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## Expert Analysis

### The 'Climategate' Controversy: A Tree Falls in the Forest, But Is Copenhagen Listening?

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*It is a tale told by an idiot, full of sound and fury, signifying nothing.*

—William Shakespeare, *Macbeth*, Act V, Scene 5

No one familiar with Al Gore, either in person or on video, would suggest that his oratory is Shakespearean. Nevertheless, he recently retreated to the bard's writings to slam those who claim that the so-called "Climategate" scandal vitiates the science underlying global warming. In a recent CNN interview Gore dismissed the controversy, saying, "To paraphrase Shakespeare, its sound and fury signifying nothing."

Climategate began in November, when more than 1,000 hacked e-mails from climate scientists in England and the U.S. were posted on the Internet. The e-mails discuss how the researchers used temperature data — manipulated it, critics say — to support their theory of manmade global warming. The scientists also blast skeptics of climate change and appear to encourage the suppression of contrary research from being published.

Despite Gore's indifference to the scandal, the leaked e-mails that prompted Climategate mean a great deal — even if anthropogenic climate change is a real phenomenon. Although large amounts of time, effort and money have been invested in climate change science, its politics remain vulnerable. Those problems will intensify as the U.S. Senate considers climate change legislation, and they might ultimately influence public perception sufficiently to motivate the Senate to reject a climate change treaty.

I do not propose here to argue the validity of any particular points regarding climate change science. (I've examined and explained the science from a "lawyer's perspective" extensively and objectively. *See, e.g.,* Richard Faulk & John Gray, *A Lawyer's Look at the Science of Global Climate Change*, 44 DAILY ENV'T REP. 2 [Mar. 10, 2009]). As a lawyer, however, I must point out that

cavalier dismissals of critics' arguments seldom convince people that the critics are wrong. Without more, statements that the issue is "settled" resolve nothing. Indeed, they awaken public suspicion.

Skeptical citizens may think that environmentalists cannot give comprehensible answers to their critics or that they arrogantly believe that the understanding of common people is irrelevant. Worst of all, they may conclude that Gore and his retinue think that average citizens are incapable of understanding the scientific basis for climate change. If that happens, it won't matter, politically, whether Gore is right. The climate change advocates' position can and should be rejected if they cannot offer more than, "Trust me; I'm a lot smarter than you are."

The skeptical scientists understand this point very well, and their message is penetrating the public mind, especially in the United States. It is no accident that Australian scientist Ian Plimer's book "Heaven and Earth," a critique of the evidence supporting manmade global warming, has inspired a following among those whose minds remain open to debate. It also is no accident that the intrigue of *how* the hacked Climategate e-mails were obtained is drowned out by the outcry and demand for more details regarding *what they say*. Not surprisingly, liberal Sen. Barbara Boxer's demand for an investigation into the hacking fell on deaf ears, and conservative Sen. James Inhofe's skeptical diatribes are attracting new listeners.

Whatever the merits of the Climategate allegations, they have alerted and opened the minds of thousands, perhaps millions, of inquisitive laypeople. If the allegations are false, misleading or erroneous, the flaws will be revealed and the controversy will end quickly. If, however, the scandal persists, climate change advocates must face the "inconvenient truth" that the fate of negotiations is controlled by democratic, rather than scientific, principles, and that the growing body of skeptical voters in the U.S. is more important than the Nobel Prize committee that blessed Gore's efforts a few years ago.

Although the U.N.'s climate chief, Yvo de Boer, is firmly pledged to the climate movement, he recognizes that Climategate is taking its toll. De Boer conceded to the Associated Press that the hacked e-mails have damaged the image of the global warming research in the eyes of the public.

"I think a lot of people are skeptical about this issue in any case," he said Dec. 6, the day before the Copenhagen conference began. "And then when they have the feeling ... that scientists are manipulating information in a certain direction then of course it causes concern in a number of people to say, 'You see I told you so, this is not a real issue.'"

By at least recognizing that skepticism exists, de Boer sees part of the picture. Nevertheless, he still fails to understand *why* it exists. The doubters are not new. They were there well before the hacked e-mails came to light. They are unconvinced, distrustful and naturally resistant to spending billions of dollars to solve problems that, in their view, have been insufficiently justified and inadequately explained.

In a rush to make a case for the polar bear, the climate change movement neglected to make a compelling case for opening the pocketbooks of those responsible for paying for their salvation. Emotional appeals, not intellectual ones, still prevail because communications were oversimplified to populations considered incapable of scientific understanding.

The core questions raised by the hacked e-mails concern why their authors are comparatively silent in the face of criticism and why they have as yet refused to engage the critics in meaningful debates. It seems inexplicable that they would behave this way if they are as privately convinced of the strength of their case as they claim to be in public. Now, at the most delicate moment in climate change history, the doubters are empowered — and their numbers and intensity are growing.

Politics is taking control of the situation, driven by cost concerns pressed by a disastrous recession. In the next American elections, it is likely that the pocketbook — not the polar bear — will be at the forefront of voters' minds. Today's job, not tomorrow's weather, is likely to control the ballot lever. Political candidates who presume that climate scientists can prevail without cogent and comprehensible explanations, and without fully and publicly responding to the arguments of their adversaries, may be rudely surprised by an unreceptive American public.

In the midst of the rising storm, the Copenhagen conference remains confidently disengaged. In more than a week of attendance here, I have looked for, and failed to find, meaningful dialogues that openly consider the skeptics' allegations. The conference rolls

on with daily meetings regarding financing, adaptation and mitigation, apparently secure in its belief that the science is settled and that the skeptics are unworthy of debate. Apparently, most of the attendees have other issues on their mind. How much will my country have to pay? How much does my country stand to receive? Plainly, the money is being counted — and the skeptics have already been counted out. It is a bit early in the match, however, to take such an arrogant approach before the American political system is even engaged.

An alarm bell sounded in my mind, however, when one of the most startling presentations of the conference took place. Several “legal and policy experts” discussed how President Obama could move forward on a climate change agreement without securing congressional approval, thereby bypassing the democratic process entirely. The meeting was originally titled (on the conference video schedule) “Yes he can! How Obama can make a climate change agreement without waiting for Congress.” At the meeting, however, it was labeled, “Yes he can? How Obama can deliver stronger emission reductions.”

Either way, the presentation was alarming and shocking to those who believe that U.S. citizens still had a voice in the process. A video of the meeting is posted on the conference Web site ([http://www1.cop15.meta-fusion.com/kongresse/cop15/templ/play.php?id\\_kongressmain=1&theme=cop15&id\\_kongresssession=2338](http://www1.cop15.meta-fusion.com/kongresse/cop15/templ/play.php?id_kongressmain=1&theme=cop15&id_kongresssession=2338)). American citizens owe it to themselves to watch it so they can fully understand that a debate is underway to deprive them of their voice.

The presentation included discussions about how Obama was not just elected by Americans, but was selected as a leader by the “world society.” According to a Brazilian presenter, Obama is accountable to the planet’s entire population, who approved of him, and not merely to Americans, who merely voted for him.

According to another speaker, Kassie Siegel of the Center for Biological Diversity, Obama is not legally constrained by the U.S. Constitution’s requirement that international treaties be ratified by a two-thirds vote of the Senate. She explained that U.S. presidents have the power to make “executive agreements” to govern their country’s international affairs without securing congressional approval.

Supposedly, Congress has already preauthorized such an agreement by passing the Global Climate Protection Act of 1987, which gave the executive

branch the power to take international action to reduce the impact of greenhouse gases. Moreover, even without the statute, Siegel argued that the president could act *alone* to bind the United States internationally.

Although the president’s ability to affect U.S. *internal* affairs through such agreements is debatable, Siegel noted that Congress could be entirely bypassed by Environmental Protection Agency regulations. She pressed for wholesale regulation of greenhouse gases by the EPA pursuant to its recently released “endangerment” finding, which is the first step toward regulating greenhouse gases as pollutants under the Clean Air Act.

Even without a treaty, executive agreement or congressional climate change legislation, Siegel argued, the president is fully empowered through the EPA to “move beyond the ongoing debates” and “move forward quickly under the Clean Air Act” to deal with greenhouse gas issues. Accordingly, Siegel said, since the president’s “hands are not tied” by constitutional or legislative cords, he can and should forthrightly exercise his powers to make a firm deal in Copenhagen.

I do not intend to debate the legalities of such strategies in the brief space allowed here. I do, however, challenge the wisdom and common sense of anyone who believes that a U.S. president should bypass the democratic process on matters of global concern and tremendous public cost. No cause, however important, is significant enough to replace popular sovereignty with executive tyranny. Democratic freedoms should not be so lightly relinquished. Climate change is no exception, for without the individual liberties so many have fought and died to preserve, we are little more than lemmings doomed to follow the leader over the cliff.

It is beyond common sense, beyond wisdom, to trust *any* leaders, however popular, to arrogate such critical decisions to themselves without the consent of those who are governed. Even contributions to climate change financing cannot be made unilaterally. Otherwise, we face the same “taxation without representation” that spawned the American Revolution in the first place. Our founding principles matter — they matter far more than any international relationships that may be compromised, far more than any consequences we face from climate change or any other concern being discussed in Copenhagen. Even if legal arguments somehow can be made to justify those

powers, our country's traditions cry loudly against their exercise.

At least for now, no one in the Obama administration has advanced extreme strategies. Although it may be true that, if the EPA's endangerment finding survives, the agency may someday create a "command and control" system to regulate even the most minute emissions, the administration wisely disfavors such an exhaustive approach.

Indeed, the same day of Siegel's extreme presentation, EPA chief Lisa Jackson assured delegates in Copenhagen that the agency had no intention of taking unilateral action. She said legislation is needed to address any uncertainties that businesses might have. She said the EPA will "work closely" with Congress to pass a law to cut America's greenhouse gases by at least 80 percent by 2050.

Jackson said the U.S. would take "reasonable efforts" and also "meaningful, commonsense steps" to cut emissions, but she didn't provide specifics.

Hopefully, Jackson and the entire Obama administration are serious about using common sense — which requires full vetting, democratic debate and consent by the American people — as opposed to some fictitious global plebiscite. In the final analysis, the nation's citizens may agree that a climate change agreement serves their best interests, but that decision is wisely, constitutionally and politically entrusted to their representatives in Congress. Any president who thinks that such a vital issue is within his personal discretion may find that the voters at home — who placed him on the world stage — may exercise their franchise in 2012 to limit his run. Even before then, however, such unilateralism could imperil the president's agenda for the remainder of his term.

An old philosophical riddle asks, "If a tree falls in a forest and no one is around to hear it, does it make a sound?" The Climategate tree has fallen, and there were plenty of people around, both in Copenhagen and Washington, to hear it. The question is, however, was anyone listening? For the sake of the Copenhagen conference, and our Republic, one hopes so.



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