The Administration Goes It Alone on Energy Policy

David Spence February 25, 2014

In his State of the Union address, President Obama pledged to move forward on important policy problems with or without Congress. Since then he has issued an executive order directing the federal government to purchase more renewable electricity, and has directed the Environmental Protection Agency (EPA) to tighten mileage standards on heavy-duty trucks. And the Supreme Court heard oral arguments on another EPA regulation, on greenhouse gas emissions, yesterday.

These are just the latest in a long line of initiatives designed to address important energy and environmental policy problems during a period of unparalleled congressional gridlock. Political scientists have documented the "how" and the "why" of gridlock, showing that congressional parties are far more ideologically polarized now than at any time in the modern regulatory era. This creates incentives for the minority party to use tools like the filibuster to stop the majority, and for the majority to use its control over the agenda to prevent legislation that may command majority support, but not the support of the majority party. (This is the so-called "Hastert rule," used sometimes in the House of Representatives.)

This polarization and gridlock has prevented Congress from updating any major environmental statute in more than 30 years. Congress' record of inattention to energy legislation is almost as impressive. Meanwhile, life goes on, and the environmental and energy regulators – mainly, EPA and the Federal Energy Regulatory Commission (FERC) — have continued to grapple with the new problems that have arisen within their jurisdiction over the last two decades, struggling to fit old statutory regimes to these new problems. In a forthcoming article, my co-author Jody Freeman and I explore what this state of affairs means for regulatory policymaking, and for courts charged with reviewing the decisions agencies make in response to these challenges.

We focus much of our attention on how these agencies have addressed the pressing problem of climate change and the need for a cleaner energy mix. After the Supreme Court endorsed the notion that the greenhouse gases (GHGs) were pollutants subject to Clean Air Act regulation in 2007, and Congress subsequently failed to enact legislation addressing GHG emissions in 2009-10, EPA promulgated a succession of rules, including: (1) the "tailpipe rule," regulating emissions from motor vehicles, (2) the "tailoring rule," establishing the EPA's basic approach to regulating greenhouse gases from stationary sources, and (3) proposed GHG emissions standards for new power plants. The agency is also working on its program for limiting GHG emissions from existing power plants. Meanwhile, the FERC has established or proposed new rules designed to make it more profitable for renewable sources of electricity (wind and solar) and demand side resources to participate in wholesale electricity markets (Orders 764 and 745, respectively). And its Order 1000 is designed to facilitate the construction of new transmission lines that will bring clean, renewable power to market, in part by authorizing transmission planners to spread the cost of those lines more widely.

In each of these cases, the agency was faced with the task of adapting an old statute – the Clean Air Act or the Federal Power Act – to a set of problems that were probably not foreseen by Congress when it enacted the statute in the first place. We explore these adaptations in our article, but there is no question that for some of these regulatory initiatives, the statutory fit is awkward. Nevertheless, we show that in their efforts to discharge their statutory mandates, EPA and FERC have not taken advantage of congressional gridlock and simply "gone for broke" when wrestling with problems of fit. Instead they proceed cautiously and strategically, cognizant of the preferences of their political overseers and the risk of being overturned in the courts. The case before the Supreme Court illustrates this point: the parties are effectively arguing about the legality of the EPA's decision to regulate only a small fraction of the GHG emission sources that would be covered by a literal reading of the Clean Air Act.

EPA and FERC have also behaved in ways that are surprisingly accountable, not just to the president but also to Congress, the courts, and the larger public. This public accountability claim is supported by the most recent University of Texas Energy Poll, in which majorities in every partisan/ideological category* except "Strong Republicans" and "Libertarians" supported "taking steps to reduce carbon emissions. And in every ideological category, 70 percent or more supported "federal government action to develop renewable technologies." On clean energy issues, these agencies' initiatives seem to be more in line with public opinion than congressional Republicans.

Naturally, this being the United States, each of these regulatory initiatives has been or is being challenged in the courts, so federal judges must decide in each case whether the agency has stretched the statutory language too far. In discharging their judicial review function, courts will need to recognize that in the new strategic environment of regulatory policymaking (from which Congress is absent), either the executive branch or the courts decide policy outcomes. In other words, if courts "kick the problem back to Congress," that is a de facto policy decision in favor of the status quo, in most cases.

Professor Freeman and I argue that agencies are better suited than courts to do the work of updating these old statutes, and that the case for deferring to agencies in that task is stronger than ever with Congress largely absent from the policymaking process. The agency is the legally designated custodian of the statute (so designated by the enacting Congress), so the agency may have the superior claim to interpret the statute's application to new problems during periods of congressional quiescence.

So far the courts have been fairly deferential to these agencies' interpretations of their enabling legislation, but many of the initiatives listed above (like EPA's tailoring rule) are before reviewing courts right now. So it remains to be seen whether the courts will stop these clean energy initiatives in their tracks. They ought not to do so, because in these issue areas, the agencies are making policy choices with broad public support, and are doing so by creatively adapting their enabling statutes, not bending or breaking them.

* The seven categories were Strong Democrat, Somewhat/Lean Democrat, Strictly Independent, Libertarian, Somewhat Lean Republican, and Strong Republican.

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