

by some within the Obama administration and EPA, may provide a built-in incentive for Congress to move forward with some version of comprehensive climate change legislation.

All of these factors make it more likely than not that any future proposed climate change legislation will require a higher degree of bipartisan support than S 1733 enjoyed. While it is possible that the Kerry-Graham-Lieberman framework will provide the basis for future "filibuster-proof" climate change legislation, much remains to be seen about the structure of an

actual bill as support is garnered, compromises are negotiated, and concessions are made. Until such details are released, it is difficult to assess the success that any proposed bill might have, or whether competing bills, including Senator Graham's recently circulated proposed bill, will overshadow the trio's efforts. In any event, these multiple legislative proposals, together with EPA's ongoing march toward regulating GHGs under the Clean Air Act, should ensure that the Senate's agenda on climate change issues remains full for the foreseeable future. (M. Tory, M. McDonough)

THE FIGHT OVER EPA'S 'ENDANGERMENT FINDING' ON GREENHOUSE GASES GOES TO CONGRESS

The battle over the U.S. Environmental Protection Agency's (EPA) regulation of greenhouse gases (GHGs) has heated up in Congress. Over two years following the U.S. Supreme Court's decision in, *Massachusetts v. U.S. EPA* (2007), that carbon dioxide and other GHGs fall within the Clean Air Act's definition of air pollutants, and last year the EPA made a finding that such emissions endanger human health and welfare (the Endangerment Finding). Newly introduced congressional actions, however, seek to nullify EPA's Endangerment Finding

Background

Prior to 2007, the EPA did not interpret the definition of "pollutant" in the Clean Air Act to include carbon dioxide. In *Massachusetts v. EPA*, the Supreme Court determined that carbon dioxide emissions do meet the definition of a pollutant. In December 2009, after considering comments from hundreds of thousands of individuals and organizations, EPA determined that:

...greenhouse gases (GHGs) threaten the public health and welfare of the American people and....are the primary driver of climate change.

The net result of the Supreme Court decision and EPA's Endangerment Finding is that EPA must now move forward to regulate GHG emissions. EPA is currently working on regulations of GHGs.

Legislative Developments

On January 21, Senator Lisa Murkowski of Alaska (along with 40 other co-sponsoring senators) introduced a Joint Congressional Resolution (SJ RES. 26) to disapprove the EPA finding. The joint resolution is short and sweet:

A joint resolution disapproving a rule submitted by the Environmental Protection Agency relating to the endangerment finding and the cause or contribute findings for greenhouse gases under section 202(a) of the Clean Air Act.

The effect of the resolution is to nullify EPA's December 15, 2009 finding that GHGs endanger human health and welfare and, therefore, require regulation under the Clean Air Act.

Similarly, U.S. Representative Marsha Blackburn (R-Tenn.) introduced a bill on January 9, 2009, (HR 391). Similar to Senator Murkowski's Resolution, H.R. 391 totals two straightforward sentences:

Section 302(g) of the Clean Air Act is amended by adding the following at the end thereof: 'The term "air pollutant" shall not include carbon dioxide, water vapor, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, or sulfur hexafluoride.' Nothing in the Clean Air Act shall be treated as authorizing or requiring the regulation of climate change or global warming.

Broad Ramifications

The concern underlying the legislative actions is that the broad reach of the Clean Air Act may not restrict EPA's ability to account for the broader economic and policy implications inherent in the regulation of GHGs. Indeed, the Obama administration itself has indicated it prefers congressional legislation over regulation through the Clean Air Act.

Despite the simplicity of the proposed legislative actions, the presence and attention could affect broader efforts to pass federal climate change legislation. In statements on the Senate Floor on February 15, 2010, Senator Murkowski noted the bipartisan support against EPA regulations:

At least 41 members of the Senate are already on record as opposing [EPA regulations]. That's about as bipartisan as the climate debate has been in this Congress. And by allowing the EPA to move forward, the president is actually limiting Congress' ability to develop a bipartisan bill—instead of debating cap and trade or a carbon tax, we'll spend at least some of our time talking about the EPA's regulations. As I've said before, the EPA's actions will harm our economy at a time we can least afford it. I also believe the debate over climate policy belongs in Congress, because that's the only place where the best interests of our constituents can be fully represented.

On the other hand, proponents of cap and trade legislation, including the Obama administration, have used the threat of imminent EPA regulation of GHGs as a sort of "stick" to encourage reluctant colleagues to move forward.

States Take Aim

Governors and environmental groups, however, oppose any slowdown in the formulation of GHG regulations. In a January 21, 2010 letter to the Senate leaders of both major parties (Majority Leader Harry Reid and Minority Leader Mitch McConnell), Governor Arnold Schwarzenegger of California argued that efforts to block the EPA regulation will further stall "billions of dollars in job-creating clean energy investments" by "exacerbat[ing] the crippling uncertainty" facing the energy industry. In addition, Governor Schwarzenegger and supporters argued that the congressional joint resolution will block positive environmental effects of GHG regulation. The governors advocate for federal regulation of GHGs to provide a consistent regulatory framework and incentivize new business in renewable energy.

Conclusion and Implications

Few people believe that Senator Murkowski's joint resolution or Representative Blackburn's legislation will get very far. However, the introduction underscores the unique back-and-forth between the U.S. Supreme Court, Congress, and the Executive Branch (including agencies such as EPA), which has become an interesting dynamic in these efforts to introduce climate change and GHG regulations. While Congress does have the authority to overturn agency action, Congress rarely does so where the rulemaking involves scientific findings. Moving forward, there will, no doubt, be more interplay between the three branches of our federal government in the battle over climate regulation. (J. Davis, B. Flanagan)