in the Clean Air Act, EPA had to devise a fiendishly convoluted series of rule-makings.

It started with a pair of rules that made greenhouse gases a pollutant for purposes of regulating emissions from mobile and especially stationary sources. Under the Clean Air Act, every structure that emits more than 250 tons of a designated pollutant must obtain expensive emissions control equipment and file for expensive permits. It was ridiculous to subject CO₂ to this threshold: any 250 people sitting in a building exhale enough CO₂ to violate the Clean Air Act if CO₂ is regulated as a pollutant. According to EPA's own estimates, the number of businesses subject to onerous new requirements would increase from 12,000 to 6.1 million, including millions of restaurants and apartment buildings, most of which would simply have to shut down. EPA estimated the cost to governments and business at more than \$100 billion just in the first few years.

Turning this obstacle into an opportunity to seize still more power, EPA argued that it would be absurd to apply the statutory threshold to everyone, and then simply promulgated new emissions thresholds (at hundreds of thousands of tons) so that the new rules would apply only to industrial facilities such as refineries and power plants – its real targets all along. If any more proof were needed that EPA is out of control, it is now rewriting its own enabling statute at will.

Still worse was to come. Towards the end of last year, with most state legislatures in adjournment, EPA suddenly gave states just a few weeks (rather than several years as provided by the Clean Air Act) to rewrite their laws and regulations in order to implement the new federal standards, which were rushed into effect on January 2, 2011. Many states simply could not comply. At

least 13 are now subject to a moratorium on all new industrial construction or expansion of existing facilities. Now EPA is moving to take over permitting authority that the Clean Air Act clearly leaves to the states.

Every one of these actions is the subject of multiple lawsuits by states desperate to protect their industries.

It is difficult to imagine a clearer violation of the non-delegation doctrine and separation of powers under our Constitution than the Tailoring Rule. Congress cannot delegate legislative authority to the executive branch. Yet by rewriting the Clean Air Act to say whatever it wants, EPA is brazenly seizing that power from Congress. If the Tailoring Rule is allowed to become precedent, any federal agency that wants to rewrite its enabling statute need only adopt a regulation that would have absurd results, and then it can rewrite the statute to say whatever it likes.

EPA is also trampling on the constitutional prerogatives of the states. The requirement that states revise their laws and regulations to take account not only of the new pollutants, but also to "automatically update" for all future pollutants designated by EPA, is an unconstitutional commandeering of the states. The Supreme Court ruled in *U.S. v. Printz* (1997) that the Federal Government may not compel the State to implement, by legislation or executive action, federal regulatory programs." The Court noted that it never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." Yet that is in effect what EPA did when it required states to change their laws in a matter of weeks if they wanted to avoid a construction moratorium on industrial facilities. The Supreme Court has held that when the federal government induces State action under threat of some economic penalty, pressure turns into compulsion."

States are challenging EPA actions on these and other grounds, but the prospects for these lawsuits remain grim. Ever since caving in to Franklin Roosevelt's New Deal programs, the federal courts have become largely rubber-stamps for every expansion of federal power, however clearly unconstitutional. Indeed, ever since the Warren Court started "finding" all manner of rights in the Constitution, the federal courts have been perhaps even more guilty than federal agencies of violating separation-of-powers by legislating.

The EPA has encountered significant opposition even among Democrats, nearly a dozen of whom are on the record against regulating greenhouse gases. We are close to the votes needed for the McConnell amendment to make it into a small business bill that the president would almost certainly have to sign. One senior staffer tells me that Democratic senators Sherrod Brown of Ohio, Claire McCaskill of Missouri, Tim Johnson of South Dakota, and Ben Nelson of Nebraska will be the key votes.

The EPA has established the framework for subjecting the whole economy to draconian regulation. At stake are the prerogatives of Congress and of the states under our Constitution as well as the nation's economic well-being.

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