

## 51. CLIMATE AND THE CONSTITUTION #9

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### **Former Senator Schmitt Summarizes the Major Constitutional Limits on Climate Change Policy**

The Constitution of the United States of America sets clear limits on the powers of the Federal Government and permits exercise of those powers only in specifically enumerated activities that relate to providing for the “common defence”, promoting the “general Welfare”, and securing “the Blessings of Liberty” to all Americans and future Americans. The first ten Amendments to the Constitution, and the 14<sup>th</sup> Amendment, further limit the powers of Federal and State Governments relative to the rights of the people, leave to the people those natural rights not specifically protected, and reserve all un-enumerated powers to the States. Other Amendments expand the powers of the Federal Government but, again, only within specified limits.

Article V defines the process by which constitutional powers can be changed and the rights and liberties of the people possibly further limited. The Constitution defines no process that allows any of the three branches of the Federal Government to change their powers or the rights of the people without a constitutional amendment. Unfortunately, over many decades, the amendment process of Article V has not been followed in the determination of many extra-constitutional national legislation, executive actions, and Court decisions. Rather, there have been as-

sumptions of non-enumerated powers by all three branches of Government.

In analyzing the Constitution, it is critical to recognize the clear requirement in the Preamble and Article I to “provide for the common Defence and the general Welfare”. Meeting this requirement demands ready access to abundant energy in order to have a strong economy that can support national security and other constitutional functions of Federal, State, and local government. Unconstitutionally limiting energy production and taxing carbon emissions to “do something about climate change” would clearly adversely affect the economy and thereby limit the Nation’s ability to counter potential adversaries or direct attacks and provide for the general welfare.

Actions related to modification of “climate change” clearly are not included within the directly enumerated powers of Congress given in Article I, of the President in Article II, or of the Judiciary in Article III. Therefore, the question arises as to whether such actions can be constitutionally justified or invalidated under various enumerated powers or within the Amendments that protect political and natural rights. In answering this question, the constitutional powers of the three branches of Government must be con-

sidered relative to permissible law, regulation, executive order, or judicial decision. Similarly, the relevant rights guaranteed by the 5<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 14<sup>th</sup> Amendments also must be reviewed.

**Legislative Power:** Clauses 2 through 17 of Article I, Section 8, lay out the specific limits on Congress's power to undertake the duties stated in Clause 1 of that Article. Nothing in those sixteen Clauses, directly or indirectly, gives the Congress the power to attempt to regulate climate, assuming that Nature would permit such regulation to be effective. Where commerce between the States in energy, transportation or industry needs to be regulated to prevent economic discrimination between those States, Congress has the power to do so under Clause 3, the "Commerce Clause". To extend such regulation in an attempt to affect climate, however, would have no constitutional basis.

Some would argue that Clause 18 permits Congress to legislate in any way it deems "necessary and proper"; however, this phrase, in specific words, applies only to the "Execution of the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Clearly, no extra-constitutional powers, such as attempts to regulate climate, can be assumed by the Congress by way of Clause 18.

**Executive Power:** Article II gives significant executive power to the President, but in no way gives that Office legislative authority beyond that wielded by the Congress in which the President participates by signature or veto. In fact, the President's Oath of Office specifically requires that the President "preserve, protect and defend the Constitution..." and thus requires a veto of any legis-

lation that is unconstitutional on its face. Further, any Executive Order by the President must be limited to the management of the Office of the President or to the implementation of the responsibilities of Executive Branch Departments and Agencies as defined by the Constitution or by Acts of Congress. Executive Orders are explicitly unconstitutional if they have no tie to constitutional Acts of Congress or violate the rights of individual Americans or the States as defined by Amendments to the Constitution. No Executive Order that attempts to mandate actions relative to climate, therefore, would be constitutional.

Executive Order 13524, for example, issued October 5, 2009, by President Obama, requires that Federal agencies set "sustainability goals" for their use of energy. This order would be constitutional if its stated purpose were to reduce the cost of the Executive Branch operations through cost-effective energy related operations; however, the stated primary purpose of the Order is "to establish an integrated strategy towards sustainability in the Federal Government and to make reduction of greenhouse gas emissions (GHG) a priority for Federal agencies." This is a purpose for which the President has no constitutional authority to implement. In addition, it is well documented that a reduction in carbon emissions by means other than employing under-utilized technology of enhancing fossil fuel combustion and conversion efficiency will not net cost savings and will lead to greater costs of government. The Order also states that Order 13524 is "intended as a means to create a clean energy economy" and to "foster markets for sustainable technologies and environmentally favorable materials, products, and services". This is an industrial policy purpose for picking economic winners and losers for which there is no constitutional basis.

Regulatory Agencies: The Environmental Protection Agency (EPA) has no direct constitutional foundation for existing because “environmental regulation” is not an enumerated power of Congress or the President. The 10<sup>th</sup> Amendment leaves all unenumerated powers to the States without equivocation. A State, therefore, with the implicit consent of the electorate in that State and with solid scientific justification, can regulate activities that affect the environment within the borders of that State. If activities in one State adversely affect the environment in another State, and the issue cannot be resolved between the two parties, then Article III, Section 2, provides for recourse to Federal Courts, stating that “The judicial Power shall extend...to Controversies between two or more States;...”

There exists a strong argument that under the Commerce Clause of Article 1, Section 8, Congress can provide for regulation of interstate commercial activities for which there is strong scientific evidence of potential harm to the health and safety of Americans arising from those activities. Some of the few examples of such harm come from excessive release of Mercury, Lead, Arsenic, radiation and some artificial chemicals into the environment. The critical scientific issue in these and all cases of potential harm lies in the dose received by individuals. The key to any environmental regulation is “strong scientific evidence of potential harm to health and safety” and the balancing of the benefit of the regulation against its full economic cost and its infringement on the constitutional rights of the people. These constitutional rights, of course, include the inherent natural rights protected by the 9<sup>th</sup> Amendment [1]. With respect to the EPA’s moves to regulate the use of fossil fuels in the name of fighting global warming, as discussed in previous Chapters, there is no strong scientific basis that such regulation

can significantly counter natural warming or cooling cycles.

Similarly, the Department of Energy (DOE) has no constitutional basis for attempting to affect commercial decisions through its subsidies for solar, wind, battery and bio-fuel energy production. Again, industrial policy is not an enumerated function of the Federal Government. As with regulations promulgated by the EPA, DOE’s authority to provide such subsidies is supported by partisan political rationales rather than engineering and economic reality. Federally funded research and technology development in these significantly non-economic areas of energy conversion can be justified by their potential long term tie to national security [2] in relation to future depletion of currently much more economic and more environmentally friendly North American fossil and nuclear energy production [3].

Regulatory mandates by the Federal Government, including the Executive Branch, that artificially raise the price of goods and services indirectly and unconstitutionally manipulate industrial policy and introduce damaging non-market forces into private decision making. For example, the President and the Secretary of Energy have expressed a clear Administration policy to raise the price of fuel and energy derived from fossil fuels through increased fuel taxes; mandated additives, such as ethanol; mandated unscientific emissions controls, such as to reduce emissions of carbon dioxide and infinitesimal amounts of Mercury; and the imposition of regulatory requirements for power companies to distribute minimum amounts of wind and solar generated electrical energy. These policies, of course, mean that the price goes up on food, trucks and cars, and everything else that needs energy to be produced.

The President's and the Secretary of Energy's decision to not uphold the Federal Government's legal and constitutional responsibility to reprocess or dispose of spent nuclear fuel rods, a need for which power companies continue to be taxed, clearly is aimed at eventual closure of all U.S. nuclear power plants. This decision, along with the closure of many existing coal-fired power plants by regulatory fiat, poses a grave threat to the stability of the national electrical power grid and to the future economic health of the country and the livelihoods of its citizens.

**Judicial Power:** Decisions by the Supreme Court, outside the resolution of apparent conflicts within the wording and intent of the Founders, best illustrate the assumption of non-enumerated powers by Government. The Court has frequently "amended" the Constitution to insert the Federal Government into issues reserved to the people by the 9<sup>th</sup> Amendment or to the States by the 10<sup>th</sup> Amendment. Both the Legislative and Executive Branches, however, also routinely ignore constitutional limits on their powers. Cases in point are the expansion of the enumerated limits on the general welfare provision of Article I (Section 8, Clause 1), particularly with respect to property rights; over interpretation of the meaning of the "Commerce Clause" (Article I, Section 8, Clause 3); and delegation and lack of oversight of the powers to regulate use of or dispose of public lands (Article IV, Section 3, Clause 2).

Through the last two centuries, the Supreme Court has assumed far greater power than intended by the Founders. Most seriously, the Court has substituted its decisions for the constitutional amendment process provided by Article V and, in so doing, has given the Federal Government powers not enumerated in the Constitution and therefore

left to the States by virtue of the 10<sup>th</sup> Amendment. The Court also has expanded legislative, executive and judicial powers beyond the obviously restrictive intent of Articles I, II and III, respectively. For example, the Court's 2007 decision to allow the Environmental Protection Agency to regulate production of a natural atmospheric gas, carbon dioxide, essential to life on Earth, clearly expanded the EPA's powers beyond the intent of Congress or what would be constitutionally permissible.

In addition, the current deliberations relative to the constitutionality of a mandate that Americans must purchase health insurance highlight how the "Commerce Clause" has been amended by Court decisions to mean far more than the narrow intended purpose "To regulate Commerce...among the several States..." Specifically related to the scientifically misguided efforts to affect climate, the legislative or regulatory mandates for Americans to use particular products, such as ethanol in gasoline or a specific type of light bulb, attempt to expand the power of the Commerce Clause in the same way as the now contested health insurance mandate.

**5<sup>th</sup> Amendment:** The 5<sup>th</sup> Amendment's guarantee that "No person shall...be deprived of life, liberty, of property, without due process of law..." has been violated by the many mandated or prohibited actions that unnecessarily and unscientifically regulate the otherwise free exercise of individual liberty and the use of private property. Examples abound and grow day by day: the legislated phase-out of incandescent light bulbs in favor of less desirable and dangerous fluorescent bulbs; regulated property-use restrictions based on unscientific definitions of wetlands; and regulated mileage standards that restrict access to desired personal transportation.

**9th Amendment:** The 9<sup>th</sup> Amendment protects the natural rights of the people that are not otherwise enumerated in the Constitution and its Amendments. These natural rights include “life, liberty, and the pursuit of happiness”, as mentioned specifically in the Declaration of Independence, and other rights derived from our natural, and societal instincts as free human beings. Other natural rights include free association, education, travel, work, communication, thought, privacy, property, shelter, and defense of self and family. In addition to their basic unconstitutionality as discussed above, attempts to control the behavior of Americans in a fruitless effort to control climate change violate most of their natural rights.

Overall, pernicious and unjustified regulation restricts “liberty”. Direct and indirect costs transferred to individuals by the regulation of carbon dioxide as a pollutant stand in the way of “the pursuit of happiness”, in other words the exercise of economic liberty. Federal grant processes and educational publications biased in favor of research on human-caused global warming corrupt both “education” and the science necessary to support legitimate national needs. Otherwise affordable “travel” is limited by unscientific and costly requirements on vehicle fuels and performance. “Work” options are lost as unjustified regulatory burdens force closure of power plants and agricultural and other businesses. Political browbeating of those skeptical of the human-caused global warming hypothesis clearly attempts to restrict “thought” as well as free scientific and political speech. Taxes, fees and regulatory costs in support of unproven climate science destroy “property” in the form of individual wealth. As a final example of 9<sup>th</sup> Amendment violations related to misguided climate policy, so-called green building requirements make individually owned “shelter” unaffordable for many Americans.

**10th Amendment:** The 10<sup>th</sup> Amendment leaves to the States, and thus to the people, those powers not enumerated as available to the Federal Government. This particularly applies to the powers of Congress addressed specifically in Article I. For example, nowhere in Article I is Congress given power to regulate climate and environment, energy, health, retirement, housing, welfare, transportation or many more of the areas in which the Federal Government has assumed authority. Regulation of any aspect of these areas, but still under the restrictions imposed by the Bill of Rights and the 14<sup>th</sup> Amendment, can come only indirectly through Section 8 Clauses related to commerce and defense and through the powers given Congress in Article IV related to guarantees made to the States and the management of United States territory.

**14th Amendment:** Whatever constitutional justification may support it, any legislation passed by Congress and signed into law by the President that provides federal monetary, tax credits or penalties, or mandated use subsidies for some individuals and entities and not others in a particular competitive area of commercial activity violates the 14<sup>th</sup> Amendment’s guarantee of “...equal protection of the laws.” Of particular note are subsidies given to energy sources that are not economically competitive with fossil fuels and nuclear power made in the name of altering trends in climate change, such as subsidies for bio-fuels, wind and solar electric power, and battery and hydrogen powered transportation. A constitutional case for such subsidies could be made from a national security perspective only if the country did not have the capacity to produce sufficient fossil fuel and nuclear energy to satisfy defense and economic requirements.



All in all, the overt and covert climate and energy initiatives of the Federal Government pose a clear and present danger to the economic future and national security of the United States. These initiatives stand in clear violation of the intent of the Founders and the constraints on the imposition of tyranny that they provided in the Constitution.

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#### References Cited in Text

1. **See: America’s Uncommon Sense Essay: No. 36**, *Natural Rights and the 9th Amendment*, available to read or download from the downloads page at <http://americasuncommonsense.com/blog/downloads/>.
2. **See: America’s Uncommon Sense Essay: No. 35**, *Science Policy and the Constitution*, available to read or download from the downloads page at <http://americasuncommonsense.com/blog/downloads/>.
3. **See: America’s Uncommon Sense Essay: No. 44**, *Energy and the Constitution #1*, available to read or download from the downloads page at <http://americasuncommonsense.com/blog/downloads/>.