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Obama Regulators' Grab Beyond Courts, Congress

by Shannon Goessling

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In the multi-party, multi-state legal challenges against the greenhouse gas/climate change regulations rushed into force by the U.S. Environmental Protection Agency, EPA lawyers have taken a stunning, unprecedented line of attack. Turns out, it's the same line argued in court by the Food and Drug Administration (FDA), National Labor Relations Board (NLRB), and other Obama-era regulatory agencies: the courts have little say, and even less power, to review decisions by Executive branch agencies.

In late February, appearing before the U.S. Court of Appeals for the District of Columbia, EPA lawyers argued that they are entitled to "extreme deference" from the courts over their wholesale adoption of the highly controversial UN Intergovernmental Panel on Climate Change scientific "findings" that human activity causes global warming.

More importantly, EPA lawyers contend the trillion-dollar regulations impacting as many as 6 million carbon dioxide "emitters" in the U.S. are entirely within the power of the agency – no court review, thank you. And Congress? The Clean Air Act requires congressional action for statutory changes under existing law. None has happened to date.

Regardless of your personal views on the environment and global warming, the actions and arguments of the EPA (and other agencies) represent a concerted effort to undermine the system of checks-and-balances that preserve our freedom.

In short, Congress provides oversight and writes laws; the courts review the laws and how they're enforced to ensure they're constitutional. The regulatory agencies are doing exactly the opposite – acting without Congressional oversight and approval, re-interpreting laws, and then arguing in court that they alone have the power to interpret and enforce the laws.

In a recent case involving regulation of pharmaceutical compounding for veterinary purposes, the FDA “interpreted” a 1930s law to say that they have the power to regulate in this area – despite 80 years of inaction. In court, FDA lawyers argued that the judiciary has no authority to review the agency decision. One federal judge reputedly responded in open court, “And I wonder if I’m being asked to be a potted plant?”

In recent federal court action involving the so-called “poster rule,” the NLRB sought overbroad powers in its effort to enact and enforce the requirement that private employers must post an elaborate notice about the “right” for workers to engage in collective action and to complain about employers to, you guessed it, the NLRB. The court found that the Board has the power to enact the rule, but not the power to enforce it broadly.

The American people now realize, or should, that the EPA under President Obama is engaged in a power grab against Congress and the courts. It's a constitutional crisis. And, adding fuel to the fire, President Obama's regulatory and law enforcement agencies are doing the same across the board – from the FDA and Department of Justice to the NLRB. The system of checks and balances on which our liberty depends requires that Congress and the courts are indeed anything but potted plants.