



By Richard Lazarus

## Rules “With All Deliberate Speed”

After the Supreme Court’s landmark 2007 decision in *Massachusetts v. EPA*, many environmentalists quickly dubbed the Court’s ruling the equivalent of *Brown v. Board of Education*. What the Court did in *Brown* for civil rights in 1954, by outlawing segregation in public education, the Court had now accomplished for future generations, by making clear the seriousness and legitimacy of the climate change issue. And, in both cases, the High Court rejected arguments that the judiciary should stay its hand because of the potentially enormous social and economic repercussions of such a ruling.

What environmentalists failed fully to appreciate in 2007, however, was that the Supreme Court, one year after deciding *Brown*, decided *Brown II*, in which the Court limited its initial ruling. The Court then made clear that the states need not comply immediately with *Brown*’s mandate, but instead must do so only with “all deliberate speed.” For some, that “speed” seems often to have been at a snail’s pace. On February 28 and 29, the U.S. Court of Appeals for the D.C. Circuit was scheduled to hear oral argument in a consolidated action, *Coalition for Responsible Regulation v. EPA*, that will likely, as a practical matter, determine at what “speed” the promise of *Massachusetts v. EPA* will be met, if at all.

In the spring of 2009, two years after the High Court’s ruling, EPA com-

menced a series of regulatory initiatives that sought, finally, to regulate greenhouse gas emissions under the Clean Air Act. These included proposed, and later final, threshold determinations that greenhouse gas emissions from new motor vehicles may cause or contribute to an endangerment of public health and welfare; proposed, and later final, regulations limiting emissions from such vehicles (joined by the Department of Transportation); and timing and tailoring regulations intended to phase in restrictions on greenhouse gas emissions from new and modified stationary sources, beginning with the largest sources.

The case before the D.C. Circuit is classic environmental litigation. There are 26 consolidated actions and they cover three topics: EPA’s endangerment determination, the Motor Vehicle Rule, and the Timing and Tailoring Rule. Underscoring the significance of the case, the appellate court has scheduled oral argument over two days, reminiscent of what the Supreme Court is doing only a few weeks later in considering the constitutionality of the recently enacted national healthcare legislation.

A mere listing of the lawyers in these cases reveals a *Who’s Who in Environmental Law*. In the challenge to EPA’s endangerment determination, there are two briefs in support of the rule’s overturning: the first signed by more than 50 lawyers from 20 law firms, the state of Alaska, and 15 different companies, business trade associations, and non-profit organizations; and the second, filed on behalf of 15 states. On the other side, supporting EPA, is a brief signed by approximately 60 lawyers representing 11 states, New York City, and 6 environmental organizations.

Everyone knows that the stakes are huge. With the collapse of any meaningful legislative activity on Capitol Hill, the only tangible progress environmentalists can claim on climate since *Massachusetts v. EPA* are these three

sets of rulemakings. An adverse ruling by the D.C. Circuit would threaten to wipe out all those gains.

For instance, should the D.C. Circuit find fault in EPA’s endangerment determination, that could eliminate the legal basis of EPA’s regulatory authority over greenhouse gas emissions. The Department of Transportation’s authority would remain over the related issue of fuel efficiency, but at the very least a cloud would be cast over EPA and DOT’s joint regulations on greenhouse gas emissions from new motor vehicles — the Obama administration’s signature environmental achievement.

A ruling against EPA’s Timing and Tailoring Rule would have profound practical effects. The purpose of that rule is to make the regulation of greenhouse gas emissions from stationary sources workable, by isolating out the largest sources for controls first. Should the court rule that EPA cannot do so, but must regulate now the literally hundreds of thousands of stationary sources potentially subject to greenhouse gas

*Will the promise of Massachusetts v. EPA in the climate arena be met, if at all?*

emission regulation, the resulting administrative burden could be nightmarish. Ironically, those complaining that EPA cannot limit its regulatory scope are not environmentalists, but industry, precisely because of their apparent objective to trigger such a regulatory collapse.

The three judges scheduled to hear the case are Chief Judge David Sentelle, and Judges Judith Rogers and David Tatel. Both Sentelle and Tatel were on the D.C. Circuit panel that decided *Massachusetts v. EPA*, with Tatel’s dissent in that panel ruling ultimately vindicated by the Supreme Court’s decision. This is, of course, a different case raising very different legal issues, but if past is prologue, Judge Rogers’s vote here could well prove pivotal.

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