

Energy and Environmental Policy: The Courts vs. The Congress

The recently announced retirement of Justice Anthony Kennedy is expected to tilt the Supreme Court to the right as early as this fall. Meanwhile, conventional wisdom is that Democrats will increase their numbers in the U.S. House of Representatives and may even take the majority in the House. The most bullish Democrats think there is potential to take a majority in the Senate too.

Given these cross currents, what is the outlook for energy and environmental policy in the next few years?

The bottom line: the courts are going to continue to be deciders on environmental policy in the foreseeable future. President Trump's focus on pushing forward judges at all levels will be one of the biggest influencers on policy for years to come.

Congress has struggled to pass any major energy or environmental legislation in recent years. At the end of 2015, a legislative package that included a lifting of the oil export ban and also provided certainty on some renewable energy tax breaks was enacted. But other than that, big efforts to overhaul outdated laws have fallen short. Regardless of the outcome of the election in November, the margins in the House and the Senate will be narrow. So even with Democratic control, the prospects of legislation moving forward in this area are slim.

In contrast, the courts continue to weigh in on key environmental issues. Given the logjam on Capitol Hill, more and more policy is made through regulation—and those regulations show up in courtrooms across the country. This is a pattern that is likely to continue. Even if a Blue Wave washes over the House and Senate, more and more policy is going to be set at the increasingly conservative courts.

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