



The Ethan Allen Letter

IDEAS FOR VERMONT'S FUTURE

A Monthly Publication of The Ethan Allen Institute

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The Future of the “Affordable Care Act”

BY JOHN McCLAUGHRY

The Supreme Court has now issued its startling ruling on the Patient Protection and Affordable Care Act (aka ObamaCare).

Four liberal justices ardently believe, with President Obama, that the constitutional power to regulate commerce authorizes Congress to require individuals to purchase government-approved health insurance, or suffer a monetary penalty for minding their own business.

Five conservative justices believe that the commerce power cannot be stretched to authorize any such penalty.

Four of these five believe that the entire act – enacted without a severability clause – should be invalidated.

One of these five – Chief Justice Roberts – believes that the government that argued the case for the commerce power expansion that he resoundingly rejected has nonetheless shown that the law passes constitu-

tional muster as an exercise of the taxing power, which the government barely mentioned in its briefs and oral argument.

To avoid throwing out the entire case under the Anti-Injunction Act (which prevents litigating a tax until it is actually applied), the Chief Justice decreed that the individual mandate carries a penalty for unlawful acts, and is thus not a tax to raise revenue for the support of the government.

Then, with the case safely before the Court, the same Chief Justice rewrote the ACA into a tax law that Congress did not pass, the President emphatically rejected, and the Solicitor General failed even to discuss until he offered 21 lines of text in reply to another party's Supreme Court brief.

Then the Chief Justice triumphantly upheld his newly invented law, decreeing that an individual's failure to buy government-approved health insurance triggers not a penalty but a new tax, and thus is within the power of Congress to levy taxes.

As the four conservative justices pointed out, in so many words, this sort of sophistry gives judicial activism a bad name. Meanwhile, the four liberal justices, clearly furious at

the Chief Justice's rejection of their beloved commerce power rationale, nonetheless joined his opinion based on the taxing power as the only way of keeping their equally beloved ACA alive.

Meanwhile, seven justices – the Chief Justice, the four conservatives, and two of the liberals – held that the power of Congress to spend money does not extend to the point of demanding that the states produce billions of dollars to expand Medicaid spending beyond its present levels, or lose all current Federal matching money. Exactly how far Washington can go before reaching the point of “too far” remains to be seen on a case by case basis, which is not reassuring.

Politically, what happened beginning in 2009 was this: first the House passed a bill taxing failure to purchase government-approved health insurance. But then Obama and the Democratic Senate got cold feet about creating a new federal tax likely to be very unpopular.

So the Senate converted the House-passed tax bill to a regulatory measure based on the commerce power. Obama then went on national television to say he “absolutely rejects” the

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The Ethan Allen Letter

The Ethan Allen Institute is an independent, non-profit, nonpartisan public policy research and educational organization, incorporated in 1993 under Vermont law.

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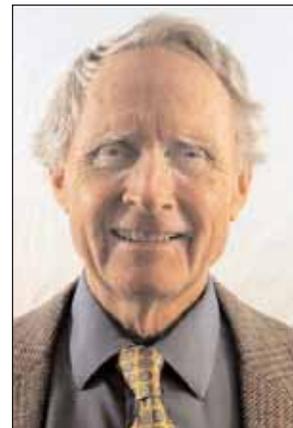
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PRESIDENT'S MESSAGE

A Voice for Energy Sanity



On July 28, the Institute's Energy Education Project hosted a workshop on Vermont's energy options. The recent power outage in India, caused when generating capacity failed to meet demand, reminds us how high the stakes are for Vermont.

One vocal faction in Vermont demands that the state shut down the reliable and stable Vermont Yankee Nuclear Plant in Vernon. This faction – including our governor – imagines that a variety of intermittent sources commonly called “renewable power” can replace most or all of Vermont Yankee. Our workshop focused on the likely consequences of this strategy.

The workshop was organized by Meredith Angwin, director of our Energy Education Project. Meredith is a physical chemist with decades of experience in both nuclear and renewable energy. The attendees included at least three nuclear engineers (none from Entergy), a physicist, and a mechanical engineer.

It was abundantly clear that wind and solar, intermittent and non-dispatchable, can at best form a minor part of Vermont's energy mix. Because of the price competition from presently abundant natural gas, “renewable” electrical generation will only occur if government forces utilities to buy it at above-market prices (as ours does). Forcing Vermont consumers to buy high-priced energy threatens any economic development relying on safe, reliable, and low-cost power. The 36 attendees did not foresee a happy ending if this trend continues.

Over the years EAI – and especially Meredith since 2010 – has been an informed and articulate voice of sanity in Vermont's energy debate. (For instance, see “The Renewable Industrial Complex” commentary of October 2010).

This issue will continue to loom large in our state for many years. Your support for EAI – and particularly our Energy Education Project – will make sure that our voice of sanity continues to be heard.



PRESIDENT

North Bennington Leaders Work to Save the Village School

REPORT

Three North Bennington education leaders explained their village's perilous journey out of Vermont's public school system at the Institute's 6th annual Friedman Day event on July 31.

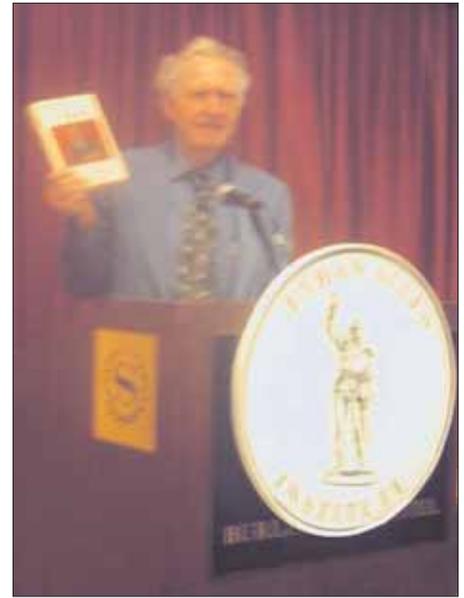
Principal Tom Martin and citizen board leaders Eva Sutton and Ray Mullineaux said that their two-year-long search for alternatives was motivated by the threat of their beloved village K-6 school being swallowed up into a Regional Education District and then closed. North Bennington instead elected to close the public school, lease the building to a new K-6 independent school, and

pay tuition for the district's pupils to attend the school of their choice. Headmaster of the nearby Mountain School at Winhall, Daren Houck, also a member of the citizen board, reviewed the success of his school which followed the same strategy a decade ago.

The panelists agreed that choice in education means that some village children might choose to attend elsewhere, but they were confident that the new independent school, locally managed and largely freed from public school control from Montpelier, would attract most of the village's children as well as others from neighboring towns. After several delays, the State Board of Education will consider North Bennington's applica-

tion on August 21, and the Department has given it its support notwithstanding Commissioner Vilaseca's advocacy for Regional Education District consolidation.

The Institute's Sheraton Economic Series event occurred



EAI President Bruce Shields holds an autographed copy of Milton and Rose Friedman's *Free to Choose* (1980).



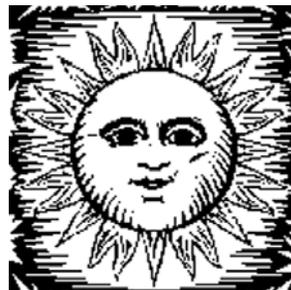
The panel: Daren Hauck (Mountain School at Winhall), Tom Martin, Raymond Mullineaux, and Eva Chatterjee Sutton.

on the centennial of the birth of Nobel Prize economist Milton Friedman, a leading champion of parental choice in education and founder, with his wife Rose, of the Friedman Foundation for Educational Choice. Among the 45 attendees were House Education Chair Joey Donovan (D-Burlington) and committee ranking member Peter Peltz (D-Woodbury), U.S. Senate candidates John MacGovern and Brooke Paige, and attorney general candidate Jack McMullen.

Vermont Voters' Report Card Published

The Institute has published its biennial voters' report card, as it has done in every even-numbered year since 2000. The booklet reports nine House and nine Senate roll call votes in the most recent biennium that we felt offered the clearest picture of the behavior of legislators on the issues the Institute is concerned with.

We usually do not include votes that are 28-2 or 135-9, since they indicate broad consensus among legislators of all parties. As an educational organization, EAI is precluded from indicating "good" and



"bad" votes and ranking legislators' performance.

Readers who want copies to distribute should contact President Bruce Shields (bruce@ethanallen.org). We do not think the report card is suitable to hand out on street corners or door to door. For an effective hand-out to the general public, readers are welcome to extract the votes of interest and make up their own custom hand-outs. The report card can be downloaded in PDF format from www.ethanallen.org and reproduced as needed.

Centennial Tribute to a One-time Vermonter

COMMENTARY

High on a hill outside the village of Ely stands an unusual octagonal house with a commanding southeast view down the Connecticut River valley. For several years, from the late sixties to the mid-seventies, it was the summer home of Milton and Rose Friedman.

Friedman was for 30 years a professor of economics at the influential University of Chicago. As an interviewer for a now-disappeared magazine called *Business and Society Review*, I interviewed a number of leading economists. That's how I made the Friedman's acquaintance at their Ely home, which they sold a few years later when Milton retired and moved to San Francisco.

I well recall several things about that interview – my first for the magazine. The location, on a bright summer day, was stunning. Both Friedmans were about five-foot-three but, as I said later, “with seven-foot intellects”.

Perhaps most memorable was Milton's lightning-fast responses to questions. They followed the pattern “the correct view (mine) is such and such, and there are four principal reasons for it”. Then he would recite, concisely, the reasons, and stop. My taped Friedman interview needed no editing at all.

Friedman's most celebrated professional work, *A Monetary History of the United States* (1971) won for him the Nobel Memorial Prize in Economics in 1976. In that work, Friedman and his coauthor Anna

Schwartz showed convincingly that the Great Depression was not, as leading economists believed at the time, due to “insufficient demand” that could be cured by government deficit spending.

As he later wrote, “The Fed was largely responsible for converting what might have been a garden-variety recession, although perhaps a fairly severe one, into a major catastrophe. Instead of using its powers to offset the depression, it presided over a decline in the quantity of money by one-third from 1929 to 1933 ... Far from the depression being a failure of the free-enterprise system, it was a tragic failure of government.”

Later, when inflation (the general rise of the price level) became a leading concern, one of Friedman's mantras was “inflation is always and everywhere a monetary phenomenon”. This is widely understood today, but for many years it was commonly believed that inflation was caused by above-market wages secured by union bargaining or manipulated increases in the price of commodities like minerals and petroleum.

Friedman favored replacing a discretionary monetary authority – the Fed – with a permanent monetary growth rule administered, in principle, by a computer. The more he examined the workings of government, the more he became devoted to economic freedom.

A recurring Friedman observation, based as always on rigorous research, was “The only cases in recorded history in which the masses have escaped grinding poverty is where they have had capitalism and largely free trade.” He despised price controls and correctly identified the minimum-wage

law as “one of the most, if not the most anti-black law on the statute books,” because it created a high labor force entry barrier to people with low education and skills – young people and minorities.

One of Friedman's great successes was laying the groundwork for elimination of the military draft, which he accomplished as chairman of a Nixon task force on military manpower. When General Westmoreland objected on the grounds that a paid soldiery would be “mercenaries”, Friedman retorted “If you insist on calling our volunteer soldiers ‘mercenaries’, I'll call those who you want drafted into service ‘slaves’”.

In his final decades – he died in 2006 at the age of 94 – Friedman powerfully championed parental choice in education. Let parents have an education voucher, like the GI Bill, to spend at the school that they believe is best suited to meet the needs of their children; then let all sorts of schools compete for empowered consumers.

That consumer choice and provider competition model is making great progress in states like Wisconsin, Ohio, Indiana, Louisiana, and Arizona. (In Vermont, it's a constant battle against bureaucrats and the teachers union just to preserve the tuition town choice system in place since 1859.)

Milton Friedman richly earned the accolade “Champion of Freedom”. Everyone who views individual and economic freedom as the path to liberty and prosperity – as proven in Friedman-influenced countries like Chile, Estonia, and Reagan-era America – owes a debt of gratitude to Milton on the occasion of his centennial.

Beware the Use Value Stealth Amendment

COMMENTARY

BY BRUCE SHIELDS

The 2012 legislature has just passed, and Gov. Shumlin has signed, a stealth provision of the “Vermont Energy Act” (Act 170) that threatens the future economic viability of Vermont’s farm and forest woodlot economy.

The story goes back to the early 1970s. Rising land values and the resulting higher property taxes were becoming steadily more destructive to farming and forestry. After several years of gestation, the Vermont legislature in 1978 created the Use Value Appraisal (UVA) program. This allows farm and forest land in the program to be taxed at actual use value, rather than at the often much higher market value for development.

Today, more than three-fourths of Vermont’s active farmland, and about half of all privately owned forestland, is enrolled. The reduction in the landowners’ taxable value is above 90% for forest land in more than half of Vermont towns, enabling many farms, family owned forestland, and associated wood industries to remain economically productive.

Environmental activists have always favored preventing development of rural land, but they have also yearned to use the UVA tax reduction as a tool to compel participating landowners to accept extensive restrictions on the uses of their land, as for example specifying

how many animals any farmer might keep or restricting forestry to non-mechanized harvest.

When the 1997 legislature enacted Act 60, large-scale landowners began to enter the UVA program to escape the pressure of the new statewide education property tax. That fact energized the environmental activists to promote ever more stringent controls over how landowners manage their property, citing such concerns as biodiversity, invasive species, water quality issues, management of Total Maximum Daily Loads in agricultural runoff water, and flood control.

On the final day of the 2012 session, the environmentalist-dominated legislature passed a major change to the UVA law. Buried in S.214, “the Vermont Energy Act of 2012” (now Act 170), there suddenly appeared a new section 16(a), captioned “Harvesting Guidelines and Procurement Standards”. Its first paragraph creates a voluntary standard for all timber harvesting to promote “long term sustainability”.

The second paragraph is not voluntary. It gives the commissioner of forests and parks the power and duty to issue regulations to impose “sustainability standards” governing any harvesting “for wood energy purposes” of forest lands in the UVA program, and requires all state agencies that make use of wood energy to buy chips only from compliant woodlots.

The Senate Natural Resources Committee did not alert any representative of any landowner or forestry organization that such a section was being inserted. The

legislators took no testimony on it. Commissioner of Forests and Parks Michael Snyder might possibly have raised an alarm, but happened to be away at the crucial moment.

This major intrusion of the state into the operation of private timber management was slipped through totally in the dark, except presumably for the environmental lobby that wanted it and has never had much of a commitment to open government.

In practice, the new state controls will govern impacts of harvesting on “rare, threatened, or endangered species, wetlands, wildlife habitat, natural communities, and forest health and sustainability”, as defined by Agency of Natural Resources officials.

A very feasible interpretation of this last paragraph is to require every operation selling any wood fuel to a state facility, or by extension to any public school or other plant using biomass, to conduct an Environmental Impact Review prior to operations. This would impose on Vermont woodland owners the same regulation that has been used so effectively by environmental activists to stop timber harvesting in Green Mountain National Forest.

The impact of this stealth amendment upon the timber income of UVA property owners is potentially devastating. The health of Vermont’s rural economy depends on rolling back this dangerous law in 2013, before it causes fatal damage to Vermont’s farm and forest land owners.

Coming Event: *Wall Street Journal* foreign affairs columnist Bret Stephens will speak at UVM's Davis Center on September 23. More details in the next *Letter*.

Thus Spake the Conservative Justices: "The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it." – From Chief Justice Roberts' opinion in the ACA case, supported by the four conservative justices. (June 26, 2012)

Thus Spake EAI: "There are more reasons than liberty, constitutionality, cost, taxation, jail, corporate welfare, and reverse Robin Hood economics to oppose an individual mandate, but these ought to be enough." (*EA Letter*, October 2009)

NEWS & VIEWS

Thus Spake the Liberal Justice: "In the 1990s, several states—including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont – enacted guaranteed-issue and community rating laws without requiring universal acquisition of insurance coverage. The results were disastrous. All seven states suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers." – Justice Ginsburg's opinion in the ACA case. (June 26, 2012)

Our Gold-plated Exchange: "The Department of Vermont Health Access issued a press release on July 3 announcing that they have applied for another \$104 million from the federal government to fund planning, technology and the start-up of the Ver-

mont Health Benefits Exchange. They are in the process of exhausting their level 1 grant of \$16 million...

"That's \$120 million expended or to be expended on staff, consultants and systems – not a penny to deliver actual health care services. By the way, \$120 million works out to \$2,553 per uninsured Vermonter." (VHCF 7/6/12)

Sorrell Takes Another Courtroom Hit: In the June *Letter* we quoted AG Sorrell's brief in the ACA case: "Congress may regulate under the Commerce Clause the conduct of individual people whose decisions *not* to participate in interstate commerce nonetheless have substantial effect on interstate commerce." The Supreme Court held 5-4 that Congress may not use the Commerce Power to mandate purchase of government-approved health insurance.

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The Future of the "Affordable Care Act"

Continued from Page 1

charge that his individual health insurance mandate – which became the Affordable Care Act – was a tax.

But it soon became clear to Obama that the commerce power mandate wouldn't survive a Constitutional challenge. Suddenly, as the Justice Department defended the ACA in the Florida case, the administration began to recast the mandate as a tax.

When oral argument in the Supreme Court in March strongly indicated that five justices wouldn't buy his commerce power argument, Obama and his political and media allies (notably including Sen. Patrick Leahy) launched a campaign to intimidate the Chief Justice into "preserving the integrity and legitimacy of his court" by upholding the ACA. The Chief Justice, for reasons still not known, caved in to the pressure, switched sides, struck down the com-

merce power expansion, but seized on the little-noticed taxing power argument to keep the ACA alive.

The upshot is that, thanks to the Chief Justice's excursion into judicial never never land in an almost certainly vain attempt to improve his reputation as Chief Justice, America now has a new federal tax on personal behavior that Congress never enacted, at least as a tax.

A responsible Justice, faithful to his duty to interpret the constitution, ought to have struck down the commerce power expansion, refused to consider the ACA as a tax measure until actually applied to a taxpayer (per the Anti-Injunction Act), noted that the ACA's provisions were not declared severable, and tossed out the whole law.

Then Congress and President would be free to pass a new ACA founded on the taxing power, impose

the tax on someone, and defend it against constitutional challenge.

It may or may not be within the constitutional power of Congress to tax an individual for declining to buy government-approved health insurance. Whether such a tax would be a direct tax (that must be apportioned among the states) deserves argument. In any case, as the four conservative justices wrote, "one would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression."

The Court has spoken, albeit with quadruply forked tongue. Now the issue comes before the voters in November. The ACA, which remarkably avoided interment by the apostasy of one Justice, is still likely to have a very rocky future.

After being shellacked by courts on campaign finance, data mining, carbon-dioxide emissions as a public nuisance, and Vermont Yankee (twice), Sorrell is now 1-for-6 over the past few years. (The one victory? *Massachusetts v. EPA*, where the Court inexplicably ruled 5-4 that carbon-dioxide is a “pollutant” subject to EPA regulation.)

More on Canadian Single Payer: “In Quebec, nearly 1.7 million people, or 25 percent of the population, still have no family doctor. Patients wait an average of 17.6 hours in the emergency room, nearly two hours more than a decade ago. Throughout Canada, the median wait time between seeing a general practitioner and treatment by a specialist has almost doubled from 1993 to 2010, going from 9.3 to 18.2 weeks.” – Yanick Labrie (IEDM, *Financial Post* 11/24/11)

Whence the Tax Power: Two years ago we predicted the government would start thinking about a tax on Body Mass Index to win the “war on obesity”. Following the ACA decision, ex-lobbyist Jack Abramoff wrote: “Lobbyists sapient enough to understand the consequences of the Roberts decision are already conferring with clients that desire to use the federal government as a competition-stifler and market-protector.”

“You don’t have to be a Nostradamus to predict taxes for those not installing certain kinds of solar panels on their roofs, particular security software on their computers or specific GPS devices in their cars. How high will be the tax for not enrolling in Acme Diversity Training seminars? How about federal tax on those loafers not installing the favored low-flow shower head? The possibilities are endless. And when government possibilities are endless, the lobbyists swarm.” (TTP 7/5/12)

AntiNukies Can’t Let Go: “The Vermont State Nuclear Advisory

Panel met on July 9 in Montpelier. They discussed nuclear safety. They quizzed Entergy about whether they were making adequate changes to the plant post-Fukushima. Listening, I felt I was in a time warp.

“It’s almost as if the [Entergy] court case hadn’t happened. It’s almost as if the judge hadn’t pointed out that Vermont has no jurisdiction about nuclear safety. It’s almost as if nobody knows that the NRC has sole jurisdiction on that subject. It’s almost as if Vermont never learns.” – Meredith Angwin (EEP 7/30/12)

Vermont Ranked 39th: CNBC released its ranking of “top states for doing business”. Vermont: 39th (last year: 44th). Keeping Vermont 39th in the rankings were Quality of Life (3rd) and Education (4th). New Hampshire: 19th: 1st in quality of life, 2nd in education.

Spending per pupil on K-12 education (2010): Vermont: \$15,274. New Hampshire: \$12,383 (19 percent less). U.S.: \$10,615 (30 percent less).

No More ACA Mandate: “In the wake of the Roberts decision, participation in Obamacare’s insurance scheme is optional. Rather than a requirement to buy coverage backed with a penalty for violators, the law now offers Americans two equally lawful and legitimate options: buy expensive insurance (which Obamacare will make all the more expensive), or pay a modest (and still largely unenforceable) tax and just buy insurance for the same price later if you need it.

“Presented as a choice, not a command, this provision will invite a straightforward comparison, and for many Americans the choice it would pose would be a very easy one.” (Capretta & Levin, NRO, 7/16/12)

Big News from Big Wind: “On the horizon: super-giant turbines ap-

proaching 1,000 feet in diameter ... bigger turbines produce greener electricity for two main reasons. First, manufacturers now have the

knowledge, experience and technology to build big wind turbines with great efficiency.

“Second, advanced materials and designs permit the efficient construction of large turbine blades that harness more wind without proportional increases in their mass or the masses of the tower and the nacelle that houses the generator. That means more clean power without large increases in the amount of material needed for construction or fuel needed for transportation.” – *Wind Daily* (6/25/12)

Remember This? The most recent quarterly report of the vaunted Challenge for Change process posted on its legislative web page is dated July 2011.

School Choice Preferred: The Friedman Foundation contracted with a national polling firm to test voter support for “a school voucher system” in 14 states where expanding parental choice is an issue (not including Vermont). Grouped together, the respondents favored a school voucher system by a 62-30 margin. (*School Choice Advocate* 6/12).

Global Warmers in Full Voice: “A high pressure system is stalled over the eastern U.S., resulting in a series of hot days. This is similar to what happened in Russia in 2010. As was the case in 2010, the [global warming] chorus is blaming global warming/climate change with prophecies that this is the future if carbon-dioxide emissions continue.

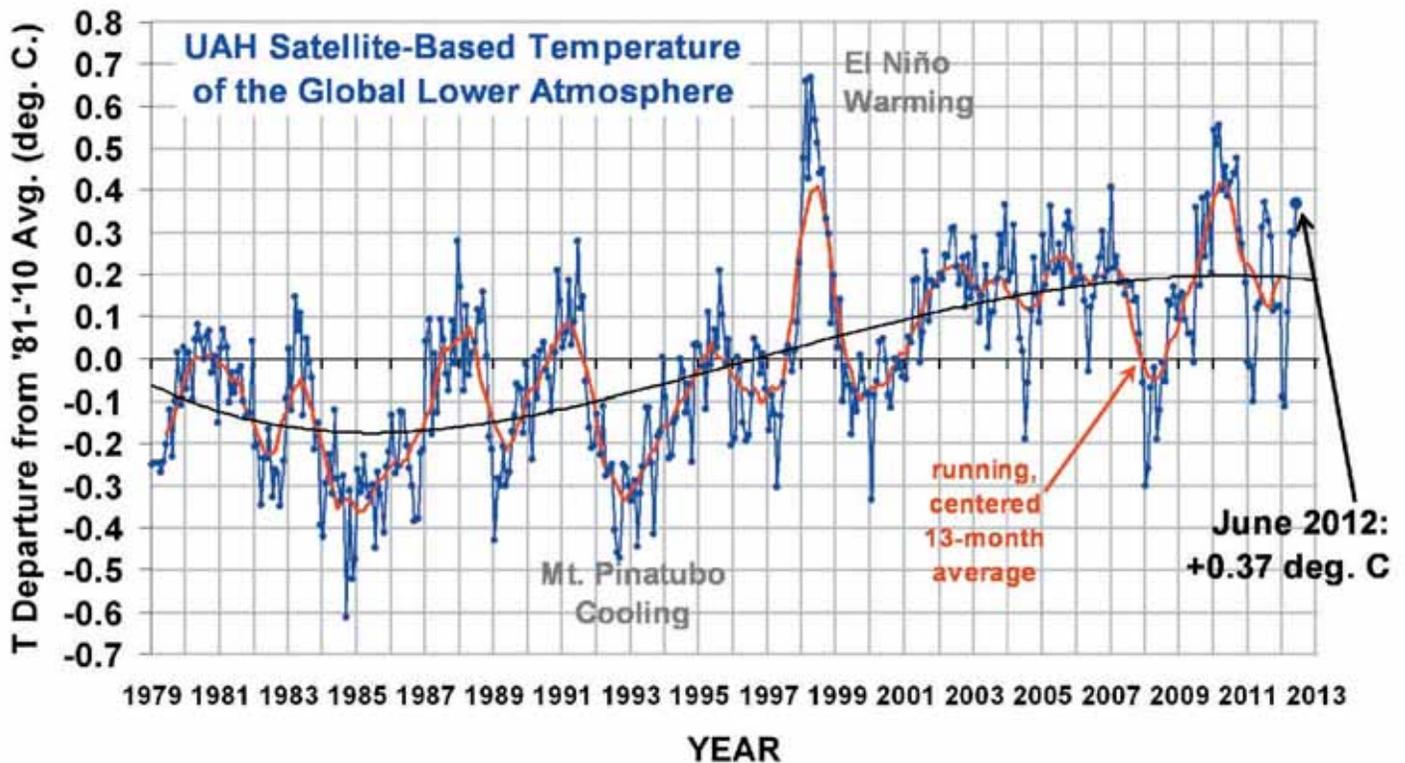
In the winter of 2010, the chorus called the unusual cold as normal weather change. And the members of the chorus wonder why the public is becoming increasingly skeptical towards global warming/climate change.” – Ken Haapala (SEPP 7/8/12)



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This chart is derived from satellite microwave lower troposphere (near ground) temperature measurements produced by NASA at the University of Alabama-Huntsville. During the period covered (1979-2012) atmospheric carbon dioxide concentrations have risen steadily from 336 ppm to 395 ppm.

In a third of a century the global temperature anomaly (departure from average for the period) is now higher by 0.37 degrees C. It is generally agreed that greenhouse gases from human emissions produce less than two percent of the overall natural greenhouse effect. The major greenhouse gas is water vapor, which unlike combustion emissions cannot be controlled by government regulations.