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OPINION

Court must conclude that global warming gases are a real danger

Opinion by Joseph M. Feller

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PHOENIX

President Bush has often criticized "activist judges" for allegedly shaping the law to fit their own policy preferences instead of enforcing it as written.

Now, Bush's own appointees to the Supreme Court have an opportunity to show that they will enforce a law that Congress enacted more than 30 years ago, rather than bending that law out of shape to avoid a result that they would rather not reach.

The law involved is the Clean Air Act, enacted in 1970 and still very relevant today. Although the Clean Air Act is long and complicated, at least one of its requirements is clear and simple. It requires the administrator of the Environmental Protection Agency to issue standards limiting automobile emissions of any air pollutant "which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare."

This provision is mandatory. If a pollutant "may reasonably be anticipated to endanger public health or welfare," then the EPA must act.

In 1999 a group of parties petitioned the EPA to issue emission standards for carbon dioxide, methane and other "greenhouse gases" emitted from auto tailpipes that contribute to global warming.

There can be little doubt that such gases "may reasonably be anticipated to endanger public health or welfare" within the meaning of the Clean Air Act, because the act defines endangerment of public welfare to include harmful effects on the Earth's climate. Since global warming is likely to, among other things, raise sea levels by melting the polar ice caps, thereby inundating heavily populated coastal areas, it is certainly a threat to public welfare.

The EPA denied the petition. However, it did not deny that automobile emissions contribute to global warming, or that global warming endangers public welfare. Instead, it offered two justifications for its refusal to act. First, the EPA claimed that greenhouse gases are not air pollutants within the meaning of the Clean Air Act. This denial, however, is not credible. The act defines "air pollutant" to include "any substance or matter which is emitted into or otherwise enters the ambient air." Since greenhouse gases are substances, and they enter the air, they are air pollutants.

EPA's second reason for denying the petition was subtler, but equally arrogant. It argued that, as a matter of policy, automobile emission standards are not a good approach to solving the problem of global warming. Claiming such standards would not be "effective or appropriate," the EPA declared that it "disagrees" with their use to combat global warming.

In early December, the Supreme Court heard arguments in a lawsuit brought by 12 states that have asked the courts to overturn the EPA's decision. Its lawyers urged the court to affirm EPA's refusal to act on the grounds that the EPA's decision was "reasonable."

The problem with the EPA's defense is that it asks the court to second-guess a judgment Congress made more than 30 years ago when it created the Clean Air Act. It is not up to the EPA, or the courts, to decide whether automobile emission standards are a wise, reasonable or economical way to control air pollution.

If Bush's EPA doesn't agree with the Clean Air Act, it can ask Congress to change it. Until then, the EPA should implement the law that Congress wrote, not the one that it wishes Congress had written. And if the EPA refuses to follow the law, then the courts should order it to do so.

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