BY ROBERT A. LEVY

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Chairman's Message

Who Elected Lisa Jackson?

Here's how a *Washington Post* editorial described the ultimatum that President Barack Obama posed to Congress: "Pass climate-change legislation, or the Environmental Protection Agency will use its authority under the Clean Air Act to curb carbon emissions without your input." That generated some pushback, even from some Democrats. Former Rep. Ike Skelton (D-MO) said, "We cannot tolerate turning over the regulation of greenhouse gas emissions to unelected bureaucrats at EPA." Rep. Collin Peterson (D-MN) warned, "If Congress doesn't do something soon, the EPA is going to cram these regulations through all on their own."

Meanwhile, EPA administrator Lisa Jackson officially celebrated the New Year by launching the EPA's drive to restrict emissions of carbon dioxide and other greenhouse gases—foisting regulations on the public, decreed not by our lawmakers, but by an administrative official. Therein lies a major problem, and it has constitutional implications.

Article I, section 1 of the Constitution states, "All legislative Powers. . . shall be vested in a Congress," which means legislating is for the legislature—not delegated to the EPA or any of the 320 executive and independent agencies in Washington, D.C. Regrettably, that doctrine—known as the nondelegation doctrine—is now moribund. Until the 1940s, the Supreme Court required Congress to enact an "intelligible principle" to guide agencies in exercising delegated legislative power. Since then, however, not a single statutory program has been invalidated as an unconstitutional delegation.

Fast forward to April 2007. That's when a 5-4 majority of the Supreme Court held in *Massachusetts v. Environmental Protection Agency* that the EPA could decide, without congressional input, whether carbon dioxide poses a health and safety risk under the Clean Air Act. This past December, Administrator Jackson decided "yes," and accepted the Court's invitation to fashion rules—again without congressional input—slashing CO2 emissions. As a result, U.S. companies may have to comply with Kyoto-type global warming standards, imposed by administrative fiat, despite Congress's rejection of the Kyoto Protocol.

Like clockwork, a handful of major utility CEOs defended the EPA because its rulemaking would "yield important economic benefits." Conveniently omitted was the fact that the presumed benefits would flow to the CEOs' companies—yet another example of short-sighted corporate rent seekers with little appreciation for long-term consequences. It's bad enough when supposed capitalists wrongly perceive that the market can be efficiently disciplined by bureaucrats. It's even worse when businessmen embrace regulation because their companies might gain a temporary edge at the expense of rivals who lack political clout.

If you're looking for an "intelligible principle," there isn't one. Our lawmakers seem content to let Lisa Jackson supply her own principle. Never mind that the constitutional basis of the nondelegation doctrine is that Congress, not independent agencies, must make important policy choices, which form the core of legislative power. For purposes of that doctrine, it does not matter which principle is ultimately chosen; what matters is that Congress supplies it. The concept is straightforward: Congress is free to legislate or not, but it may not effectuate a wholesale transfer of legislative power to administrative or executive officials. That's the essence of the separation of powers.

If Congress needs technical assistance to legislate, it can certainly obtain such assistance from congressional staff, universities, professional associations, think tanks and, naturally, from the agencies that will be responsible for implementation. But Congress itself has to review the recommendations and give its stamp of approval. After the "shellacking," Congress needs a bipartisan consensus to pass laws. Who are the 535 "legislators" that Lisa Jackson has to convince? And what do the voters, taxpayers, and affected industries do if Ms. Jackson gets it wrong?

Of course, the EPA is just the tip of the iceberg. With Congress unwilling to advance the Obama agenda, Washington's alphabet agencies will be operating overtime—the Department of Health and Human Services regulating health care, the Federal Communications Commission controlling the Internet, and the new Consumer Financial Protection Bureau making mischief under the Dodd-Frank Act. To grasp the scope of the problem, consider that federal agencies now dwarf Congress when it comes to making rules that control what Americans can do. The Code of Federal Regulations comprises more than 200 bound volumes—about six times as large as the U.S. Code containing all laws passed by Congress.

Nowhere in our Constitution was Congress given, explicitly or implicitly, the power to delegate. Our administrative agencies cannot be, said Justice Benjamin Cardozo, "roving commission[s] to inquire into evils and upon discovery correct them." Those who make the laws must be directly accountable to the voters.

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