

The Path to Climate Change

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The past several years have witnessed a rush to the courthouse by lawyers around the world seeking to tackle climate change. Nowhere is this climate change chasing more prevalent than in the US, where a diversity of cases has been filed. Ranging from a lawsuit against oil and chemical companies for damages from a global warming-intensified Hurricane Katrina, to a challenge against the government for its failure to assess the impacts of global warming on polar bears and the Pacific walrus, the legal onslaught seeks to bring an intransigent US president and overly cautious Congress into the international mainstream of addressing the collective environmental future.

As these cases proliferate, their success in mitigating the causes of global warming and remunerating the injured will owe a great deal to an aggressive and unique eight-year legal effort that culminated in an historic ruling by the US Supreme Court.

The path to an emerging and seismic shift in US climate policy began quietly in the waning days of the Clinton Administration. As the 1990s wound to a close, the US was at a standstill in addressing global warming. In the case of emissions from automobiles, a contributor of more than 25% of all US greenhouse gas emissions (GHGs), the political and bureaucratic gridlock was palpable. The prospect of raising automobile fuel efficiency was politically dead in the Congress and the Environmental Protection Agency (EPA) willfully avoided the issue when setting new car tailpipe pollution standards. It was at this nadir that the International Center for Technology Assessment (ICTA), a US NGO, embarked on a unique legal strategy that would eventually break the logjam. Using the science behind the Second Assessment report of the 1995 Intergovernmental Panel on Climate Change (IPCC), the ICTA filed an administrative legal petition - essentially a legal request - demanding that the EPA regulate the release of carbon dioxide and other GHGs because, under the US Clean Air Act, they were 'airpollutants' that were reasonably anticipated to harm public health and welfare :

Embraced by only a few other environmental organisations, the legal petition was viewed by many as a long shot. When such actions are filed they often get stuck at the bottom of the bureaucratic priority list and gather dust.

Given the politically sensitive nature of the ICTA petition and the Bush Administration's avoidance of all things climate, it is not surprising then that the petition languished in the halls of the EPA. For the petition to have any meaningful impact, the ICTA knew all along the issue would have to be forced.

In 2002, over the objections of some in the environmental movement who feared political blowback from pushing the petition's agenda, the ICTA, joined by the Sierra Club and Greenpeace, filed a lawsuit that compelled the Bush Administration to respond to the petition. As the groups expected, the ultimate agency response was to reject the petition's demands to regulate GHG emissions from cars. In answering the petition, the EPA cited an array of disjointed legal and policy reasons including the need to maintain President Bush's ability to negotiate international agreements and the uncertainty of the science that surrounds climate change.

The petition's denial was the galvanising moment that ICTA and others had long anticipated. In denying the petition, the EPA had opened itself up to a formal legal challenge. A diverse number of groups joined together to make that challenge.

With the state of Massachusetts taking the lead, joined by 10 other state governments, three cities, and 12 other environmental groups, ICTA again marched into federal court, now attacking the legal bases of the EPA's petition denial. What had been an administrative law dispute with the EPA transformed into a legal showdown with the Bush Administration over its refusal to tackle global warming.

The initial legal battle yielded an unsettling result. A panel of three judges issued a split decision, with one judge holding that the EPA acted illegally in denying the petition and two others deciding (for different reasons) against the environmentalist legal position. Determined to press forward, the coalition appealed its loss in the lower court and sought review by the US Supreme Court. While such a review is rarely granted (approximately 1 in 100 cases), the court agreed to hear the case prompting *The New York Times* to call it 'among the most important environmental disputes ever to come before the court.'

On November 29, 2006, before a standing room-only crowd, the court heard oral argument and the justices bantered back and forth about, among other things, whether global warming happens in the troposphere or stratosphere. And then everyone waited until April 2, 2007, when the court finally released its opinion. The decision sent shock waves through Washington and permanently altered the US political debate on global warming. Writing for the majority, Justice Stevens' opinion begins in striking fashion, repeating the petitioners' view that global warming is 'the most pressing environmental challenge of our time' and emphasizing that 'the unusual importance of the underlying issue [i.e. climate change]' triggered the court's review. The initial prose foreshadowed the end result - a stunning 5-4 decision finding that the EPA had illegally denied the ICTA legal petition.

Maybe of most significance in the decision was the court's initial finding that the petitioners had 'standing' to bring the case. The court found that Massachusetts was injured in its capacity as a landowner because of climate change-induced sea level rise (and the subsequent loss of state property). The court added that US motor vehicle GHG emissions, amounting to about 6% of total world GHG emissions, were significant enough to be considered a cause of global warming and the sea level rise, and if the EPA implemented regulations to curb these emissions, as requested by ICTA, global warming would be slowed and the petitioners' injuries redressed.

In so finding, the court indirectly became a final arbiter on the science, weighing in favour of finding that the impacts caused by climate change were real and reasonably foreseeable. And in recognising that harm from climate change is an injury allowing parties to seek relief from the court system, the justices kicked the courtroom's door wide open for future litigation.

The court's second crucial determination was that carbon dioxide and other GHG emissions were 'air pollutants' under the Clean Air Act. The legal result of this conclusion has broad impacts on US policy options to reduce domestic GHG emissions. Once the EPA makes a finding that the emissions of these 'air pollutants' endanger public health and welfare—a foregone conclusion given the court's ruling and the recent IPCC Fourth Assessment - US law will trigger

the first mandatory regulatory reductions of emissions from mobile sources (cars) and stationary sources (power plants). These sectors comprise nearly two-thirds of all US emissions.

The political fallout has arguably been even greater. What the final EPA regulations will look like is anybody's guess. Nonetheless, the decision supports the ability of California and 11 other states to continue on their own to adopt strict new regulations designed to reduce carbon dioxide emissions from cars. And the Congress may not allow the EPA to act on its own. The court's decision prompted Senator Barbara Boxer to exclaim that the decision 'puts the wind at our back' in pursuit of new global warming restrictions and has rejuvenated movement toward a legislative solution focusing on a cap and trade programme.

While the end result may not be clear and the resolution several years away, the landscape has changed so significantly that through either an NGO litigation assault, a reformed EPA or an empowered legislature, the next five years will witness a monumental about-face in the legal and political direction of US climate change policy. The Bush Administration's reliance and praise for voluntary steps to curb global warming is rapidly crumbling under the weight of the Supreme Court's decision. Indeed, ICTA's legal long shot appears to have paid off handsomely for the planet. □□□

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