

without Senate ratification (*see, e.g.*, Knollenberg amendments to the FY 1999 and 2000 VA-HUD and Independent Agencies Appropriations Acts). Since enactment of the 1990 CAA amendments, numerous bills to control GHG emissions from mobile and stationary sources have failed to win passage (*see, e.g.*, H.R. 2993, 102d Cong., 1st Sess. 137 *Cong. Rec.* H4611 (daily ed. 1991)).

Against this backdrop of consistent congressional action to learn more about the global climate change issue before specifically authorizing regulation to address it, the CAA cannot be interpreted to authorize such regulation in the absence of any direct or even indirect indication of congressional intent to provide such authority. EPA is urged on in this view by the Supreme Court's decision in *Brown & Williamson*, which struck down FDA's assertion of authority to regulate tobacco products under the Food, Drug and Cosmetic Act (FDCA). That statute contains a broadly worded grant of authority for FDA to regulate "drugs" and "devices," terms which the statute also broadly defines. However, the FDCA does not specifically address tobacco products while other Federal laws expressly govern the marketing of those products.

Notwithstanding the FDCA's facially broad grant of authority, the Supreme Court explained that "[i]n extraordinary cases, * * * there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." The Court noted that FDA was "assert[ing] jurisdiction to regulate an industry constituting a significant portion of the American economy," despite the fact that "tobacco has its own unique political history" that had led Congress to create a distinct regulatory scheme for tobacco products. The Court concluded that FDA's assertion of authority to regulate tobacco was "hardly an ordinary case." The Court analyzed FDA's authority in light of the language, structure and history of the FDCA and other federal legislation and congressional action specifically addressing tobacco regulation, including failed legislative attempts to confer authority of the type FDA was asserting. Based on that analysis, it determined that Congress did not "intend[] to delegate a decision of such economic and political significance * * * in so cryptic a fashion."

It is hard to imagine any issue in the environmental area having greater "economic and political significance" than regulation of activities that might lead to global climate change. Virtually every sector of the U.S. economy is

either directly or indirectly a source of GHG emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change. We believe, in fact, that an effort to impose controls on U.S. GHG emissions would have far greater economic and political implications than FDA's attempt to regulate tobacco.

The most abundant anthropogenic GHG, CO₂, is emitted whenever fossil fuels such as coal, oil, and natural gas are used to produce energy. The production and use of fossil fuel-based energy undergirds almost every aspect of the U.S. economy. For example, approximately 70 percent of the electric energy used in this country is generated from fossil fuel, and the U.S. transportation sector is almost entirely dependent on oil.

Proposals to reduce CO₂ emissions from these sectors have focused on four major approaches: (1) Improve fuel efficiency; (2) capture and sequester CO₂; (3) switch to alternative non-fossil fuel sources; and (4) reduce vehicle usage by switching to alternative forms of transportation. Congress has already addressed the first approach in other statutes—not the CAA—by giving other Departments and agencies—not EPA—regulatory authority to deal with fuel and energy efficiency. For example, Congress has authorized DOT to set fuel economy standards for motor vehicles and the Department of Energy to set efficiency standards for products such as air conditioners and appliances that consume electricity.

The other approaches for reducing CO₂ emissions all have substantial economic implications. While it may eventually be possible to achieve widespread capture and sequester CO₂ emissions from power plants, such an approach would require a new generation of power plants and would be very costly, even if implemented over many years. As for the use of alternative fuels, governments and private companies around the world are investing billions of dollars to explore the possibility of using non-fossil fuels for power generation and transportation. Any widespread effort to switch away from fossil fuels in either sector would likewise require a wholesale transformation of our methods for producing power and transporting goods and people. As for alternative modes of transportation, Congress and many states have already adopted measures to encourage public transportation, car pooling, bike usage, and land-use planning designed to minimize commuting distances. EPA supports these measures and believes

that they provide many environmental benefits. However, widespread substitution of alternative forms of transportation for transportation based on fossil fuel energy would also require a wholesale remaking of this sector. It is hard to overstate the economic significance of making these kinds of fundamental and widespread changes in basic methods of producing and using energy.

The issue of global climate change also has enormous political significance. It has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue.

In light of Congress' attention to the issue of global climate change, and the absence of any direct or even indirect indication that Congress intended to authorize regulation under the CAA to address global climate change, it is unreasonable to conclude that the CAA provides the Agency with such authority. An administrative agency properly awaits congressional direction before addressing a fundamental policy issue such as global climate change, instead of searching for authority in an existing statute that was not designed or enacted to deal with the issue. We thus conclude that the CAA does not authorize regulation to address concerns about global climate change.

It follows from this conclusion, that GHGs, as such, are not air pollutants under the CAA's regulatory provisions, including sections 108, 109, 111, 112 and 202. CAA authorization to regulate is generally based on a finding that an air pollutant causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare. CAA section 302(g) defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant[.]" The root of the definition indicates that for a substance to be an "air pollutant," it must be an "agent" of "air pollution." Because EPA lacks CAA regulatory authority to address global climate change, the term "air pollution" as used in the regulatory provisions cannot be interpreted to encompass global climate change. Thus, CO₂ and other GHGs are not "agents" of air pollution and do not satisfy the CAA section 302(g) definition of "air pollutant" for purposes of those provisions. We reserve judgment on