Law and the Public's Health

MASSACHUSETTS ET AL. v ENVIRONMENTAL PROTECTION AGENCY: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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This installment of *Law and the Public's Health* reviews the U.S. Supreme Court's April 2, 2007, decision in *Massachusetts et al. v Environmental Protection Agency*¹ and considers its implications for public health policy and practice. This landmark decision focused on a central concern in administrative law; namely, when an agency vested with the authority to regulate in the public's health has the power to refuse to carry out a legislative directive. The subject of the case was regulation of greenhouse gas emissions by new motor vehicles under the section 202(a)(1) of the Clean Air Act, but the central question was allocation of powers between a legislative branch that desires action and an executive branch agency that for policy reasons refuses to act.

BACKGROUND

The case began with a group of 19 private organizations that petitioned the Environmental Protection Agency (EPA), on October 20, 1999, to regulate "greenhouse gases" based on section 202 of the Clean Air Act. This section of the statute provides that if, based on the EPA Administrator's judgment, any air pollutant is endangering public health, the EPA can regulate the emission of the air pollutant from any class of new motor vehicles. For two central reasons, the EPA denied the petition.

The agency first asserted that the Clean Air Act did not allow the EPA to promulgate regulations that focused on global climate change. Second, the EPA concluded that the causal link between greenhouse gases and increasing global surface air temperatures was not "unequivocally established."² The EPA also stated that such regulations would interfere with the President's broad approach to reducing greenhouse gas emissions, which encouraged voluntary reductions by the private sector instead of relying on government regulation and, further, that such a regulatory approach

also might hinder the President's ability to convince developing nations to decrease their emissions.²

This denial was reviewed by the D.C. Circuit Court of Appeals. On review, the petitioners were joined by multiple states, the District of Columbia, American Samoa, and a number of local governments. Two of the three judges of the D.C. Circuit agreed with the EPA. Both judges agreed that the Administrator's judgment regarding the safety of a pollutant could include an assessment as to whether a causal link between greenhouse gases and climate warming existed and, further, whether the EPA's efforts might weaken the President's overall strategy for decreasing emissions worldwide. Petitioners then appealed to the U.S. Supreme Court.

THE U.S. SUPREME COURT DECISION

A five-to-four majority, led by Justice Stevens, reversed the decision of the D.C. Circuit Court of Appeals, concluding (1) that Massachusetts and other states had standing (i.e., the legal right to seek redress for agency inaction), (2) that the EPA had the authority to regulate greenhouse gases, and (3) that the EPA could not refuse to exercise this authority for policy reasons.

The first question—that of whether a petitioner has standing to seek redress—is one that arises in virtually all judicial decisions, whether federal or state. The powers of the judiciary are tempered in a democratic society through both laws and self-imposed rules that prevent the courts from hearing a dispute unless there is concrete injury for which some sort of judicial redress is available. The majority concluded that Massachusetts had indeed a legal right to seek relief, reasoning that the Commonwealth had met all three of the essential elements of standing: (1) a concrete and particularized injury that is actual or imminent, (2) the injury that is traceable to the act of the defendant (in this case, the EPA), and (3) evidence that favorable action by the EPA would help repair the injury.³

Stevens noted that the state's right to seek relief was underscored by federal legislation that permitted states to challenge the rejection of a petition to the EPA.⁴ The majority also concluded that the evidence showed that the EPA's refusal to regulate greenhouse gases presented an actual or imminent risk of harm to Massachusetts and that a favorable decision by the

courts could reduce this risk of harm. The evidence that most moved the Court involved indications of an increase in global sea levels in Massachusetts as a result of global warming, which in turn would cause the state to spend hundreds of millions of dollars. The EPA argued that its decision not to develop regulations contributed insignificantly to Massachusetts' injuries and not enough for the EPA to be sued in federal court.

While the EPA argued that its power to regulate global climate change was insufficient to provide relief, Justice Stevens concluded that incremental agency action over time may produce cumulative effects and that for standing to be present, the state would not have to show that any single action would remedy its problems. Stevens further reasoned that the EPA's regulation of greenhouse gases would have a significant effect because of the enormous amount of carbon dioxide emitted by the U.S. transportation sector. The majority also found persuasive prior reasoning by the EPA regarding the need to undertake efforts to remedy global climate change.

In furtherance of its claim that it lacked authority to act in ways to remedy the problem, and that the state therefore lacked standing to sue, the EPA argued that carbon dioxide was not an air pollutant within the meaning of federal law and, furthermore, that even if it did constitute a legal air pollutant, the EPA could not regulate it because such regulation would conflict with the President's priorities. The majority rejected this argument, reasoning that the definition of air pollutant under the Clean Air Act included all types of airborne compounds, including greenhouse gases. The majority also concluded that under the Act's judicial review provisions, the courts could reverse the EPA's decisions if they proved to be "arbitrary, an abuse of discretion, or otherwise not in accordance with law" regardless of the conflicts that such agency regulation might have with the President's priorities.⁵

The EPA also attempted to avoid the use of its powers by arguing that regulation of carbon dioxide emissions from cars would overlap with the Department of Transportation's role of setting mileage standards. The Court responded that overlapping duties did not prevent the EPA from carrying out its duty to protect public health.⁶

The majority also reasoned that other policy reasons offered by the EPA for not regulating greenhouse gases were unrelated to the statutory text in question and thus left the agency in violation of its statutory duties. Writing for the majority, Justice Stevens concluded that the judgment that the EPA Administrator was empowered to exercise under the law was described by

the statute, and, by law, the Administrator's exercise of judgment turned on the extent to which a particular air pollutant was found to affect the environment in a manner that is harmful to the public's health. Hence, the agency could not simply refuse to do anything. Instead, it could avoid action only if it developed a record of evidence either showing that greenhouse gases did not in fact contribute to climate change, or alternatively offering a reasonable explanation as to why the agency's actions would be inappropriate—that is, why the agency "cannot or will not exercise its discretion to determine" if greenhouse gases contribute to climate change.⁷

Stevens stated that the EPA took no appropriate action for an agency of the executive branch. Instead, it simply presented an evidence-free laundry list⁷ of reasons justifying its failure to develop regulations. The Court found that this list of reasons was unrelated to the question of whether greenhouse gases caused climate change or provided a reasonable explanation for why the EPA declined to make a scientific judgment on this matter. The Court reasoned that if scientific uncertainty was the reason that the EPA decided not to develop regulations, the agency had to actually state this fact and demonstrate the ways in which uncertainty would prevent the agency from making regulatory judgments.

The Court reasoned that the key question for the EPA to answer was "whether sufficient information exist[ed] for [the EPA] to make an endangerment finding [regarding the impact of the pollutant]." Instead of conducting itself in the lawful manner of a regulatory agency, the EPA used "impermissible information"—in this case, essentially no scientific administration and a host of political arguments—to reach its decision. Thus, the Court held that the EPA's reasons were "arbitrary, capricious, or otherwise not in accordance with law."⁸ The Court further indicated that the EPA's future decisions of whether or not to create regulations for air pollutants would have to be based on the statutory standards.

Two dissenting opinions in the case—one by Chief Justice Roberts and another by Justice Scalia—demonstrated the breadth of disagreement with the majority decision as well as the differences among the Justices themselves. Chief Justice Roberts' opinion focused on the preliminary matters of whether petitioners had a right of redress at all rather than the central question of agency conduct; in his view, the state lacked the right to seek judicial relief at all.

Justice Scalia, on the other hand, reached the actual merits of the case, finding that the courts owed broad deference to an agency's conclusions under a law based

in science and should not exercise judicial powers to review the soundness of the agency's record. In his opinion, the Court should not substitute its judgment in place of the EPA Administrators. (Readers of *Law and the Public's Health* may recall that in *Rapanos v U.S.*,⁸ Justice Scalia reached an entirely different conclusion regarding the power of courts to examine agency justifications for rulemaking, in soundly rejecting Corps regulations protecting the nation's waterways.)

IMPLICATIONS FOR PUBLIC HEALTH PRACTICE AND POLICY

This case offers a striking example of the degree to which the political process can shape the course of public health laws intended to ensure that policy rests on scientific inquiry rather than unfounded claims. The purpose of the federal legislative provisions at issue in this case was not to stop global warming. It was, instead, to ensure that in so complex a field as environmental regulation, policy-making—including the decision to make no formal policy at all—would rest on science.

The response of the Executive Branch, over two Presidential administrations, was to refuse to even commence scientific inquiry and instead to argue for inaction on several grounds unrelated to scientific fact. The relationship between the Executive and the legislative branches of government is never a smooth one; this decision underscores how the political to and fro over public welfare law can result in unending political standoff, even long after the political “sausage-making” essential to producing the legislation has been completed.

In this case, of course, the years lost to agency inaction—even if incremental as envisioned by the Court majority—are particularly consequential. A report by the Intergovernmental Panel on Climate Change, released 11 days after the Court's decision, provides a

current understanding of the impact of global warming. According to this report, regional climate change is affecting multiple natural systems such as water temperature and quality, and deforestation. The report concluded that there is evidence of a demonstrable link between the regions of the earth where significant warming is taking place and the locations of significant environmental changes.⁹

While the report underscores the amount of further study and knowledge necessary to attribute climate change to human action,⁹ its conclusions are important evidence for science-based policy-making. The importance of laws that, in scientific fields, demand scientifically based policy rather than political conjecture can hardly be overstated. *Massachusetts v EPA* stands as a reminder that, at some point, the law requires that politics stop and hard policy decision-making begins.

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REFERENCES

1. *Massachusetts et al. v Environmental Protection Agency*, 127 S. Ct. 1438 (2007).
2. *Massachusetts et al. v Environmental Protection Agency*, 127 S. Ct. 1438, 1451 (2007).
3. *Id.* at 1453, citing *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).
4. 42 U.S.C. §7607(b)(1).
5. 42 U.S.C. §7607(d)(9).
6. 42 U.S.C. §7521(a)(1).
7. *Massachusetts et al. v Environmental Protection Agency*, 127 S. Ct. 1438, 1462 (2007).
8. 126 S. Ct. 2208 (2006).
9. Working group II contribution to the Intergovernmental Panel on Climate Change fourth assessment report, climate change 2007: impacts, adaptation and vulnerability, April 13, 2007 [cited 2007 May 8]. Available from: URL: <http://www.ipcc.ch/SPM13apr07.pdf>