

## **GOVERNMENT AND CLIMATE CRISIS: DISCRETION OR OBLIGATION?**

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MAY 4, 2007

### I.

Last month, Time Magazine issued a special edition on climate change in which it said, “Never mind what you've heard about global warming as a slow-motion emergency that would take decades to play out. Suddenly and unexpectedly, the crisis is upon us.”

United Nations reports show rapid melting of the polar ice sheets, Antarctica, Greenland, and glaciers throughout the world. The oceans are heating and rising. Coral reefs are bleaching and dying. Species are on exodus from their habitats towards the poles. As a result of global warming the world now faces crop losses, food shortages, flooding, coastal loss, wildfire, drought, pests, hurricanes, heat waves, disease and extinctions. An international climate team has warned countries to prepare for as many as 50 million

human environmental refugees by 2010. Scientists explain that, due to the carbon already in the atmosphere, we are locked into a temperature rise of at least 2 degrees F. This alone will have impacts for generations to come, but if we continue business as usual, they predict Earth will warm as much as 10.4 degrees Fahrenheit, which will leave as many as 600 million people in the world facing starvation and 3.2 billion people suffering water shortages; it will convert the Amazon rainforest into savannah, and trigger the kind of mass extinction that hasn't occurred on Earth for 55 million years.

Global heating is leagues beyond what civilization has ever faced before.

## II.

I will give only brief background here. As you know, global heating is caused largely by heat-trapping gasses that we emit into our atmosphere. The more greenhouse gasses we put into the atmosphere, the hotter Earth gets. It's rather like putting a greenhouse roof around the entire Earth and locking it down. Carbon dioxide has climbed to levels unknown in the past 650,000 years, and we are still pumping it out at an annual increase of over 2% per year. The United States produces 25% of the world's carbon emissions. Carbon persists in the atmosphere up to a few centuries, so our emissions on this very day will have impacts far beyond our lifetimes. We can't turn this thermostat down. Scientists across the globe warn that we are nearing a dangerous "tipping point" that will set in motion irreversible dynamics through environmental feedback loops. After

that tipping point, our subsequent carbon reductions, no matter how impressive, will not thwart long-term catastrophe. British Prime Minister Tony Blair said months ago, “This disaster is not set to happen in some science fiction future many years ahead, but in our lifetime. Unless we act now . . . these consequences, disastrous as they are, will be irreversible.”

### III.

Let us consider the magnitude of the challenge we face.

First – the scale of the threat. It’s global. It affects every square inch of Earth.

Second, the intensity of the threat. Global warming threatens all of our basic survival mechanisms -- food, water, shelter, and health. British commentator Mark Lynas, author of *HIGH TIDE*, summarizes it this way:

If we go on emitting greenhouse gases at anything like the current rate, most of the surface of the globe will be rendered inhabitable within the lifetimes of most readers of this article.

Third –the timeframe for response. Jim Hansen, the leading climate scientist for NASA states: “[W]e have at most ten years—not ten years to decide upon action, but ten years to alter fundamentally the trajectory of global greenhouse emissions.” We have to reverse what is now still a climbing trajectory of greenhouse gas emissions and bring it down within 10 years at most, then reduce it 80% by 2050. You can think of these

requirements as Nature's Mandate. The tipping point concept means that we are sitting on a ticking clock. If we fail to bring carbon down in the next decade, we effectively lock the doors of our heating greenhouse and throw out the keys, leaving ourselves and future generations trapped inside as disaster unfolds over the long term.

Fourth –consider the scale of response needed to meet Nature's Mandate. Nearly every aspect of human daily living results in carbon emissions. Therefore, climate response must reach into virtually every sector of society: residential, commercial, industrial, transportation -- everything.

When we consider the scale, intensity, timeframe and kind of action needed, it is plain to see that we have never faced anything remotely like global warming before. Only a national response that is swift, focused and encompassing will be sufficient to confront this threat.

#### IV.

Let's reflect back to when citizens across this country rose in solidarity behind a clear national purpose. The attack on Pearl Harbor galvanized America in a way that we desperately need today. Almost overnight, the private business sector began retooling and overhauling production lines. The automobile industry scaled down car sales and channeled its workers and materials into the production of defense vehicles. The financial world sold war bonds. Communities planted victory gardens to grow food locally so that

the commercial food supplies could be sent to the military. Consumers made do with the bare minimum. States lowered their speed limits to conserve gas.

Individuals took initiative without being asked. Men signed up for active duty. Women took their place in the work force. Volunteers entertained the troops.

Speakers Bureaus formed in cities across the country, drawing 100,000 volunteers. These Victory Speakers, as they were called, were key to mobilizing the nation quickly. They would give five-minute speeches at theatres, club meetings, town halls, schools -- any forum they could find -- to explain the nature of the threat and the need for citizen support. Victory Speakers were not chosen for their outstanding oratory skills, but rather were the "trusted and familiar voices" in the community -- the banker, carpenter, mother, or school teacher, mother.

People did not just sit by. This was a time in our nation's history when individuals, families, businesses, schools and neighborhoods were engaged together, tapping their resources, ingenuity and energy in concerted defense of the country they loved and the future they hoped to pass to their children.

Generations later, how is this same country responding to the threat of climate crisis?

The reality today is that most Americans are too absorbed in their own routines to make time for global warming. We parents tend to be an especially busy group. We are so

consumed with taking our children to soccer games and piano lessons that we don't think ahead to how our children will get food and water, and be safe from storms, disease, and all of the other life-threatening circumstances that planet's heating will bring them. By living out the American dream, we are essentially signing our own children up for a draft for their lifetimes. But this war will be the most frightening because it has no end in sight for even their descendants, and all of Nature's survival resources will be scarce. Unfortunately, it's no consolation that we are good, devoted parents who just aren't that interested in global warming. Nature won't recognize our children as conscientious objectors to climate crisis.

To be sure, there are some Americans who are engaged and responding with small changes in their lives. They ride the bus more often, they refuse to buy bottled water, they turn off lights. This brings them comfort, thinking the problem is on its way to being solved. These people are important models, but national defense cannot be put on the backs of a few good soldiers. Most concerned citizens are doing nothing to enlist the rest of society in climate defense. There are no Victory Speakers for climate crisis.

Small progress can give us a dangerous sense of security. Overall, our society is nowhere near decarbonizing. Climate defense entails carbon math. We lose this war for countless generations to come if we can't get our total planetary carbon levels down before the tipping point. Each day that passes, the window of opportunity to avert global

catastrophe closes a little more.

Looking back, Hurricane Katrina was the Pearl Harbor of climate crisis. But in World War II, new agencies and commissions sprang up overnight to amass a national defense effort. One would think that every elected body and every agency in America would be convening task forces to achieve carbon lockdown within a decade. But aside from a small handful of officials, there is no leadership at the helm. There are plenty of hummers on the streets of America, but we have no national defense against global warming.

We simply cannot meet Nature's Carbon Mandate without leadership. Only government can provide both the regulation and the infrastructure necessary to bring carbon down within 10 years. We have thousands of agencies—more than any other nation in the world. If every one of them made global warming a top priority, we might stand a chance of meeting Nature's Mandate head on. But government would have to start now. Tony Blair said to the world five months ago, "There is nothing more serious, more urgent, more demanding of leadership . . . in the global community."

Instead of defending our atmosphere, our government is driving this country towards *runaway* greenhouse gas emissions. County commissioners are approving trophy home subdivisions and destination resorts as if global warming didn't exist. State

environmental agencies are approving air permits as if global warming didn't exist. The Forest Service is approving timber sales as if global warming didn't exist. And the electric power industry is racing to build more than 150 new coal fired power plants across the United States, banking on federal approval as if global warming didn't exist.

You might ask why, in the face of an unprecedented threat to the planet, does our American population just sit by and allow government to act as if the problem doesn't exist? Harvard Psychology Professor Daniel Gilbert suggests that humans evolved to respond to immediate threats, like enemies coming over the hillside. Intelligent as we are, it's hard for us to take seriously any threat that is not immediate. In other words, we'd be better off being invaded by Martians. But I think there is even more to it than that. Global warming has been captured by the press and the public as an environmental issue. Americans are fundamentally confused about government's role towards our environment, and that confusion operates as a dead-weight against decisive action.

In the remaining time, I want to suggest why our modern environmental law inhibits a response to global warming. And then I will suggest how Americans could demand climate response through asserting their collective property rights.

V.



Let me first explain how our atmosphere has been caught in a legal death spiral. Environmental law consists of hundreds of statutes and regulations passed since the 1970s to protect our natural resources. This is the body of law I have taught over the past 16 years. Had environmental law worked, we would not have this ecological crisis on our hands. The heart of the problem is this: while the purpose of every local, state and federal environmental law is to protect natural resources, nearly every law authorizes the agencies to permit the very pollution or damage that the statutes were designed to prevent. Of course, the permit systems were never intended to subvert the goals of environmental statutes. But most agencies today spend nearly all of their resources to *permit*, rather than prohibit, environmental destruction. Most officials are good, dedicated individuals, but as a group, they dread saying no to permits. Essentially, our agencies have taken the discretion in the law and have used it to destroy Nature, including its atmosphere.

You can think of environmental law, with all of its statutes and regulations, as one big picture. The agencies have constructed a frame for that picture. The four sides of that frame are discretion, discretion, discretion, and discretion -- to allow damage to our natural resources. All of environmental law is carried out through that frame. And so, though our statutes were passed to protect the air, water, farmland, wildlife and other resources, when the laws are carried out through the discretion frame, they are used as tools to openly

legalize damage. That is why we have species extinctions, rivers running dry, dead zones in our oceans, and global warming.

Why would public servants whose salaries are funded by tax dollars use their discretion to allow destruction of resources? It is because the discretion frame never characterizes natural resources as quantified property assets. Instead, the environment is portrayed as a nebulous feature of our world. So when private parties come to agencies seeking permits to pollute or destroy resources, they almost always carry the day because their property rights are clear and tangible.

Our federal government uses this discretion frame to justify inaction in the face of climate crisis. Protecting our atmosphere is characterized as a political choice. EPA claims discretion to permit pollution by the oil, gas, coal, and automobile industries—no matter that this legalized pollution will degrade the atmosphere so much that it will no longer support human civilization as we know it.

## VI.

So how can the public engage government to immediately respond to global warming? The public has to find a new frame for viewing government's role towards Nature. As author George Lakoff says, "Reframing is changing the way the public sees the world. It is changing what counts as common sense." This new way of looking at

government's role must engage all agencies and officials in climate defense as the supreme national priority.

## VII.

Reframing environmental law does not mean throwing out our environmental statutes. Those statutes give us a tremendous bureaucracy that we can steer back on course. They simply have to be infused with clear principles. The reframing I suggest draws on Supreme Court jurisprudence that has been around since the beginning of this country. It characterizes all of the resources essential to human survival—including the waters, wildlife, and air—as being packaged together in a legal endowment which I call Nature's Trust. Our imperiled atmosphere is one of the assets in that trust. A trust is a fundamental type of ownership whereby one manages property for the benefit of another. Long ago, the Supreme Court said that government, as the only enduring institution with control over human actions, is a trustee of Nature's resources. In other words, government holds this great natural trust for all generations of citizens. We all hold a common property interest in Nature's Trust.

With every trust there is a core duty of protection. The trustee must defend the trust against injury. When we call upon government to safeguard our atmosphere, we are invoking principles that are engrained in government itself. Back in 1892, our Supreme

Court said: “The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government . . . .” The Nature’s Trust concept is so basic to governance that it is found in many other countries today. For example, thirteen years ago, the Philippines Supreme Court invoked the trust to halt logging the last of the ancient rainforest there, saying, “[E]very generation has a responsibility to the next to preserve that . . . harmony [of Nature] . . . [These principles] are assumed to exist from the inception of humankind.” In contrast to the discretion frame, the trust frame forces government to protect Nature’s Endowment as property for future generations to inherit. Failure to protect natural inheritance amounts to generational theft.

## VII.

We can all take the very same set of environmental laws, and without changing a word of them, reframe the government’s *discretion* to destroy Nature into an *obligation* to protect Nature. But this principle works in reverse as well. We can pass any new law we want, and no matter what it says, if it is pressed through the discretion frame, the government will continue to impoverish natural resources until our society can no longer sustain itself.

The trust frame can be a coalescing force to confront climate crisis, in three ways. First, it may generate a national feeling of entitlement towards Nature. The discretion frame gives no hint of environmental loss. Because air and other natural resources are not defined assets, we never imagine that they could be all spent down, all used up. We seem unbothered even when our government leads us into global environmental catastrophe. But when we portray Nature as a trust rather than an ill-defined commons, we vest citizens with expectations of enduring property rights to a defined, bounded asset. We start thinking, “Hey, that’s my air, even if I share it with others.” Pollution of that air becomes an infringement on American property. Government is obligated to defend that property. The failure to mount a national climate defense becomes as absurd a proposition as the idea of government sitting idle during an attack on American soil.

Second, by defining Nature in familiar property terms, the trust frame reconciles private property rights with environmental protection. The discretion frame doesn’t do this. It portrays environmental resources as nebulous features of the world we live in. Private property rights carry the day in our agencies simply because they draw upon a language of property that is so deeply embedded in our national culture. To confront any environmental crisis today, including global warming, we have to be clear on how public resources and private property rights fit together in the scheme of things. The trust frame is itself a property concept, so rather than pitting environment against property rights, you

are fitting Nature into the system of property rights. The Nature's Trust frame is not anti-property rights. To the contrary, it affirms our collective property rights in assets, like the atmosphere, that support humanity. In securing our public property, the trust also anchors our entire system of private property rights. All private property depends on Nature's infrastructure. When that infrastructure collapses, it causes natural disasters that make property boundaries irrelevant. Remember, private property deeds didn't account for anything in the aftermath of Hurricane Katrina. And they won't account for anything along coastlines inundated by rising sea levels.

Third, the trust frame positions all nations of the world in a logical relationship towards Nature. The atmosphere is shared as property among sovereign nations of the Earth. They are sovereign co-tenant trustees of that atmosphere. They are all bound by the same duties that organize, for example, the relationship of family members who share ownership of a cabin as co-tenants. Property law has always imposed a responsibility on co-tenants to not degrade the common asset. This one concept lends definition to international climate responsibilities.

## VIII.

Let me conclude. Global heating dwarfs any threat we have known in the history of Humankind. Giving our government political discretion to allow further damage to our

atmosphere puts the future of this nation and the rest of the world in grave danger. If Americans take the lead to reframe our government's purpose as a trust duty to safeguard the commonly held atmosphere, we may soon find every other nation in the world engaged with us, not against us, in a massive, urgent defense effort to secure the systems of life on Earth for all generations to come.

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