Climate Change

Part I

The summer of 2023 represented the proverbial canary in the coal mine regarding climate change. The widespread global conditions experienced around the globe match the projections of science and the global climate models that will result from the increasing concentration of greenhouse gases in the exceedingly thin atmosphere that surrounds the earth. These include extreme weather events (tens of days in the southwest US exceeding 110 degrees), ocean temperatures rising (water temperatures in the waters around Florida reaching 100 degrees), wildfires throughout the northern hemisphere, glaciers and sea ice melting across the globe, and sea levels rising. The Southern Hemisphere is experiencing record-high winter temperatures. To carry forward the analogy the summer 2023 canary is on its back, its feet in the air and it's making its last gasps.

Notwithstanding these alarming signals, our public policy processes and politics are stymied, irresponsibly so.

Congress has turned a blind eye. No serious proposals for addressing climate change are being proposed by members of either party, no public hearings are being held. Instead, Congress is preoccupied with political score-settling. This avoidance is primarily a consequence of the GOP kowtowing to its climate change deniers. But the Democrats, even with control of the Senate, have not made any serious legislative proposals nor conducted vigorous public hearings on specific proposals. Contrast this with the process that led, with much less public support, to the Clean Air Act of 1970 where the Senate Committee held 30 days of hearings on more than a dozen legislative proposals with the full participation of members of both parties and produced landmark legislation which has and continues to achieve dramatic improvements in air quality.

The Administration has taken some initiatives but is mostly frustrated by members of Congress (attempting to defund efforts) and countered by the Courts, including the U.S. Supreme Court.

The Court rejected the Environmental Protection Agency's (EPA) regulations designed to limit greenhouse gas emissions from major sources. The Court reasoned that the EPA went beyond its authority under the Clean Air Act and created a novel and unprecedented concept it called the "major question doctrine," to justify its regulations. Specifically, the Court held that EPA's regulation would cause 'generation shifting'. The production of electricity would be shifted from fossil-fueled generation to alternative systems of production of electricity even though Congress did not specifically authorize such a shift.

Even if one accepts the premise of the Court's articulation of the 'major question', The Clean Air Act decisively answered the 'major question' by looking to its objective and purpose: that air polluting activities and facilities were to be controlled or replaced to protect health and the environment. Neither the Clean Air Act nor the regulation rejected by the Court has the effect such that electricity is not going to be produced or be otherwise limited. On the contrary, in addressing climate-changing air pollution, the Clean Air Act will drive immensely more generation of electricity — but it will be, as the Clean Air Act mandates, through non-air polluting, climate changing processes. The Clean Air Act was emphatic that process change was among the enforceable compliance techniques authorized. Among other benefits, process change stimulates innovation and less expensive, more cost-effective systems. For example, alternative solar powered systems to generate electricity are less expensive than fossil fueled systems.

The Court concluded that shifting electricity generation to nonpolluting processes was not authorized. Yet process change, whether in manufacturing processes or in controlling emissions from mobile sources process change is what is contributing to delivering healthful air in almost every corner of the country. It can do the same in abating climate-changing emissions of greenhouse gases. It is indeed unfortunate that the Court did not allow already authorized actions to address the major threat to the habitability of the earth. Many would consider that whether it did so out of ideology to overturn generations of administrative law is the 'MAJOR QUESTION.'

It is disheartening that the Supreme Court has ruled that the legislation that has delivered such dramatic improvements in the quality of the air we breathe is not available to protect the habitability of the earth that sustains all life. The Court has assumed the role of the legislature in forcing its ideological political agenda on the nation. Congress in enacting the Clean Air Act has authorized a successful comprehensive regulatory regime that stimulates innovation and produces cost-effective responses to protect our health and environment. Climate-changing air pollution is well within the scope and purview of the Act. Congress has enacted the tools. The Act has produced healthful air while the economy has boomed. Applied to climate changing air pollution it can do the same. There is not a moment to waste. We cannot witness the canary dying.

This article was drafted by Tom Jorling, advisory board member of MHTL and co-drafter of the original Clean Air and Water Act. Mr. Jorling was a professor and Director of the Center for Environmental Studies at Williams College for over 20 years while serving appointed positions under President Reagan and President Carter regarding the Clean Air and Water Act. This article was reviewed and approved by Arthur Murphy, Katherine Hesse and Etty Singer. If you have any questions about this issue, please contact us at (617) 479-5000.

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