

The Barriers of the Separation of Three Powers and the Federal System Faced by “the Most Productive President”

Ayako Sugino*

Introduction

President Trump, before being inaugurated as President, pledged to abolish unnecessary environmental regulations and other restrictions, accelerate the development of national energy resources and expand the supply of low-cost energy to U.S. consumers and manufacturing industries.¹ In early June, five months after inauguration, President Trump emphasized his own achievements saying that in terms of the number of bills signed in the first five months, he has done more than any other president since Franklin Roosevelt.² In fact, the number of bills, executive orders and memorandums that President Trump has signed is exceptionally large in comparison with other recent presidents since 1980, including many related to energy and environmental policies, such as promoting pipeline construction, abolishing environmental regulations on coal mines, and repealing CO₂ emission criteria for power stations.

Discussions on the Trump Administration’s policy tend to focus on whether it has real impacts on the energy supply and demand and on the behavior of the utilities. It has been pointed out that the trend toward reduced carbon dioxide emissions in the U.S. energy supply structure is already irreversible because of ongoing state-level efforts to reduce emissions, irrespective of the Federal Government policy, and the contribution of market factors such as the ample supply of natural gas at low cost and the falling cost of renewable energy. Still, a more basic point is that, in spite of the apparent image of the Administration’s strong executive power, there are doubts about the feasibility of the public commitments made by President Trump as government policy.

Difficulties in Constructing Oil Pipelines that Seemed Promising Immediately after Inauguration

President Trump, four days after his inauguration, signed a memorandum that ordered an immediate review of the Keystone XL Pipeline Project planned by TransCanada, a Canadian pipeline operator, for transporting synthetic crude oil derived from oil sands to the Gulf of Mexico.³

* Senior Researcher, Electric Power Group, Electric Power Industry & Smart Community Research Subunit, Fossil Fuels & Electric Power Industry Unit, The Institute of Energy Economics, Japan

¹ The White House, “An America First Energy Plan.”

² *The Washington Post*, “Trump says he has done more by this point than anybody since FDR. Sort of.,” Jun 12, 2017.

³ Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, January 24, 2017.

This project had been announced in July 2008, aiming to route the pipeline through the States of Montana, Nebraska and South Dakota. The Canadian Government approved the plan in March 2010 for the Canadian section of the route, followed by the approval of the State Government of South Dakota for the South Dakota section. In August 2011, the U.S. Department of State issued an environmental assessment report on the Keystone XL Pipeline Project, stating there was no possibility of serious environmental impact. This raised expectations that a construction permit would be issued within 2012. However, in November 2011, a bill mandating the consideration of another plan was submitted to the Nebraska State Legislature due to concerns about oil pollution and water quality degradation that might result from routing the pipeline through Sandhills, a region located close to a water source. As a result, in January 2012, the application for a construction permit to the Department of State was rejected. In May, TransCanada resubmitted the application for a construction permit after changing the route. In March 2013, the Department of State issued an environmental assessment report, stating that the Keystone XL Pipeline is unlikely to cause a major increase in greenhouse gas emissions; moreover, it is not expected to lead to a significant acceleration of oil sand development or to a significant increase in the refining of heavy crude oil in the Gulf of Mexico; and the lack of approval of this project will not stop crude oil development because alternative transportation means like railways are available. However, protests from environmental groups and tribes in the states involved continued. In November 2015, President Obama announced the suspension of a construction permit for the Keystone XL Pipeline.

The memorandum signed by President Trump prompted TransCanada to resubmit an application for the construction permit while ordering the Department of State to promptly review and approve it. On March 21, the Department of State issued the construction permit. Thus, it appeared that President Trump, two months after inauguration, had fulfilled one of his campaign promises. With the construction permit granted, TransCanada launched open season (bidding for oil transportation capacity) for the Keystone XL Pipeline Project at the end of July 2017. However, the market environment has changed greatly since the pipeline project was initially proposed, including sluggish demand for oil in the United States. Moreover, the State Government of Nebraska is reviewing the Keystone XL Pipeline Project for the Nebraska section of the route with a view to reaching a decision by late November 2017. TransCanada has mentioned the possibility of canceling the project depending on the state government's decision and bid results.⁴

As of August 2017 at the time of writing, we cannot predict the final decision of TransCanada. In any case, a major project that President Trump positioned as “a remarkable achievement right after inauguration” appears to be in difficulty due to the shared authority between the Federal Government and state governments.

⁴ *Lincoln Journal Star*, “TransCanada may decide not to build Keystone XL,” Jul 28, 2017, *World Herald Bureau*, “TransCanada official casts doubt on Keystone XL pipeline project,” Jul 29, 2017.

Delay in Promoting Infrastructure Investments that may Enjoy Nonpartisan Support

President Trump has also promised to promote the development of infrastructure including pipelines for export and harbor facilities that will help accelerate the development, utilization and export of abundant national energy resources.⁵ However, as of the end of July 2017, 17 projects for the construction of natural gas pipelines and associated LNG facilities are still waiting for permits. With all these projects combined, the total investment is estimated to be 13 billion dollars, with expected employment of 23,000 persons.⁶ The delay is caused by the slowness in appointing Federal Energy Regulatory Commission (FERC) Commissioners who are authorized to issue infrastructure construction permits.

There should be five FERC Commissioners who have to be nominated by the President and approved by the Senate. Two resigned under the Obama Administration, followed by two more under the Trump Administration, causing a shortage of four in July. Due to a provision in the basic law, a balance between parties has to be maintained: not more than three of the five Commissioners should be supporters of the same political party. As reported earlier, there have been delays under the Trump Administration in the appointment of ministers and politically appointed senior officials at administrative bodies as well as confusion in personnel affairs such as the dismissal of White House staff. In the case of FERC Commissioners, the President has to appoint two from the Republicans and two from the Democrats because of the provision concerning the balance between parties. Because of the severe clash between Republicans and Democrats in the Senate, there was concern that the Republicans might deliberately delay the appointment and approval of two Commissioners from the Democrats. This made it difficult to appoint relevant individuals to fill the vacancies left by the resigning four FERC Commissioners. Finally in August, progress toward the approval process was made, and the date for discussing the would-be Commissioners from the Democrats was determined.

The projects that are presently on hold due to the delay in reviews by the FERC are the plans supported by real demand in the energy market independent of the Trump Administration's campaign promise of "one trillion dollars of investment in infrastructure". These projects, which enjoy considerable nonpartisan support because of their advantages for stable power and gas supply, promoting investment and creating employment, are suffering delays due to troubles in Congress.

The Barrier of Jurisdiction that Hinders Deregulation

On the other hand, among the three powers that constitute the Federal Government, jurisdiction hampers the Trump Administration's policy to abolish the environmental regulations established under the Obama Administration. President Trump signed an Executive Order on

⁵ The White House, "President Donald J. Trump Unleashes America's Energy Potential," Jun 27, 2017.

⁶ *Politico.com*, "Why are these billions in pipeline projects stalled?," Aug 5, 2017.

Promoting Energy Independence and Economic Growth on March 28⁷. It ordered a review of the two regulations established by the Environmental Protection Agency (EPA) under the Obama Administration, namely, the CO₂ emission criteria for power stations and the methane emission criteria for shale gas development, and to freeze, amend or abolish them at the earliest possible timing.

As to the CO₂ emission criteria for existing power stations (the so-called Clean Power Plan), the final rule was promulgated in August 2015, but state governments, etc. began lawsuits asking for an injunction to suspend its execution. In response, in February 2016, the U.S. Supreme Court issued an order to suspend the execution of the rule until the lawsuits are settled. In response to the executive order from President Trump, the EPA will newly begin the process of establishing a rule concerning the abolishment of the CO₂ emission criteria.

Regarding the other criteria, namely, the methane emission criteria that had been promulgated in June 2016, the EPA, in response to the executive order from President Trump, declared in June 2017 the suspension of its execution for two years in order to review the regulation. Environmental groups began an administrative lawsuit against this decision. As a result, in July, the Federal Court of Appeals issued a judgment that the EPA is not authorized to suspend the execution of rules that have been promulgated, and therefore the EPA's action was inappropriate and the EPA should promptly implement the methane emission criteria.⁸ That is to say, the EPA under the Trump Administration will be required to assert that there are defects in the methane emission criteria that are already in effect, even though the criteria were established by the EPA under the Obama Administration on the basis of careful examination of scientific grounds so as to be able to withstand any future lawsuit and considering the opinions of different stakeholders collected according to an appropriate process. If the EPA succeeds in developing an alternative plan that leads to the substantial abolishment of the methane emission criteria according to the public commitment of President Trump, then the EPA will face lawsuits from environmental groups. The barrier of jurisdiction may be higher than those of state governments and Congress.

In view of such restrictions, what will happen to the ambitious public commitment of the President? We may find an answer in the Constitution, which sets the framework for the United States. The President's constitutional duty is to "take care that the laws be faithfully executed" and only Congress has legislative power. Reviewing turning points for energy policy in recent years, we find cases in which the President has set a powerful vision, but in none of them has the vision materialized as policy without gaining support through legislative processes.

Exceptionally, the above does not apply to foreign affairs. Since the establishment of the Trump Administration, instability has emerged around the world as a result of the United States' weakening commitment to maintaining the world order. Unlike in the domain of U.S. internal affairs where mechanisms for reconciling interests and making decisions have been clearly established, unsuccessful communication, like a message suggesting self-restraint taken as a threat, could easily develop into chaos in the domain of foreign affairs. In view of the constant flux of international

⁷ Executive Order 13783-Promoting Energy Independence and Economic Growth, March 28, 2017.

⁸ Clean Air Council, et al v. Pruitt, et al, No. 17-1145, D.C. Circuit, Jul 3, 2017.

affairs, it is important to refocus our attention on energy security risks and preparations against them.

Writer's Profile

Ayako Sugino

She Joined IEEJ in 2001. She is an expert in Energy situation in Americas. She holds PhD from The University of Tokyo. Her main works are “Expansion in the Presidential Authority and Unorthodox way of Achieving Agenda” (Nippon Hyoron Sha, 2016) and “Changing Energy Demand-Supply Balance and its Implications for the Diplomatic Policy” In *Recent Development in the Domestic and Foreign Policy of the United States*, Fumiaki Kubo et.al. (The Japan Institute of International Affairs, 2013).