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Executive Omnipotence in Copenhagen

A tale of how far modern "constitutional law" has taken us toward the executive state.

By Roger Pilon

As climate talks conclude in Copenhagen today, all eyes will be on President Obama — the "miracle worker" many hope will "save the planet." Regrettably, the underlying assumption here — that the president is all-powerful — is not that far-fetched.

Back in Washington last week, the executive branch's Environmental Protection Agency unveiled its long-awaited "final findings" — that greenhouse gases like carbon dioxide "endanger public health and welfare" — laying a foundation for massive EPA emissions regulations across the entire economy. Less noticed a day later was the release of a report by the Climate Law Institute's Center for Biological Diversity claiming that the president needn't worry about congressional inaction when he goes to Copenhagen. Despite Washington's cap-and-trade impasse, the report said, he has all the power he needs under current law to make a legally binding international commitment. The CLI report is right, and therein is a tale of how far modern "constitutional law" has taken us toward the executive state.

Titled "*Yes He Can*: President Obama's Power to Make an International Climate Commitment Without Waiting for Congress," the report makes two main claims. First, the president doesn't need a treaty (which would require a two-thirds vote in the Senate) or a statute (which would require majorities in both houses of Congress) to commit the nation to reduced emissions; he can instead use various types of "executive agreement," some 15,000 of which are already in force in areas like trade and foreign relations. Drawing on authority already granted under the Global Climate Protection Act, for example, the president can negotiate a "congressional-executive" agreement consistent with domestic environmental laws. And he can even negotiate a "sole executive" agreement, which would bind us under international, if not domestic, law.

The core of the matter, however, is the report's second claim, that the president "has clear authority under existing domestic law to regulate greenhouse gas emissions" and so doesn't need to create additional domestic law through an international agreement. He needs simply to "take care" that domestic laws be faithfully executed. The Clean Air Act is the foundation for this claim, but the Clean Water Act, Endangered Species Act, and National Environmental Policy Act all supplement it.

Enacted in 1963 and amended several times since, the Clean Air Act today authorizes the executive branch to implement a variety of measures to reduce pollution from all sectors of the U.S. economy, but the scope of its authority hasn't always been clear. Thus, in 1999 some 19 groups, including CLI's Center for Biological Diversity, petitioned the EPA to regulate greenhouse-gas emissions from new motor vehicles. After reviewing extensive public comment, the EPA concluded in 2003 that it lacked the authority to do so. The groups then sued, joined by twelve state and local governments. In 2007, in

Massachusetts v. *EPA*, a sharply divided Supreme Court, with Justice Kennedy joining the Court's four liberals, ruled that greenhouse gases like CO_2 are air pollutants covered by the Act, and that the EPA must determine whether they endanger human health. Last week's findings were the result.

The EPA must now establish air-quality "criteria" for pollutants emitted by everything from cars, airplanes, and ships to factories, buildings, lawnmowers — the list is endless — plus set a national pollution cap. Since the Clean Water Act authorizes the EPA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and CO_2 is said to produce ocean acidity, look for new water regulations as well. The CLI report tells us the administration has thus far "disavowed" any intent to use the Endangered Species Act to address the causes of climate change, but look for petitions to get that process going too. And finally, the National Environmental Policy Act requires detailed Environmental Impact Statements for proposed legislation and major federal actions significantly affecting the environment. Think of it as meta-regulation, meant to ensure that the regulation of other public and private entities serves the environmentalists' agenda.

"President Obama is not arriving in Copenhagen with his hands tied by a recalcitrant Congress," the report concludes. He has all the power he needs "to bind the United States to a formal, meaningful agreement to reduce emissions."

The single-minded arrogance we've come to expect from environmental zealots runs through the CLI report. Nowhere, for example, do we find any concern for the world's poor, who will suffer most from the proposed policies. Indeed, one imagines that, deep down, they and their appetites are seen as the ultimate environmental problem. Nor do we see any concern for the niceties of democratic legitimacy. The people be damned: If Congress balks, Obama can veto anything they might do, and let the chips fall where they may.

What we have here is the modern executive state. And the tale of how so powerful an executive arose is not really complicated: Congress and the Supreme Court conspired to create it. A century ago, progressives began viewing the Constitution's checks and balances not as protections against overweening power but as impediments to enlightened government — the kind of government that would one day be used to "save the planet." Since the New Deal, Congress has delegated ever more powers to the executive branch without much guidance as to how they are to be used. And a supine Court, cowed originally by Franklin Roosevelt's threat to add six new members, has gone along, in the name of "democracy" and judicial modesty, even as the expanding government has looked less and less democratic.

Still, some democratic controls are still in place. Were the president to be so foolish in Copenhagen as to promise what is politically unacceptable back home, Congress could certainly take back some of the powers it earlier delegated to him. Ultimately, of course, Congress has the power of the purse: It can simply refuse to fund the EPA's more extravagant regulatory schemes. And if Congress fails to do so, the American people can elect a Congress that will.

The courts also have powers they can use to keep the other branches in line — power to hold Congress to its enumerated and thus limited ends, and power to prohibit Congress from delegating its legislative powers to the executive branch. In the immediate case, however, the Court was the *source* of expanded executive power. In the 2007 EPA decision, it granted standing to plaintiffs who had none. And it read the Clean Air Act as giving the EPA power that neither text nor history would warrant. Earlier judicial "restraint" allowed the executive state to emerge. Later judicial "activism" allowed it to expand.

If the president does exercise his full powers in Copenhagen, however, there will be suits — by restricted industries and others on one side, and by environmental zealots urging even more regulation on the other. In deciding those cases, one hopes that the Court will start discerning the errors of modern "constitutional law" that have given us the executive state and begin restoring constitutional government.

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