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## MASSACHUSETTS VERSUS EPA: *PARENS PATRIÆ* VINDICATED

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Last term, the Supreme Court delivered a courthouse victory to Massachusetts and its allied states over the U.S. Environmental Protection Agency.<sup>1</sup> Many states take seriously their roles as *Parens Patriæ* for protecting their natural environment.<sup>2</sup> The Supreme Court's holding in the Massachusetts case affirms the common law understanding of *Parens Patriæ*. States did not give up these rights to protect their citizens' interests upon entry to the Union.<sup>3</sup>

### I. IPCC REPORTS ON GLOBAL WARMING'S IMPACT ON THE ENVIRONMENT

The Intergovernmental Panel on Climate Change (IPCC) has issued several reports, including a recent report which links the causes of global warming to its effects.<sup>4</sup> In that report, the IPCC states that:

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1. Massachusetts v. Env'tl. Prot. Agency, 127 S. Ct. 1438 (2007).

2. See, e.g., North Dakota v. Minnesota, 263 U.S. 365, 374 (1923); New York v. New Jersey, 256 U.S. 296 (1921); Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907); Kansas v. Colorado, 206 U.S. 46 (1907); Missouri v. Illinois, 180 U.S. 208 (1901).

3. "When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." *Tenn. Copper Co.*, 206 U.S. at 237 (citing *Missouri v. Illinois*, 180 U.S. at 241). Indeed, one can argue that all governments have not only the power, but also the associated duty, to protect common resources like the atmosphere as public trust resources. "When we call upon government to safeguard our atmosphere, we are invoking principles that are engrained in sovereignty itself." Mary C. Wood, Philip H. Knight Professor of Law, Univ. of Or. Sch. of Law, Keynote Address at the University of Oregon Journal of Environmental Law and Litigation conference (Oct. 19, 2007), in *Government's Atmospheric Trust Responsibility*, 22 J. ENVTL. L. & LITIG. 369, 373 (2007). *Parens Patriæ* confers standing, while public trust imprints a duty of protection on public resources and provides a cause of action. Allan Kanner, *The Public Trust Doctrine, Parens Patriæ, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 111 (2005).

4. See WORKING GROUP I, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE

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Global atmospheric concentrations of carbon dioxide, methane and nitrous oxide have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years. . . . The global increases in carbon dioxide concentration are due primarily to fossil fuel use and land use change, while those of methane and nitrous oxide are primarily due to agriculture.<sup>5</sup>

The IPCC goes on to find that global warming's effects are beginning to have an impact: "At continental, regional and ocean basin scales, numerous long-term changes in climate have been observed. These include changes in arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, heat waves and the intensity of tropical cyclones."<sup>6</sup>

## II. EPA RECOGNIZES THE SEVERITY OF THE GLOBAL WARMING PROBLEM

The United States Environmental Protection Agency (EPA) recently cataloged some of the disastrous effects likely to occur as a result of global warming as follows:

It is very likely that heat waves will become more intense, more frequent, and longer lasting in a future warm climate, whereas cold episodes are projected to decrease significantly.

Intensity of precipitation events is projected to increase in the U.S. and other regions of the world, increasing the risk of flooding, greater runoff and erosion, and thus the potential for adverse water quality effects. Increases in the amount of precipitation are very likely in higher latitudes, while decreases are likely in most subtropical, more southern regions, continuing observed patterns in recent trends in observations. The mid-continental area is expected to experience drying during summer, indicating a greater risk of drought. It is likely that hurricanes will become more intense, with stronger peak winds and more heavy precipitation associated with ongoing increases of tropical sea surface temperatures.<sup>7</sup>

The EPA made this finding to support its argument that states have no right to regulate greenhouse gases from automobiles, because the calamity is so widespread.

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INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Susan Solomon et al. eds., Cambridge Univ. Press 2007), available at [http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1\\_Print\\_SPM.pdf](http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf).

5. *Id.* at 2.

6. *Id.* at 7.

7. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12166 (Mar. 6, 2008) (footnotes omitted).

With such a threat facing the world, one might expect the EPA to have adopted this finding in support of new rules to limit the emission of greenhouse gases. Instead, Administrator Johnson goes out of his way to explain, by way of footnote 1, that his nearly apocalyptic finding does not mean that there is public “endanger[ment].”<sup>8</sup> Such logic has not always ruled the day at the EPA. Indeed, previous administrators had concluded that carbon dioxide is a pollutant subject to regulation under the Clean Air Act.

### III. PREVIOUS ADMINISTRATOR AND COUNSEL OUTLINES EPA’S LEGAL AUTHORITY TO REGULATE GREENHOUSE GASES IN CLEAN AIR ACT DEFINITION OF WELFARE

In 1998, EPA General Counsel Jonathan Z. Cannon issued a legal opinion which concluded that carbon dioxide and other greenhouse gases were air pollutants under the Clean Air Act and therefore subject to regulation by the EPA.<sup>9</sup> The memorandum was issued upon request of Congressman Tom DeLay as a follow up to testimony offered by the EPA Administrator before Congress.<sup>10</sup> The Cannon memorandum sets forth a short, concise explanation of the relevant statutes and legislation.<sup>11</sup> Cannon pointed out that climate has been protected by the Clean Air Act since 1970 by its incorporation into the definition of welfare.<sup>12</sup> Cannon also writes:

Some substances regulated under the Act as hazardous air pollutants are actually necessary in trace quantities for human life, but are toxic at higher levels or through other routes of exposure. Manganese and selenium are two examples of such pollutants. EPA regulates a number of naturally occurring substances as air pollutants, however, because human activities have increased the

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8. *Id.* at 12157 n.1. The footnote reads like the ending of a bad car leasing ad: “This document does not reflect, and nothing in this document should be construed as reflecting, my judgment regarding whether emissions of GHGs from new motor vehicles or engines cause or contribute to air pollution ‘which may reasonably be anticipated to endanger public health or welfare,’ which is a separate question involving different statutory provisions and criteria; nor should it be construed as reflecting my judgment regarding any issue relevant to the determination of this question.” *Id.*

9. *See* *Massachusetts v. Env’tl. Prot. Agency*, 127 S. Ct. 1438, 1449 (2007).

10. Memorandum from Jonathan Z. Cannon, EPA Gen. Counsel, to Carol M. Browner, EPA Adm’x (Apr. 10, 1998), *available at* <http://www.law.umaryland.edu/environment/casebook/documents/EPACO2memo1.pdf>.

11. *Id.*

12. *Id.* at 4.

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quantities present in the air to levels that are harmful to public health, welfare, or the environment.<sup>13</sup>

Cannon's successor, Gary S. Guzy, reiterated the opinion that carbon dioxide emissions were within the EPA's scope of regulation before a congressional committee before the end of Administrator Browner's term of service.<sup>14</sup>

On the campaign trail before his first election as President, George W. Bush had promised that he was going to ask the EPA to regulate emissions of a number of pollutants under the Clean Air Act.<sup>15</sup> Bush laid out what his campaign called "A Comprehensive National Energy Policy." In a speech before an audience in Michigan, Bush stated that as part of that policy he would seek to "require all power plants to meet clean air standards in order to reduce emissions of sulfur dioxide, nitrogen oxide, mercury and carbon dioxide within a reasonable period of time."<sup>16</sup> He then went so far as to take Al Gore to task for seeking voluntary reductions instead.

As late as March 10, 2000, it appeared that regulation of carbon dioxide would be proposed by the Bush Administration as confirmed by the EPA Administrator, Christie Todd Whitman.<sup>17</sup> President Bush shortly thereafter reneged on that promise.<sup>18</sup> President Bush had adopted a view of the scope of the Clean Air Act that reversed the Cannon memorandum, without refuting Cannon's arguments.<sup>19</sup>

Industry advocates applauded the President's reversal. Chris Horner of the Competitive Enterprise Institute described it as correcting a mistake, a policy proposal that had not fully been vetted.<sup>20</sup> Others were more direct in their criticism of Bush's pledge: "There was a great contradiction between mandating carbon dioxide

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13. *Id.* at 3.

14. *Massachusetts v. EPA*, 127 S. Ct. at 1449.

15. See *With a Hard-Fought Victory Out of the Way, Bush Now Has . . . Promises to Keep*, MIAMI HERALD, Dec. 17, 2000, at L1.

16. Eric Pianin & Amy Goldstein, *Bush Drops a Call For Emissions Cuts; Energy Firms Opposed Carbon Dioxide Pledge*, WASH. POST, Mar. 14, 2001, at A1.

17. See Andrew Revkin, *Despite Opposition in Party, Bush to Seek Emissions Cuts*, N.Y. TIMES, Mar. 10, 2001, at A1.

18. See Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts (Mar. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/03/20010314.html> (last visited Mar. 27, 2008).

19. *Id.*

20. *NewsHour with Jim Lehrer* (PBS television broadcast Mar. 14, 2001). A transcript of this broadcast is available at [http://www.pbs.org/newshour/bb/environment/jan-june01/co2\\_3-14.html](http://www.pbs.org/newshour/bb/environment/jan-june01/co2_3-14.html).

controls on the one hand and developing balanced energy programs on the other, because requiring mandatory controls would drive a stake through the heart of a balanced energy program,” said John Grasser of the National Mining Association.<sup>21</sup> The irony of Mr. Grasser’s analogy may have been unintentional, but prescient. The Bush Administration’s “balanced energy program” was developed in early 2001 and has served as the blueprint for the work of the EPA ever since.

#### IV. CHENEY ENERGY TASK FORCE ISSUES ITS REPORT

After the election, Bush’s environmental policies were vetted by the Vice President. President Bush stated that he had asked Vice President Cheney and his cabinet to look into issues related to energy and make recommendations to him.<sup>22</sup> The Cheney Energy Task Force was actually titled the “National Energy Policy Development Group.”<sup>23</sup> This Group produced a final report (Cheney Report) in mid-2000, which was the product of intense work done over a span of less than five months.<sup>24</sup> The Cheney Report lists fourteen members of the group, including the Vice President and the Secretaries of State, Transportation, Treasury, Energy, Agriculture, and Commerce.<sup>25</sup> Environmental Protection Agency Administrator Whitman got billing above Josh Bolten, but below the Director of the Federal Emergency Management Agency. The executive director of the Group was listed as Andrew Lundquist.<sup>26</sup> Lundquist is now president of consulting firm BlueWater Strategies LLC,<sup>27</sup> which

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21. Pianin & Goldstein, *supra* note 16, at A1.

22. Michael Abramowitz & Steven Mufson, *Papers Detail Industry’s Role in Cheney’s Energy Report*, WASH. POST, July 18, 2007, at A1.

23. See NAT’L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY at iv, available at <http://www.whitehouse.gov/energy/2001/index.html>.

24. “In his second week in office, President George W. Bush established the National Energy Policy Development Group, directing it to ‘develop a national energy policy designed to help the private sector, and, as necessary and appropriate, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy for the future.’” *Id.* at viii.

25. *Id.* at v.

26. *Id.*

27. Biography of Andrew D. Lundquist, BlueWater Strategies LLC, [http://www.bwstrategies.com/index.php?option=com\\_content&task=view&id=35&Itemid=22](http://www.bwstrategies.com/index.php?option=com_content&task=view&id=35&Itemid=22) (last visited Apr. 14, 2008).

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provides “regulatory, business and government relations advice, and manages major projects for U.S. and international corporations.”<sup>28</sup>

While one can criticize the task force’s closed process and obsession with secrecy, the effectiveness of the Cheney Report is hard to question. In management terms, the Cheney Report planned the work of the EPA and the EPA has worked that plan. The Cheney Report is very forthright in its assertions and recommendations.<sup>29</sup> President Bush enthusiastically supported the Cheney Report’s recommendations and the work of the task force.<sup>30</sup>

The Cheney Report recommends that the United States get more power plants built to run on coal instead of natural gas.<sup>31</sup> It supports this proposal by saying that it found that very few new plants were being built to run on coal and that we have a long-term domestic coal supply.<sup>32</sup> Oddly enough, the Cheney Report also argues that the energy supply is not diverse enough and further finds that coal currently supplies more than fifty percent of our power generation needs.<sup>33</sup> It is hard to jibe the Cheney Report’s support of coal with its announced goal of diversifying the generating portfolio.

Shortly thereafter, the Cheney Report makes its first mention of greenhouse gases, but does not evaluate the merits of natural gas over coal, as one would expect. Rather, the task force is concerned with the context of promoting nuclear power plant permitting.<sup>34</sup> The next mention of using technology to reduce greenhouse gases from energy production comes in the section extolling the benefits of new oil drilling techniques that reduce greenhouse gas emissions during oil exploration.<sup>35</sup> The Cheney Report thoroughly promotes fossil fuel exploration as essential. Vice President Cheney is quoted as saying:

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28. What We Do, BlueWater Strategies LLC, [http://www.bwstrategies.com/index.php?option=com\\_content&task=view&id=2&Itemid=4](http://www.bwstrategies.com/index.php?option=com_content&task=view&id=2&Itemid=4) (last visited Apr. 14, 2008).

29. NAT’L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY, *supra* note 23, at viii (stating that “America in the Year 2001 faces the most serious energy shortage since the oil embargoes of the 1970s” and that action must be taken to correct “[a] fundamental imbalance between supply and demand [that] defines our nation’s energy crisis”).

30. See President’s Remarks at Safe Harbor Water Power Corporation, 37 WEEKLY COMP. PRES. DOC. 765 (May 18, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/20010518-3.html>.

31. NAT’L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY, *supra* note 23, at xiii.

32. *Id.*

33. *Id.*

34. *Id.* at xi and xiii.

35. *Id.* at 5-5.

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“[w]e can explore for energy, we can produce energy and use it, and we can do so with a decent regard for the natural environment.”<sup>36</sup>

About one-third of the way through, the Cheney Report acknowledges that energy production is a major source of greenhouse gas production.<sup>37</sup> The plan touts the benefits that voluntary reduction paradigms have had, in particular the role of agriculture and forestry as carbon sinks. The Cheney Report does not identify carbon dioxide as a pollutant, but rather as a by-product of economic activity. Rather than discussing carbon dioxide emissions inventories, the Cheney Report champions that the ratio of carbon emissions to gross domestic product is being reduced over time.<sup>38</sup>

The Cheney Report could not function as a rulemaking process even though the EPA Administrator was a signatory on the Report. The Constitutional guarantees of due process, the informational openness provisions of the Freedom of Information Act, and the procedural requirements of the Administrative Procedures Act all apply to aspects of federal rulemaking. None of these provisions is cited in the Cheney Report. Rather, the Cheney Report represents a policy advocacy paper. In such a role, the Cheney Report has been and continues to be enormously persuasive in the work of federal agencies.

#### V. EPA DECLINES TO REGULATE GREENHOUSE GASES WHICH CAUSE GLOBAL WARMING

On October 20, 1999, a group of nineteen private organizations petitioned the EPA to regulate greenhouse gas emissions from new motor vehicles.<sup>39</sup> The petition alleged that the year 1998 had been the warmest year on record, that greenhouse gases were causing global warming, that global warming would cause serious harm to human health, and that the agency had previously concluded that it had

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36. *Id.* at xiii.

37. *Id.* at 3-10 and 3-11.

38. *See id.* at 3-3 fig. 3-1. A word count produced seven hits for the term “carbon dioxide” in the entire report of 170 pages. None of those mentions included an inventory on sources of carbon dioxide. *See id.* at 1-6, 3-6, 3-11, 5-14, 5-19, app. 2. In one case, lack of carbon emissions was mentioned as a positive benefit of nuclear power. *See id.* at 1-6. In two cases, it was mentioned as an aspect of natural gas power generation. *See id.* at 5-19, app. 2. On one page, the role played by the government in planting trees was touted. *See id.* at 3-11. In perhaps the most telling instance, producer uncertainty about carbon dioxide regulation was mentioned as preventing them from investing in new coal-fired plants. *See id.* at 5-13, 5-14. Ten hits were recorded for the word “greenhouse.” *See id.* at xi, xiii, 2-6, 3-10, 3-11, 5-5.

39. *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1449 (2007).

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authority to enact rules.<sup>40</sup> Staff members at the EPA delayed responding to the petition until 2001 and then solicited comments through the Federal Register.<sup>41</sup> During this comment period, in which the EPA reportedly received more than 50,000 comments, things took a turn for the interesting.<sup>42</sup>

Following the close of the comments period, the EPA staff rejected a petition by a number of environmental organizations requesting that the agency to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act.<sup>43</sup> On August 28, 2003, the EPA denied this petition on two alternative theories: the agency did not have authority to regulate carbon dioxide and other greenhouse gases under the Clean Air Act; and even if it did have the authority to do so, the EPA determined that setting greenhouse gas emissions standards for motor vehicles was not appropriate at that time.<sup>44</sup> In the rule, the EPA criticized the petition as a piecemeal approach and praised President Bush's comprehensive approach.<sup>45</sup> The approach favored by the EPA reads very much like the approach first recommended in the Cheney energy task force report, only this time the agency rejected the regulatory approach directly rather than deciding not to mention it at all.

When the EPA denied the petition, Massachusetts and a group of other states petitioned for review of this decision in the D.C. Circuit Court of Appeals and ultimately the U.S. Supreme Court.<sup>46</sup> The EPA and its industry allies sought to have the Supreme Court petition dismissed on grounds that the petitioners lacked standing to bring the case.<sup>47</sup>

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1450; Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003) [hereinafter Control of Emissions].

44. Control of Emissions, 68 Fed. Reg. at 52,925-31.

45. *Id.* at 52,931-32.

46. See *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1451 (2007).

47. *Id.* at 1446-47 ("In response, EPA, supported by 10 intervening States and six trade associations, correctly argued that we may not address those two questions unless at least one petitioner has standing to invoke our jurisdiction under Article III of the Constitution. Notwithstanding the serious character of that jurisdictional argument and the absence of any conflicting decisions construing § 202(a)(1), the unusual importance of the underlying issue persuaded us to grant the writ.").



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VI. COMMONWEALTH OF  
MASSACHUSETTS CLEARS STANDING HURDLE

Massachusetts Assistant Attorney General James R. Milkey represented the Commonwealth's case at both appeals.<sup>48</sup> Massachusetts supported its standing argument with detailed factual declarations. Paul Kirshen, a professor at Tufts University's Civil and Environmental Engineering Department, detailed that projected rises in sea levels around Boston would result in "permanent loss of coastal land" and "more frequent and severe storm surge flooding events along the coast."<sup>49</sup> He and other experts had also written about projected impacts in storm surge and in floodplain extent on behalf of the Commonwealth.

The D.C. Circuit Court issued a divided opinion on the legal questions presented as well as the issue of standing.<sup>50</sup> Judge Tatel held that Massachusetts had at least met all three of the requirements for Article III standing by default.<sup>51</sup> Judge Tatel wrote, "Because EPA nowhere challenges petitioners' declarations, I see no reason to consider what we would do if it had done so."<sup>52</sup> So there was no need to reach the question of Article III standing jurisprudence. Massachusetts won that fight by default.

In the case of Massachusetts, the Commonwealth had recognized that protection of its natural environment is a right of its people, and the protection of that right to be a public purpose as a matter of law.<sup>53</sup> The Commonwealth of Massachusetts thus confirmed its understanding that the common law doctrine of *Parens Patriae* supports its claims when it appears in court to defend the interests of its citizens in protecting these rights. States have standing as *Parens Patriae* to bring actions to redress public nuisances and to protect common resources.<sup>54</sup>

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48. *See id.* at 1444; *Massachusetts v. Env'tl. Prot. Agency*, 415 F.3d 50, 51 (D.C. Cir. 2005).

49. *Massachusetts v. EPA*, 415 F.3d at 64 (Tatel, J., dissenting).

50. *See id.*

51. *Id.* at 67 (Tatel, J., dissenting).

52. *Id.*

53. *See* MASS. CONST. art. XLIX (amended 1972) ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.").

54. *See, e.g., New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901).

Writing for the majority finding that Massachusetts met the standing requirement, Justice Stevens invoked the *Parens Patriae* doctrine, quoting *Tennessee Copper* as follows:

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.<sup>55</sup>

Stevens affirmed that states have a different set of interests than private parties. States have a right as *Parens Patriae* and a duty under the concept of public trust to protect common resources for the benefit of their citizens.

Stevens made a straightforward argument. The states surrendered some sovereignty by joining the United States, but not all of it.<sup>56</sup> Congress commanded the EPA to protect the states' citizens from environmental harms<sup>57</sup> and provided a remedy for a person whose petition to the EPA is denied. Justice Stevens thus observes simply, "[g]iven that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."<sup>58</sup> Justice Stevens explains that the Chief Justice's dissent misapplies the *Mellon* case.<sup>59</sup>

Petitioners sought to have the EPA initiate the rulemaking process. Congress provided a remedy, should EPA unlawfully refuse to initiate the process. The proximate injury at stake here was the delay and expense occasioned by the EPA's delay tactic. During that

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55. *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1454 (2007) (quoting *Tenn. Copper Co.*, 206 U.S. at 237).

56. *Massachusetts v. EPA*, 127 S. Ct. at 1454-55 (noting that "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives[.]" but that Massachusetts retained "quasi-sovereign interests" which it was entitled to protect).

57. *Id.* at 1454.

58. *Id.* at 1454-55.

59. *Id.* at 1455 n.17 ("In any event, we held in *Georgia v. Pennsylvania R. Co.* that there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do). Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act.") (citation omitted).

rulemaking proceeding, the underlying dispute will be resolved, “not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences”<sup>60</sup> of agency action. It is precisely the EPA’s inaction which deprived the Court of the basis for meaningful factual analysis and review of the underlying rule’s merits. The EPA is now obligated to provide notice, to solicit comments and to meaningfully respond to those comments. Without standing, the procedural remedy offered by law to petitioners is an empty promise.

#### VII. EPA DELAYS RESPONSE TO SUPREME COURT RULING UNTIL WHENEVER IT SUITS EPA

In response to the Court’s ruling that carbon dioxide is a pollutant under the Clean Air Act, President Bush publicly directed his administration to complete the work before the end of 2008.<sup>61</sup> In order to meet that timetable, the EPA committed itself to having draft rules completed by the end of 2007.<sup>62</sup> The EPA has not done so, and the Administrator now claims that it has no timeline for response to the Massachusetts case.<sup>63</sup>

Before the same House Committee to which the EPA confessed its lack of a response timeline, Sierra Club’s David Bookbinder testified about the frustrations of environmental advocates. Bookbinder cataloged the number of different ways that states and environmental groups have sought to address global warming, only to be thwarted by the EPA at every turn. In conclusion, Bookbinder said: “EPA’s consistent response to the terrible threat of climate change has been to twist the words of the Clean Air Act so as to justify the agency in both its own refusal to act and in preventing

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60. *Id.* at 1470 (Roberts, C.J., dissenting) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

61. See President’s Remarks on Fuel Economy and Alternative Fuel Standards, 43 WEEKLY COMP. PRES. DOC. 630 (May 14, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html>.

62. See Briefing by Conference Call on the President’s Announcement on CAFE and Alternative Fuel Standards (May 14, 2007), <http://www.whitehouse.gov/news/releases/2007/05/20070514-6.html> (last visited Apr. 10, 2008).

63. In prepared testimony to Congress, Administrator Johnson said: “While we continue to make progress in developing an approach, I cannot now commit to a certain date by which we will have a fully articulated approach in place or a response to the *Massachusetts* case completed.” *Massachusetts v. U.S. EPA Part II: Implications of the Supreme Court Decision: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 110th Cong. 5 (2008) (statement of Stephen L. Johnson, Administrator, Environmental Protection Agency), available at <http://globalwarming.house.gov/tools/assets/files/0425.pdf>.

anyone else from doing so. In the end, the only reason that I can see for the EPA's delay in answering the endangerment question is that it cannot figure out how to torture the statutory language into supporting a finding that greenhouse gases are not 'reasonably anticipated to endanger public health or welfare.'"<sup>64</sup> Looks like it's time to call on old *Parens Patriæ* once again.

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64. *Massachusetts v. U.S. EPA Part II: Implications of the Supreme Court Decision: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 110th Cong. 10 (2008) (statement of David Bookbinder, Chief Climate Counsel, Sierra Club), available at <http://globalwarming.house.gov/tools/assets/files/0429.pdf>.