

Why Progressives Should Cool to “Global Warming” Lawsuits

BY PHIL GOLDBERG

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Environmental progressives have been urging the federal government to address climate change for more than 30 years. Many of these efforts have focused on setting limits on the emissions of carbon dioxide, methane, and other gases collectively referred to as “greenhouse gases” or GHGs. Presidents George H.W. Bush, Clinton, and Obama all negotiated international treaties on global emissions, and Congress has considered numerous climate-related bills. None of these efforts, however, has resulted in binding emission caps for U.S. operations, and Senate efforts to pass a “cap and trade” bill have been dropped. As a result, some progressives advocate a new arena for this battle: the courts, with lawsuits against a group of companies to directly force them to reduce emissions.

There are four lawsuits based on the premise that a handful of American companies, all associated with energy use and production, can be held

legally responsible for “global warming.” The suits claim that the companies engaged in operations or made products that contributed to the build-up of GHGs in the atmosphere, causing the earth to warm. The cases seek either reductions in emissions or payment for injuries caused by specific weather events, such as hurricanes and flooding, allegedly caused or made worse by climate change. The liability threat for these defendants is massive: billions of dollars in the current suits, injunctions against their operations, and new filings for future weather-related injuries.

For environmental progressives, the real purpose of this litigation is to use the threat of massive liability to force the companies to accept concessions on climate change policy. These lawsuits, first filed in 2004, were born of frustration with the political process, particularly under President Bush, for failing to take steps to combat climate change. Given the seeming

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demise of climate change legislation in the current Congress, many progressives have found achieving the same – or perhaps more stringent – policies in the courts an increasingly appealing option.

Climate change litigation, therefore, poses an important question for American democracy: Should any political group – progressive or otherwise – unsatisfied with its inability to achieve a specific policy objective through political activities, be able to sue individuals or corporate interests to force them to adopt those or similar policies anyway? The answer is likely to come from the U.S. Supreme Court.

The Four Global Warming Cases

Two of the four climate change cases were brought by state attorneys general. *Connecticut v. American Electric Power Co.* was filed against six power companies in the Midwest to require them, through litigation, to reduce emissions by three percent per year for 10 years. The California attorney general filed a separate lawsuit, *California v. General Motors Corp.*, to subject carmakers to liability for selling cars that emit carbon dioxide exhaust.

The other two cases resulted from weather events. *Comer v. Murphy Oil Co.* is a purported class action of property owners against three dozen companies associated with the production and use of energy

products, such as oil, gas and electricity, for Hurricane Katrina-related property damage. The allegation is that the companies' emissions caused global warming, which caused the gulf to warm, which intensified the hurricane and caused the plaintiffs' injuries. *Native Village of Kivalina v. ExxonMobil Corp.* was brought against many of the same companies by a village in Alaska, alleging that climate change has caused the erosion of a sea ice barrier protecting the village from the Arctic Ocean. The villagers state that they will be evacuated when sea levels rise without the protection of that outer sea wall.

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Federal trial judges dismissed all four of these claims as nonjusticiable political questions, holding that they were not cases or controversies subject to the judiciary's jurisdiction under Article III of the U.S. Constitution which is the provision that establishes the scope of the federal judiciary's authority. Sitting in geographically diverse jurisdictions, the four judges recognized, as the *General Motors* judge put it, that the litigation "expose[s] automakers, utility companies, and other industries to damages flowing from a new judicially-created tort for doing nothing more than lawfully engaging in their respective spheres of commerce."

In 2009, Federal Courts of Appeals for the Second and Fifth Circuits, respectively, reinstated the *AEP* and *Comer* claims. The panels found that, regardless of the political nature of the claims, the suits were not barred by the hard-to-reach standards of the political question doctrine and that the cases are no different from any other tort suit. Defendants in *AEP* recently filed their *certiorari* petition with the Supreme Court. The Fifth Circuit vacated *Comer* and invited plaintiffs

to petition the Supreme Court as well. The Ninth Circuit recently received briefs to consider the *Kivalina* dismissal, and *General Motors* has been voluntarily withdrawn.

The Pitfalls of Legislation Through Litigation

As the district court judges understood, to the extent plaintiffs' claims allege that rising GHG emissions results from lawful energy use, they strike at the heart of American energy policy and our way of life. Since the Industrial Revolution, Congress and administrative agencies have responded to a variety of concerns, including demands on energy production, reducing dependency on foreign energy sources, worker safety, environmental impacts, and trade-offs among various energy sources. All of these factors are also balanced against the affordability

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of energy products, both for businesses and consumers who use energy for heating, air conditioning, fueling cars, turning on lights and many other staples of modern life.

If courts were to adjudicate these lawsuits, judges and juries would have to impose their own bright line emission standards. A defendant emitting below the court-imposed limit would be deemed a "reasonable" or nontortious emitter of the gases in that case, whereas a defendant emitting above that amount could face liability. As the *Comer* judge explained, courts are simply "ill-equipped or unequipped" to make these decisions, which are more "appropriately left for determination by the executive or legislative branches."

The shortcomings of judicially-set emission standards are numerous. Of most concern is that, unlike Congress and the Administration, courts make decisions based only on the limited information presented as evidence by the parties in a particular case. The Federal Rules of Evidence are very restrictive as to what can be introduced as evidence for deciding a case, and judges cannot cross-examine or bring in their own witnesses. Thus, courts cannot consider non-party emitters in the U.S. or around the world or the impact of changing U.S. energy policy. As a result, the caps might differ from jurisdiction to jurisdiction, and may have no impact on reducing global emissions.

From a jurisprudence perspective, it is particularly troubling that plaintiffs would have the extraordinary, and inappropriate, power to pick winners and losers in the climate change debate by deciding whom to sue. As the *Kivalina* court explained, despite the myriad of domestic and foreign sources of GHGs, the plaintiffs were the ones who made the "political judgment that the two dozen Defendants [associated with energy production] . . . should be the only ones to bear the cost of contributing to global warming."¹

A Defense of Progressive Proceduralism

The philosophy behind the climate change cases has spurred significant debate among progressives over the propriety of pursuing action on climate change via private sector litigation. Some progressives believe, as a prominent Washington environmental attorney recently told me, "the more lawsuits the better." This Machiavellian approach to the litigation suggests that even if the lawsuits are not about enforcing laws or seeking recompense from wrongdoers – which, after all, are the purposes of the American civil justice system – the litigation serves a higher goal: advancing the political agenda of reducing GHG emissions.

Those who favor the litigation freely acknowledge this goal. For example, Maine Attorney General Stephen Rowe said of the lawsuits, "[I]t's a shame that we're here, here we are trying to sue [companies]...because the federal government is being inactive."

Meanwhile, Connecticut Attorney General Richard Blumenthal, lead attorney general in *AEP*, asserted: “[T]his lawsuit began with a lump in the throat, a gut feeling, emotion, that CO2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn’t coming from the federal government.” Gerald Maples, lead plaintiffs’ attorney in *Comer*, perhaps put it most bluntly: “[The] primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol.”

Such rationales not only stray from the purpose of the civil justice system, they violate the cherished progressive values of procedural safeguards in the law. The American Civil Liberty Union defended the Klu Klux Klan’s right to march in Skokie, Illinois in 1977 even though it despised the group’s agenda. Progressives rightly fought efforts by conservatives in 2005 to decide the Terri Schiavo legal case in the political branches. We also champion due process rights in courts, even when we disagree with those asserting them, and force prosecutors to prove their cases, rather than put people in jail with the refrain of “even if they did not commit this crime, they must have done something wrong.”

So, why is this commitment to judicial process regularly abandoned in lawsuits against “big business”? The reason, we are told, is that litigation against corporate America is David versus Goliath, and Democrats side with the “little guy.” But there is nothing progressive about straying from procedural fairness, even if done in the name of progressive policy outcomes. The purpose of the tort system is to hold people, including businesses, accountable for wrongfully injuring another. In the climate change suits, though, there has been no objective, wrongful conduct or liability-causing event. Defendants have not failed to comply with specific laws or regulations; instead plaintiffs are suing to create those standards. Even today, the defendants would have no idea they were engaged in tortious conduct, no idea what emissions level would lead

to liability, and no idea what emission reductions would avoid liability. Thus, they do not have fair notice of what they did wrong or what “corrective” action could be taken.

On August 26, 2010, the Obama administration underscored this point when the Acting Solicitor General submitted a brief to the Supreme Court to urge the Court to grant *certiorari* in *AEP*. The administration explained that the Court should dismiss the suit because the “regulatory approach is preferable to what would result if multiple district courts – acting without the benefit of even the most basic statutory guidance – could use common-law [tort] claims to sit as arbiters of scientific and technology-related disputes and de facto regulators of power plants and other sources of pollution.”

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Before joining the Obama administration’s Justice Department, Harvard Law School’s Laurence Tribe editorialized against these cases. He concurred with the federal district court judges that the claims should be barred under the political questions doctrine. “[G]lobal climate change raises such manifestly superable obstacles to principled judicial management,” Mr. Tribe and his coauthors wrote, “that its very identification as a judicially redressable source of injury cries out for the response that the plaintiffs have taken their ‘petition for redress of grievances’

to the wrong institution altogether . . . [Courts are] institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope.”

Liberal icon Robert Reich, who was President Clinton’s labor secretary, created a term in the 1990s for tort suits whose true purpose is political change: “regulation through litigation.” At first, Secretary Reich favorably appreciated the power of such litigation to achieve what he thought were important policy objectives. He soon changed course, however, calling the lawsuits “faux legislation which sacrifices democracy.” These liberal scholars understood that such tort suits, which are fairly recent creations, are different from constitutional cases, such as *Brown v. Board of*

Education, where litigation is necessary to enforce civil or constitutional rights.

Progressives should carefully consider Mr. Tribe’s, Secretary Reich’s and the Obama administration’s perspectives and not reflexively support climate change litigation, no matter how passionately one might favor emission reductions. We should adhere to our principles and protect due process rights of defendants, even when those defendants are large corporations. The David and Goliath analogy may score political points, but it only works in litigation when Goliath does something objectively wrong. Otherwise, any group that fails to get its way in the political arena will turn to the courts. Such an act would be an affront to democratic proceduralism that has long defined our progressive philosophy.

Endnotes

- 1 It should be noted that these climate change suits differ significantly from *Massachusetts v. EPA*, a case upheld in 2007 by the Supreme Court often cited in an attempt to give legitimacy to climate change cases. *Massachusetts* settled an issue of administrative law, namely that the Bush EPA had to revisit its denial of regulating GHG emissions under the Clean Air Act. Review of administrative procedure and statutory interpretation are firmly within the province of the judiciary. *Massachusetts* did not authorize or guide the imposition of judicially-created limits on GHG emissions or imply private sector liability for GHG emissions.

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