

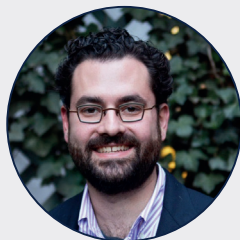
Climate Policy Architecture in the U.S.

Jack Lienke and Jason A. Schwartz

New York University



Jack Lienke (jack.lienke@nyu.edu) is the Regulatory Policy Director of the Institute for Policy Integrity at New York University School of Law, where he also serves as an adjunct professor.



Jason A. Schwartz (jason.schwartz@nyu.edu) is the Legal Director of the Institute for Policy Integrity at New York University School of Law, where he also serves as an adjunct professor.

Introduction

The central, “federal” government’s power is divided among three separate-but-equal branches, each with a distinct role: the legislature (the bicameral Congress) makes law; the executive (the president and the large network of administrative agencies that the president staffs and supervises) implements it; and the judiciary (the district, circuit, and supreme courts) interprets it. In addition to the federal centers of power, state and local governments play major roles in shaping U.S. climate policy, as do business interests and other stakeholders, including community and non-governmental organizations.

To date, Congress has passed little climate-specific law. Consequently, most federal policies that directly or indirectly limit greenhouse gas emissions have originated from executive-branch agencies, operating under broad grants of authority included in bedrock environment- and energy-focused statutes from the 1970s. The judiciary, meanwhile, has played a significant but inconsistent role in shaping these policies—initially interpreting old laws to allow or even require agencies to regulate greenhouse gases, but later issuing decisions that somewhat constrained agencies’ ambitions. This paper provides more detail on the workings of the three federal centers of power with respect to climate policy, followed by short

discussions of influence wielded by states and other stakeholders.

The Legislature

The U.S. Congress has two chambers: the Senate, which comprises 100 Senators (two for each of the fifty states, elected on staggered six-year cycles), and the House of Representatives, which has 435 members (apportioned among the states based on population, elected every two years). Most of those elected affiliate with either the Democratic or Republican party. Whichever party wins a majority leads the relevant chamber, chairs the key committees, and decides what legislation will be considered by the chamber as a whole. Legislation must be approved by both chambers and signed by the President to be enacted, and as will be discussed further below, the Senate typically has required the support of 60 Senators to advance legislation. Overriding a presidential veto of legislation requires a two-thirds majority in both chambers. These features together erect a high bar for enacting any significant legislation

Congress Is Unlikely to Play a Significant Direct Role in Near-Term Policymaking

Even though the Democratic Party—the only major U.S. political party that is at present committed to mitigating climate change—won

control of the presidency and both chambers of Congress in the 2020 election, major legislation aimed directly at reducing greenhouse gas emissions faces significant hurdles at least through 2022 (after which another election could give Democrats increased legislative majorities). One major hurdle is the filibuster, a longstanding procedural practice through which a single Senator can block legislation from advancing unless a 60-Senator supermajority votes to end debate. It is unlikely that Democrats, who currently hold only 50 of 100 Senate seats,¹ could persuade 10 Republican colleagues to vote for any significant climate legislation. And while Democrats could use their bare majority to eliminate the filibuster altogether, some in their own caucus oppose that move.

The Senate is similarly unlikely to muster the two-thirds majority needed to formally ratify any new international treaties on climate change, though the executive branch has tools to implement certain international agreements without formal Senate ratification.

A few procedural stratagems may allow a simple majority in the House and Senate to advance certain climate policies. For example, once each fiscal year, Congress can pass special budget resolutions with policies aimed at taxation and spending,² which are not subject to filibuster and which could include climate-oriented infrastructure spending or perhaps even a carbon tax. Similarly, some smaller-scale climate policies, especially spending on infrastructure and research, may be achievable if attached to “must-pass” legislation like end-of-the-year spending bills, which are less likely to be filibustered.

Notwithstanding these limited opportunities for Congressional action, federal climate policy over at least the next two years is likely to derive primarily from authorities granted to executive-branch agencies by previous legislation.

The Executive

This branch has many policy levers available. Existing legislation grants multiple federal agencies a wide variety of powers that, while not expressly aimed at greenhouse gas emissions, can nevertheless be used to reduce them. A comprehensive survey of all authorities is not possible here, but some of the most significant are flagged below.

Emission-Control Authorities

Under the Clean Air Act,³ the Environmental Protection Agency (EPA) can directly limit greenhouse gas emissions from new mobile sources and new-and-existing stationary sources. EPA has already established some limits for new cars and trucks, new and existing power plants, and new oil-and-gas wells (and related infrastructure). The design of these regulations, however, remains subject to heated debates both in and out of court, and any efforts to increase their stringency or expand coverage to additional sectors, like petroleum refineries, will spark similar controversy (Lienke, 2020).

Energy-Efficiency Authorities

The Energy Policy and Conservation Act (EPCA) grants the Department of Transportation (DOT) authority to set fuel-economy standards for certain motor vehicles. Because increased fuel economy is also auto manufacturers’ primary tool to comply with EPA’s greenhouse gas limits, DOT and EPA have traditionally coordinated their standards’ design and stringency, though the agencies are not legally obligated to do so.

EPCA also authorizes the Department of Energy (DOE) to set energy-efficiency standards for certain residential, commercial, and industrial appliances (like furnaces and walk-in freezers).

1 With a 50-50 split in the U.S. Senate, the Vice President casts tie-breaking vote. Starting on January 20, 2021, Democratic Vice President Kamala Harris will cast tie-breaking votes, giving slim majority control to the Democrats.

2 This procedural technique is called budget reconciliation. It has been used in the past to open oil drilling in the Arctic National Wildlife Refuge and to pass part of the legislation connected to the health program known as Obamacare.

3 Ironically, much of the legislation on which today’s federal climate action is based was originally passed decades ago on a bipartisan basis, often with Republican leadership.

Electricity-Market Authorities

The Federal Energy Regulatory Commission (FERC) has broad authority under the Federal Power Act to ensure that wholesale electricity rates are “just and reasonable.” FERC recently signaled openness to the integration of carbon-pricing into regional wholesale markets under its supervision. Together with DOE, FERC also enjoys some authority related to the siting and financing of interstate transmission lines. Because many of the areas most conducive to renewable-electricity generation in the U.S. are far from the country’s population centers, developing substantial new transmission infrastructure is a necessary component of power-sector-decarbonization efforts (Zevin et al., 2020).

Resource-Management Authorities

The U.S. federal government owns hundreds of millions of acres of surface and subsurface deposits of coal, oil, and natural gas, as well as offshore deposits in the outer continental shelf. Offices within the Interior Department are tasked, by various statutes, with leasing access to those deposits, and such leases currently account for almost 30 percent of annual U.S. energy production. By curtailing future leases and better managing existing leases, agencies could reduce fossil-fuel production from federal lands (Hein, 2020).⁴

Federal agencies can also affect the supply of coal, oil, and gas through control of transportation and distribution infrastructure. Notably, FERC has authority to review and approve (or not approve) interstate gas pipelines (Unel, 2020). Other federal agencies have responsibilities over international pipelines, export facilities for liquefied natural gas, coal railroad routes, and other fossil-fuel supply channels. The National Environmental Policy Act (NEPA) requires agencies to assess the environmental impacts

(including climate impacts) of such projects, and agencies may be able to cite their findings to justify denying necessary approvals (Hein & Jacewicz, 2020).⁵

Coordinating Authorities

Several White House offices exercise cross-cutting review and coordination roles across the executive branch. The Biden Administration has appointed a National Climate Advisor (sometimes referred to as the “domestic climate czar”) to ensure that key agencies’ actions and priorities reinforce each other, and that even agencies not traditionally focused on climate, like the Treasury and the Department of Health and Human Services, consider their programs’ climate impacts.

The Office of Information and Regulatory Affairs (OIRA) is responsible for reviewing major regulations, to check that regulatory benefits justify the costs and to ensure that regulations consistently advance presidential priorities. OIRA also helps harmonize agencies’ monetary estimates of costs and benefits, including estimates of the Social Cost of Greenhouse Gases—a metric that captures the marginal economic costs stemming from the physical climate damages caused by each additional ton of greenhouse gases. The stringency of climate regulations may depend partly on the estimated magnitude of the Social Cost of Greenhouse Gases (Schwartz, 2020).

The Council on Environmental Quality (CEQ) provides guidance on the preparation of environmental impact statements for major federal actions under NEPA—explaining what kinds of effects should be considered and in what manner—and also helps lead the federal government’s internal sustainability efforts.⁶

4 Following reduced production of coal, oil, and gas from federal lands, private and state-controlled lands in the United States, as well as international sources, could increase their production in response. But it is unlikely such alternate sources could perfectly substitute for federal sources by producing the same quantities at the same prices; consequently, the price for coal, oil, and gas will rise, overall supply and demand will fall, and ultimately fewer greenhouse gas emissions will be released.

5 Any such actions must be consistent with agencies’ statutory mandates, but various statutes may provide additional authorities not to approve new supply channels. For example, under the Natural Gas Act, FERC could determine that—given the climate impacts—a new gas pipeline would not advance “public convenience and necessity.”

6 The federal government is the country’s largest single consumer of energy and other goods, and so can help create markets and norms favoring alternative-energy vehicles and other climate-friendly products.

The Judiciary

Lawsuits can be brought—and, in today’s political climate, typically will be brought—against most major federal regulations and other agency actions bearing on climate change. Federal courts can temporarily or permanently block actions that fail to comply with relevant procedural requirements, are not supported by sufficient and rational analysis, or exceed the authority Congress delegated to the agency.

Judicial review slowed or stopped many of the Trump administration’s efforts to eliminate the Obama administration’s climate policies. But courts may do the same to some of the Biden Administration’s efforts to go *beyond* Obama-era policies. The Supreme Court—where conservative-minded justices now hold a two-thirds supermajority—in particular may be hostile to agency policies that rely on novel interpretations of older statutory provisions. Anticipation of this skeptical review will likely preemptively constrain the ambition of the Biden administration’s executive-branch policies.

That same skeptical review, together with a host of procedural and substantive complexities, may also dim the prospects of various nuisance suits and other common law-based attempts to seek direct remedies from the courts on climate change.

States

In most sectors, federal regulation serves as the floor, not the ceiling, for climate policy. Thus, state and local governments are typically free to exceed the scope or stringency of federal requirements, and many have already done so in the electricity and home-heating sectors. One notable exception to states and localities’ policy-making freedom is vehicle regulation. The Clean Air Act generally precludes states from setting their own auto emission standards, though California can request a waiver to do so (and the statute makes it difficult for EPA to deny that request). States can also be very influential by ‘showing the way’ for other states, the federal government, and even for countries abroad. For

example, Colorado established the nation’s first methane standards for oil and gas operations in 2014, which informed EPA’s issuance of nationwide standards two years later.

Non-Governmental Stakeholders

The policy arenas described above—federal and state, legislative, administrative, and judicial—provide formal and informal opportunities for participation by non-governmental stakeholders, including business. Fossil-fuel enterprises (especially coal) have historically opposed climate action on the grounds that it will result in large-scale economic and associated losses (Lienke & Revesz, 2016) and have sought to cast doubt on the validity of climate science (Oreskes and Conway, 2010). Recently, however, two of the nation’s most prominent trade associations, the Business Roundtable and the U.S. Chamber of Commerce (both of which have fossil-fuel companies among their members), announced support for a nationwide, market-based climate policy. Whether this endorsement of a hypothetical policy will translate to support for any specific legislative or regulatory proposals remains to be seen.

Non-governmental organizations, from environmental advocates to conservative think tanks, also play a significant role in both public and courtroom debates over climate policy. The shape and success of U.S. climate actions thus depends partly on how well politicians and bureaucrats navigate competing stakeholder interests.

Note

This Chapter does not represent the position, if any, of NYU School of Law.

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