Comment

Courting policy change

power of the judiciary in environmental decisions

Advocates for policy change often have numerous strategic options available. In a world with limited resources, the challenge is always to choose the options that will yield the greatest 'bang for the buck' in terms of actual change as well as perceived change. While variations on the theme of government structure and division of power exist around the world, we can typically look to influence policy at the executive branch, the legislative branch or the judicial branch.

In my view, many groups spend a disproportional amount of effort focused on the legislative branch, where the debate tends to be more in the public eye. Unfortunately, clean wins are few and far between, as the legislative process is one of compromise, debate and incrementalism.

The judicial process is often ignored because of the expense and complexity involved. As an attorney by training, I can tell you that while there are a number of shortcomings with the legal system, it has the advantage of declaring a clear victor of the skirmishes and battles along the way. In the US, it also has the advantage of being the final arbiter of our laws. In other words, if the Supreme Court strikes down a law passed by both houses of Congress and signed by the President, neither the President nor Congress can simply overrule the Court, because the Court's power trumps that of the other branches of government.

Thus, while policy wars may be won in the legislative branch, ultimate champions are crowned by the judiciary.

This civics lesson is offered as background to two recent court decisions – one in the US on climate change and one in the UK on nuclear policy. In 'Massachusetts versus the United States Environmental Protection Agency (EPA)', the Supreme Court ruled on 2 April, that the EPA has the authority to regulate greenhouse gas emissions from motor vehicles. In addition to this procedural ruling, the Court noted, there is a 'well documented rise in global temperatures [that has] coincided with a significant increase with the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.'

Based on the facts presented in this case, it is by no means the last word, but clearly the Administration has a lot of explaining to do on the subject of climate change and will need to address the court's concerns in the context of vehicle emissions, and also, at some point, on power plant emissions. This decision will also embolden climate efforts in Congress as well as in individual states which are already leading the way for policy reform.

While it may not be a final decision on the merits, it will no doubt prove to be one of the most significant mileposts on the path to policy changes that will reward and recognize the environmental benefits of decentralized energy.

In a February decision in the UK, the High Court ruled that the government's plans to build a new generation of nuclear power stations were 'unlawful' and the way it consulted with the public over the decision was 'misleading, seriously flawed, manifestly inadequate and procedurally unfair'. While the decision in this case brought by Greenpeace is procedural in nature, it does highlight the power of the courts to derail a policy decision that could lead to a much more centralized approach to power generation. In future issues of *COSPP* we will highlight the progress of these proceedings and gauge the ultimate impact of the respective courts' decisions.

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