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In this paper, I analyze the struggle over Corporate Average Fuel Economy (CAFE) standards since the OPEC embargo of 1973. The focus of the paper is over the growing difficulty in enacting an increase in CAFE since its initial adoption in 1975 and contrasting the initial passage during a period when congressional parties were relatively weak with subsequent efforts during a period when parties became significantly stronger. Building on Moe and Howell (1999), I argue that the growing difficulty in passing legislation presidents have a growing incentive to use unilateral action instead of legislation as the cost of working with Congress and use the Obama decision to sidestep Congress in expediting and increasing CAFE standards as an example. In fact, it appears that the Obama administration is using unilateral action on a wide range of policies when Congress seems unlikely to cooperate. Moreover, I argue that other players, most notably interest groups, also have an incentive to work with the executive branch to achieve policy resolution, depriving Congress of a role in interest aggregation.

This chapter is part of a broader effort to analyze U.S. legislative efforts to develop energy policy from the oil embargo of 1973 to the present. For the past four decades, there has been general agreement on the overall long term policy goal of making the United States less dependent on foreign sources of energy. Every president from Nixon to Obama and every Congress have articulated some version of an energy independence goal, regardless of which party has been in the majority or whether party control at the national government level has been unified or divided. What decision makers have not agreed upon are the policies needed to reach that goal. It would not be too much of a simplification to say that policy makers, interest groups and the public have largely split into two camps. One views the solution largely in terms of increasing production of fossil fuels to meet the growing energy demand, while the other prefers lowering demand through conservation and less reliance on fossil fuels. Until the last few years, when a sluggish economy slowed energy demand and some technological breakthroughs have increased supply, U.S. reliance on foreign energy has remained at or above the level at the time of the OPEC embargo. Even if one believes that dependence would have been much greater if it were not for the policies that were adopted, one could reasonably contend that U.S. energy policy is an example of policy failure.

In the description, analysis, and theorizing that follow, I will examine the legislative struggle over one policy option in the effort to enact and implement an overall energy policy, the use and adjustment of CAFE (corporate average fuel economy) standards on motor vehicles, particularly on automobiles and light trucks.¹ In doing so, I hope to provide some explanations for why energy policy has posed such difficulty for Congress and a series of presidential administrations over the past forty years. I will contend that as the hurdles to enacting legislation

¹ One might just as easily examine a policy that those favoring increasing the supply of fossil fuels have advocated, allowing drilling in the Arctic National Wildlife Refuge (ANWR), and reach similar conclusions

have grown, there has been a decline in congressional policy influence, not just on energy policy, but more broadly as presidents choose to bypass Congress in pursuing their policy goals.² In doing so, my findings are generally supportive of and extend the ideas that Terry Moe and William Howell (1999) set forth on presidential exercise of unilateral action. Moe and Howell contend that “it appears the strategy of unilateral action has grown increasingly more central to the modern presidency (1999:851-52).” Their analysis of presidential use of unilateral action rests on the examination of the ambiguities in the president’s powers, the growing statutory authority in existing law, and the hurdles that make it unlikely that “neither Congress nor the courts are likely to stop them (1999:852).” I will argue that presidents have a greater incentive to act unilaterally when the costs of passing legislation and the likelihood of success in doing so increase. In addition, other players, interest groups and the mass public, may also have incentives to support the presidential use of unilateral action as a means of avoiding gridlock.

In the course of this analysis of the legislative struggle over CAFE standards, I hope to offer insights about a number of aspects of the changing nature of Congress’ efforts to affect public policy and its relative influence vis-a-vis the president. These include the following:

1. The effect of the transition from committee government and relatively weak parties and party leadership to conditional party government with more cohesive and polarized parties and with greater authority in the hands of party leaders to hold their members together and address collective action problems;
2. The impact of contextual conditions in terms of the short term costs of the status quo and the skill of party leaders in disguising the traceability of proposed policy changes;

² It is not my intent in this paper to discuss the efficacy of the policy goal of reducing dependence on foreign energy sources.

3. Why close party balance since the 1994 election in the period of conditional party government contributes to the Congress' inability to resolve issue differences and enact legislation; and
4. How the increasing costs of overcoming congressional veto points has led the president to pursue other means to achieve his policy goals, including active engagement in interest aggregation at policy formulation stage and using existing statutory authority to achieve policy goals rather than pursuing new legislation.

To examine these propositions, I have divided this chapter into four sections. The first focuses on the expectations about how the congressional process worked when parties and party leaders were relatively weak and applies them to the struggle to enact the first set of CAFE standards in the 94th Congress as part of the Energy Policy and Conservation Act. The second part examines the efforts to increase CAFE standards beginning in the late 1980s until passage of the passage of the Energy Independence and Security Act of 2007 (EISA) during a period when parties in Congress became more cohesive and more polarized. Despite the existence of what many have labeled as conditional party government,³ it actually became more difficult to enact energy legislation than when parties and party leaders were considerably weaker. And the third section discusses the way that the Obama administration, beginning almost immediately after taking office in 2009, has used its interpretation of existing authority to set CAFE standards far beyond the intent of Congress in EISA, making non-incremental policy change. Finally, in the concluding section, I will argue that what has happened in energy policy, and specifically with CAFE standards, is not an ad hoc tactic on the part of the Obama administration but rather is a strategic change that is at the heart of a more systematic approach to overcome a congressional process that has become more difficult and more costly to navigate. In the end, as Congress

³ For elaborations of conditional party government theory, see Rohde 1991 and Aldrich 1995.

seemingly has gained policy influence through the increased use of its ability to block legislation, its policy influence is actually declining as both the executive and interest groups have reacted strategically.

Before analyzing how changes over the past forty years have impacted Congress' ability to resolving energy issues, and specifically to deal with CAFE standards, it is first necessary to discuss one important constant that has inhibited Congress' ability to legislate on energy policy, the nature of the issue itself.

Issues that Suit Legislatures

A major problem that Congress has faced in dealing with energy legislation over the past forty years has been that energy policy issues generally are not the types of policies that legislatures and their members are comfortable in addressing.⁴ The literature is filled with sound theorizing and empirical analysis supporting the idea that Congress and its members find it easiest to enact two broad types of legislation. One is pork barrel/distributive in nature because it allows members to concentrate benefits and disperse costs (Shepsle and Weingast 1981; Evans 2004; Evans 2011). When effectively logrolling with other members on programs that service their constituencies, pork barrel bills allow members to take credit for obtaining material benefits for their districts and states without seemingly conferring traceable costs on their constituents. Thus, members receive credit from their constituents when elections occur without giving potential opponents a visible basis for criticizing them.⁵ The second and related method is one the Douglas Arnold explores in his book, *The Logic of Congressional Action* (1990). Arnold asks how it is that Congress sometimes passes legislation in which costs are not dispersed. He credits congressional leaders with being able to design the legislation in such a way so as to

⁴ In this sense it is useful to think of policy as the independent variable affecting process.

⁵ Of course, this is not always the case. Especially in periods of budget constraints, members with reputations for pork barrel projects sometimes find themselves under attack as "wasteful spenders."

persuade members that the costs are not traceable. This often involves supplying the benefits of programs in the near term but deferring the costs to some later date. Again, the key is that the leaders persuade their members that a potential electoral opponent cannot use public dissatisfaction with policy costs as a campaign issue. As Rich Valley skillfully demonstrates in his chapter in this volume on the repeal of “Don’t Ask, Don’t Tell,” other members, not just party leaders, may also employ this strategy. To these two types, we might also add circumstances where majorities of both parties are willing to support policy changes that confer short term costs thus providing some insurance against either party using the issue in the upcoming campaign. The 1990 Omnibus Budget Reconciliation Act and the 1990 Budget Enforcement Act provide a good example of an effort to avoid electoral damage. As James Thurber observed: “The bipartisan agreements were intended to...provide political cover for unpopular election-year decisions (2013, 324).” These three types may not exhaust the ways to enact legislation with short term costs that might otherwise have negative electoral consequences, but they are the methods that political scientists most frequently mention.⁶

Most energy policy proposals, however, do not seemingly share any of these qualities, at least not in recent decades.⁷ Instead, they require the public to incur short term costs to reap long term benefits. These costs may come in the form of higher energy costs, increased taxes, increased costs of consumer goods (cars, appliances, heating and cooling systems), levels of air and water pollution, unemployment, and safety. Support for such policies exposes members to

⁶ It should be noted that it was easier to reach such an agreement in 1990 because the players did not perceive that partisan control of Congress was likely to be in play in the next election. Importantly, however, House Republicans, influenced by the electoral strategy of Newt Gingrich, refused to support the agreement. And President George H.W. Bush did pay an electoral cost because supporting the agreement violated his 1988 campaign promise not to raise taxes.

⁷ In the 1950s and 1960s, energy legislative issues were treated according to their separate sources (oil, gas, coal, nuclear, etc.) and fit the concentrated benefits/dispersed cost model. Support for ethanol purchase guarantees as part of broader energy packages is a notable exception. It is a more recent example of pork barrel provisions (in these instances efforts to win support of House members and senators representing corn producing constituencies).

potential electoral vulnerability. This is especially true because there are competing sides in the energy policy debate that are highly critical of the policy proposals of the other side.

Accordingly, as I have argued elsewhere, Congress has only passed significant energy legislation when the short-term political costs from maintaining the status quo exceed the short term political costs of adopting policy changes (Oppenheimer 2013). Arnold in his case example of energy legislation in the mid-1970s properly credits the skill of party leaders in limiting traceability of policy costs for the success in resolving some energy issues. Importantly, however, faced with rising energy prices and uncertainties about the supply of gasoline and heating oil in the aftermath of the embargo, Congress also had to weigh the political consequences of maintaining the status quo against the short term costs of policy change. Even under these circumstances, it took until 1980 for Congress to resolve all the key energy issues in a series of separate legislative packages. Once energy prices and supplies stabilized, the incentives for Congress to address energy policy abated.

Enactment of CAFE Standards in 1975

The enactment of the first set of CAFE standards occurred in 1975 in an era when political parties and party leadership in Congress were still weak. Although Democrats had sizable majorities, sixty senators and a 2:1 advantage in the House, they were hardly a cohesive group. Democrats in both the House and the Senate had average party unity scores of only 75 percent in the 94th Congress. The recently adopted Subcommittee Bill of Rights had reduced the power of committee chairs, but it had further decentralized decision making in the House. Some additional powers were seemingly available to the party leadership. Speaker Carl Albert, however, was reluctant to use them fully (Dodd and Oppenheimer 1977). In March 1975, the Senate did change the cloture requirements from two-thirds present and voting to three-fifths of

the membership. The number of cloture votes dropped for the remainder of that Congress but then increased, and the success of cloture motions had a modest increase. The rule change did not make Senate party leadership appreciably stronger in its ability to influence the behavior of its members. Moreover, the Ford presidency meant that there was divided party control, with differing preferences for energy policy in Congress and in the White House.

The existence of high and unstable oil and gas prices and uncertainty about supplies in the aftermath of the embargo proved critical in reaching an accommodation on CAFE standards and on some other energy issues. Both sides rejected the use of rationing or higher gasoline taxes. In his 1975 State of the Union Address, President Ford argued that “neither would achieve the desired results and both would produce unacceptable inequities (1976: 5).” Congressional Democrats concluded that “the cross elasticity between gasoline prices and the fuel economy of new cars is very low, and...lifetime fuel costs still have too little effect on consumer automobile purchasing power (S Rept 94-179, 9).” With automobiles accounting for 40 percent of domestic petroleum consumption, it was impossible to maintain the status quo. The Ford administration siding with the domestic automobile companies opposed imposing fuel economy standards and instead called for voluntary efforts from the auto industry with a goal of a 40 percent improvement in fuel economy by 1980. The UAW, in contrast, was generally accepting of some required mileage standard.

In the Senate, the pieces of a larger energy package were initially considered as four separate pieces of legislation. The Committee on Commerce dealt with S 1883, the Automobile Fuel Economy Act of 1975. Its hearings in March, 1975 built on nine previous days of hearings beginning in the 93rd Congress that considered a variety of automobile fuel economy proposals. The end product was one largely developed within the committee, albeit one that Democrats

dominated. The bill called for instituting of mileage standards for automobiles beginning with the 1977 model year with a fuel economy standard reaching 28 mpg by 1985. The Committee softened the blow, allowing the Secretary of Transportation to modify the 1980 and 1985 standards in adopting an amendment from Senator Philip Hart (D MI). Hart's fellow Michigander, Robert Griffin (R MI) provided the major opposition to the CAFÉ standards in the committee and on the floor. After his floor amendment to delay implementation of the standards for a year was handily defeated, he tried unsuccessfully to recommit the bill to the Finance Committee to be considered with an energy tax bill. At no point did Griffin indicate any intention to filibuster the bill. Hart supported Griffin on the amendment to delay implementation but voted against recommital and for final passage. Even with the Ford administration's opposition to government imposed mileage standards, the 36 Senate Republicans who voted on the bill split 18-18, and the bill passed 63-21.

The events in the House were very similar to those in the Senate in that it was a committee-dominated process. Unlike the Senate, however, all the non-tax aspects of energy legislation were contained in a single piece of legislation, HR 7014, over which the Committee on Interstate and Foreign Commerce had jurisdiction. The major focus of debate was on the sections dealing with the continuation and modifications of oil price controls, not the automobile fuel efficiency provisions contained in Title V of the bill. Nevertheless, the Committee's Energy and Power Subcommittee held an extended hearing on the mileage issue. Clarence "Bud" Brown, Jr (R OH), the subcommittee's ranking minority member, tried to delete the 28 mpg standard for 1985 during floor consideration arguing that "neither Congress nor anyone else knows how to accomplish the 28-mile-per-gallon standard by 1985 (Congressional Record, September 17, 1975, 28934)." John Dingell (D MI), the subcommittee's chair and bill manager

and a strong UAW and auto industry ally in the House, surprisingly led the opposition to the Brown amendment, clearly siding with the UAW's position about the manufacture of more fuel efficient vehicles. The amendment was defeated handily, but eight of the other eleven Democrats from Michigan supported Brown's amendment, while Republicans only split 72-62 in favor of it. As in the Senate, the competing coalitions engaged a mix of constituency and party forces. The majority party leadership did not use the rule to restrict the amendment process substantially on the House floor as twenty-four amendments received roll call votes. Although Republicans opposed the bill on final passage by more than 3 to 1 and Democrats supported it by over 5 to 1, this was not a case of the parties moving in lock step.

The conference report scheduled CAFE standards for cars to reach 20 mpg by 1980 in yearly steps and then increase to 27.5 mpg by 1985 and thereafter. The DOT secretary could make downward adjustments, if necessary, and set lower mileage standards for light trucks. Party votes did again prevail in approving the conference report in both chambers. But Majority Leader Tip O'Neill offered a more nuanced and accurate picture of the entire bill when he observed: "This is perhaps the most parochial issue that could ever hit the floor." (*Congressional Quarterly Almanac 1975*, 243) He then went on to discuss all of the geographic cleavages that affected consideration but did not mention party. Despite the congressional Republicans voting against the bill and little evidence that either chamber was capable of overriding a veto, President Ford signed the bill. He expressed reservations but acknowledged the political and electoral realities: "If I were to veto this bill, the debates of the past year would almost surely continue through the election year and beyond (Ford, December 22, 1975)." Bill proponents in a Democratic-controlled Congress had allowed for changes both in the overall legislation and in CAFE standards to produce a bill that President Ford could accept. It also

meant that some issues, most notably a final decision on how to decontrol oil prices, were left unresolved.

The initial set of CAFE standards was enacted in largely a give-and-take context with a mix of constituency, interest group, and partisan forces in play. Opponents to setting standards and to the legislation more generally, however, were not willing to be veto players, even if they preferred the status quo to the proposed policy changes. The potential electoral costs of blocking action in a period of high energy prices and uncertainty about supply meant that it was better to pass legislation and remove the issue from the table before the 1976 campaign began. For much the same reason, those who favored CAFE standards realized that they could support the mileage requirements without suffering electoral consequences. Moreover, with large Democratic majorities in both the House and the Senate, and the expectation that they would persist, there was little incentive for Republicans to engage in a strategy of obstructionism, making the Democrats appear incapable of governing and using that strategy to win control of Congress in the 1976 election. In addition, failure to produce energy legislation would reflect badly on the Ford administration as well and might hurt the reelection prospects of Republicans. Under these circumstances, Republican members had a strong incentive to resolve some of the energy issues.

Blocking Policy Change

The second period is one during which Congress enacted few energy policy changes and most initiatives, including those to increase CAFE standards, were blocked. Without a sustained crisis for more two decades, the short term political costs for members of making non-incremental changes in policy to achieve the longer term benefits of reduced energy dependence were too great. Even as energy prices again escalated, especially after 2001, energy issues were more difficult to resolve than had been the case in the 1970s. The presence of stronger, more

polarized parties in Congress meant that it was easier to mobilize party majorities, but it also meant that the minority was more cohesive in blocking legislation. In addition, after Republicans won control of Congress in the 1994 election, increased electoral competition between the two congressional parties made compromise more difficult, lest the majority party be seen as governing competently. Instead of cooperating in producing long term policy solutions and insulating each other from electoral damage, blocking majority party and presidential initiatives and reaping electoral gains took precedence. In this environment it was not until 2007 that Congress passed and President Bush reluctantly signed a bill increasing CAFE standards.

The Struggle over CAFE Standards, 1985-2006

Gasoline prices peaked in 1981 but remained at levels well above those of 1975 until 1985. As the energy crisis abated, GM and Ford successfully lobbied the Department of Transportation through its National Highway Transportation Safety Administration (NHTSA) to roll back the CAFE target from 27.5 to 26 mpg. Congress was unable to block NHTSA from doing so, and the 26 mpg standard for passenger automobiles remained in place until 1989 when it was finally raised to 27.5. By that time, the real dollar cost of gasoline, which had been declining since 1981, was lower than pre-OPEC embargo prices for more than three years. (See Figure 1) OPEC was seemingly in disarray, unable to enforce cooperation among its members to limit supply in a period of declining demand. The energy crisis had abated, and public and governmental concern focused on the health of the domestic automobile industry, not increasing fuel efficiency.⁸

⁸ The 1988 Republican platform called for deregulation to bring technological change to transportation as “ far preferable to outmoded regulation, such as the current design of corporate average fuel economy (CAFÉ) standards, which create substantial advantages for foreign auto manufacturers and actually promote the export of U.S. jobs.

By the time the 27.5 mpg standard had been reached, parties in both the House and the Senate had become stronger, more ideologically homogeneous, and more cohesive than they had been in 1975 (Rohde 1991). Especially in the House, the majority party leadership had more resources with which to mobilize its membership to pass legislation. Increasingly, the sides on the energy debate organized along party lines, with those favoring production-oriented solutions and reliance on fossil fuels more concentrated within the Republican congressional membership and those advocating conservation and alternative fuels more concentrated within the Democratic party, although there were sizeable minority positions articulated within each party's caucus until the mid-1990s on energy issues. Gradually, however, Republicans won the House and Senate seats that Democrats from oil and gas producing constituencies had held, and the number of moderate Republicans from consuming areas in the Northeast had declined.⁹ In turn, party positions on energy policy hardened. One major crosscutting cleavage party persisted within the Democratic party among members with strong environmental and organized labor constituencies, especially on issues that affected the domestic automobile industry and the UAW. Until the 2000s when another energy crisis emerged, there was little impetus to enact significant energy legislation, such as increasing CAFE standards, because the short term costs were too much of a political liability when the benefits were all in the future.

With the competing sides on energy policy intense and fairly evenly divided, it was likely that floor consideration would be very time consuming, and in the end no major legislation would be enacted. And opponents to increasing CAFE standards blocked even the potential for such action to occur, just as the opponents of production approaches blocked those as well. Even

⁹ Neither of these groups has totally disappeared. Republicans continued to struggle for support from their House members and senators from the Northeast when pro-energy production policies, such as opening off shore and environmentally sensitive areas to drilling, were perceived as having negative environment consequences. In addition, there remained a few Democratic House members and senators from producing constituencies.

after energy prices began to increase dramatically, one party or the other continued to prevent major energy policy change until 2007.¹⁰

This does not mean that there was a total absence of congressional activity on CAFE standards. Most of it, however, was futile. In 1989 as the new Bush administration, Republicans in Congress, and remaining energy-producing state Democrats began to push for oil and gas drilling in the Arctic National Wildlife Refuge (ANWR), some congressional Democrats countered with proposals to raise CAFE standards. In 1990, shortly after Iraq invading of Kuwait set off concerns about a potential energy crisis, Senator Richard Bryan (D NV) and his Republican co-sponsor, Slade Gorton (WA), undertook an unsuccessful attempt to lessen the opposition of domestic auto producers to an increase in CAFE standards by requiring a percentage increase in company mileage standards over their fleetwide averages thus putting a burden on foreign producers of smaller, more fuel efficient vehicles and not just on domestic producers. Nevertheless, active opposition auto companies and the UAW, in addition to that of the Bush administration, defeated a cloture motion as several auto state Democrats, Democrats from energy producing states, and two-thirds of the Republicans voted block a vote on the bill.

In an effort to pass a major energy bill lasting several years, Senate Energy Committee chair, J. Bennett Johnston (D LA), tried to couple CAFE with ANWR (Davis 1989). He also hoped to take advantage of residual concern over the Iraq War to enact a package that included drilling in ANWR and electric utility deregulation among other things but recognized the political necessity of a change in CAFE standards if a comprehensive bill were to survive in the Senate. Majority Leader George Mitchell (D ME) had already appointed a sixteen member party task force on energy that would require energy conservation provisions, including an increase in CAFE standards (Idelson 1991). President Bush, meanwhile, threatened to veto a bill that

¹⁰ Modest energy bills passed in 1991 and 2005, but both were stripped of controversial provisions.

mandated CAFE increases, eventually insisting that the administration decide on CAFE standards.

With the Iraq crisis fading, Majority Leader Mitchell delayed bringing the bill to the Senate floor for months by which time most of the controversial provisions had been stripped from the legislation. Johnston dropped the ANWR provision, and the bill only directed the DOT secretary to study CAFE standards and potential increase. Even if CAFE increases had been included in the Senate bill, it is unlikely that they would have passed the House where UAW and auto industry constituencies were proportionately stronger.¹¹

The Gulf War and the resulting energy crisis were relatively brief, even if they again raised concerns about energy dependence. The potential electoral costs of inaction on major energy issues were not as great as the costs of making major policy changes that would yield long term benefits but impose short term economic costs on the public. In addition, CAFE standard opponents in 1990 resorted to a filibuster, a tactic which opponents had not employed in 1975. President Ford accepted some modifications, while President Bush threatened a veto. Signs of party and party leadership involvement increased. Johnston and his Energy and Natural Resources Committee did not have autonomy in crafting energy legislation. Majority Leader Mitchell and his energy task force were a significant constraint.

After the enactment of a stripped down bill, energy policy generally, and CAFE standards in particular, ceased to be front burner issues for Congress again until Clinton presidency and even then legislative initiatives were limited as energy prices remained low. The Clinton administration's initial energy proposals dealt with energy taxes as a mean of encouraging conservation (and raising revenue) and not efficiency standards. When Republicans

¹¹ The omnibus energy bill reported by the Subcommittee on Energy and Power of the House Committee on Energy and Commerce did not contain a provision on CAFE standards. If it had, the full committee chair, John Dingell, would have strongly opposed it.

took control of Congress in 1995, they ensured that the Clinton administration did not use existing authority to raise CAFE standards. Majority Whip Tom DeLay (R TX) added a provision to the DOT appropriations bill prohibiting any increases in CAFE standards for cars or trucks, sending a clear message that it was a party position (Hager 1995). For the duration of the Clinton administration, Republicans put this restriction in each DOT appropriations bill.¹² In 1999, Senate Democrats offered an amendment to the bill that would have allowed DOT to study whether to change CAFE standards. Even that modest step was blocked. The conferees again accepted the ban on spending for updating CAFE standards that was in the House bill, and President Clinton signed the appropriations bill. A year later, with gasoline prices quickly rising in real dollars to the highest price in fifteen years, auto state senators did agree to compromise allowing for DOT and the National Academy of Science to conduct a study of CAFE standards and let DOT propose increase if the study supported a change. In exchange, however, any change in CAFE standards would require a vote by Congress, and the House rider continued for another year (Plungis 2000).

With the election of President George W. Bush in 2000 and continued Republican majorities, in the House for six years and in the Senate for all but part of the 107th Congress, the outlook for anything more than a symbolic increase in CAFE standards was bleak. As gasoline prices increased markedly, especially after the onset of the Iraq War in 2003, other items received the dominant focus of debate during three efforts to enact energy legislation between 2001 and 2006. With Republicans in control, attention focused on increasing domestic energy supplies through tax incentives to encourage fossil fuel production, making ANWR accessible for exploration, and incentives for ethanol production and use. In the 107th Congress, neither the

¹²Prior to DeLay's amendment, a Michigan Republican member of the House Appropriations Committee, Joe Knollenberg, placed a provision in the committee report for the Department of Transportation appropriations bill that reduced funding that might be used to implement increased mileage standards on vans and light trucks.

House nor the Senate version of the energy bill included mandatory increases in CAFE standards, although the bills provided guidelines that would likely lead to very modest increases.¹³ The Senate, however, was unable to invoke cloture on an amendment to allow drilling in ANWR. Without it, no conference agreement was possible. Again, in the 108th Congress, even with Republicans back in majority control of the Senate and with House Republicans reluctantly willing to remove the ANWR issue from the energy bill, the bill could not survive a Senate filibuster over liability protection for the MTBE (methyl tertiary butyl ether) additive, a provision on which House Republicans were unwilling to compromise. CAFE standards remained an auxiliary issue.¹⁴

When Congress finally passed an energy bill in 2005, it did not have a provision on CAFE standard as many controversial elements were purposely kept out of the legislation. Senator Richard Durbin (D IL) did offer an amendment on the Senate floor to increase CAFE standards to 40 mpg over eleven years, but it was soundly defeated (28-67) with even nearly as many Democrats voting against the amendment as for it. The bill made only modest policy changes, including some pork provisions on ethanol designed to insure the support of corn state senators of both parties as well as some tax incentives for fossil fuels and some support for renewables. What passed looked like a public works bill that concentrated benefits and dispersed costs. Most of the controversial energy issues remained on the table.

¹³ In the House bill, HR 4, auto producers would have to save about 3.7 percent of gas consumption over six years. The Senate bill, S 517, required NHTSA to increase mileage standards for cars and light trucks but only after considering costs, economic impact, and safety consequences. And only if NHTSA did not act could Congress decide to raise standards.

¹⁴ An amendment Ed Markey (D MA) offered during subcommittee consideration in the House requiring cuts in petroleum demand for vehicles over a five year period, thus forcing an increase in CAFE standards in a circuitous manner, was rejected 6-24 (Goldreich 2003). In the Senate, advocates of CAFE increases complained that the bill's criteria that DOT had to consider before increasing standards made it more difficult to do so than under existing law (Goldreich 2003a). Thus, had Congress passed an energy bill, it would not have contained any measurable change in CAFE standards.

In 2006, House Republicans did push legislation to allow the Secretary of Transportation to set car fuel economy standards after weighing a number of factors. By then, gasoline prices had risen to an annual average of \$2.637 in real dollar terms for unleaded regular (See Figure 1), over a dollar a gallon higher than at the time of the OPEC embargo.¹⁵ With the 2006 elections approaching, Republicans felt a need to respond in some way to growing public concern over gasoline prices. They did, however, defeat an amendment that Markey (D MA) offered to the bill in the Energy and Commerce Committee to increase CAFE standards to 33 mpg by 2015, with auto district Democrats joining with Republicans in opposition. The Bush administration supported the bill. However, when it appeared the bill would face opposition in both chambers, the Republican leadership did not schedule it for floor consideration (Tollefson 2006).

Despite the rise in gasoline prices and projections that they would go higher, Republicans in Congress and the Bush administration were able to block efforts to increase CAFE standards for six years. Democrats with auto constituencies continued to join them in arguing that raising CAFE standards would impose unacceptable costs in terms of the competitiveness of the auto industry, jobs, and vehicle safety and costs. But increasingly CAFE standards, and energy issues more generally, were partisan. Republicans could pass production-oriented legislation in the House, but fairly united Democratic opposition in an increasingly polarized Senate meant the minority party could prevent cloture if it was perceived that legislation was positioned at the Republican median chamber position.¹⁶ And Democrats were unwilling to leave the decision about increasing CAFE standards at the discretion of an administration that they viewed as being

¹⁵ The price data is from “Total Annual Energy Review” U.S. Energy Information Administration, September 27, 2012. The price is calculated in chained (2005) dollars.
<http://www.eia.gov/totalenergy/data/annual/showtext.cfm?t=ptb0524> .

¹⁶ For a more detailed analysis of the effect of “conditional party government” on efforts to pass energy legislation in the 2001-06 period see Oppenheimer and Hetherington, 2007. Ironically, when Republicans attached ANWR exploration to the budget reconciliation process to avoid a Senate filibuster of the issue, a group of environmentally sensitive House Republicans blocked action in that chamber.

against significant increases.¹⁷ Unlike the initial adoption of CAFE standards in the 1970s, compromises were not readily available even as the costs of the status quo increased with rising gasoline prices. Moreover, Republicans preferred the status quo to any position that would be acceptable to a sufficient number of Senate Democrats to invoke cloture. That position, however, became more difficult to defend as gasoline prices and the potential electoral costs increased. In addition, with the parties in tight competition for control of the House and Senate and with the expectations of very competitive presidential elections, the parties were reluctant to enact legislation for which their opponents could claim credit. Much like Daniel Tichenor's narrative in his chapter on immigration reform efforts during the same time period, forces blocking non-incremental policy change repeatedly prevailed.

A Breakthrough in 2007

With the return of Democratic control of Congress for the first time in twelve years after the 2006 election, increasing CAFE standards would have greater agenda priority. President Bush's opposition to a statutory-set increase, however, presented a major obstacle. But rising gasoline prices had been one of the issues on which Republicans proved vulnerable in the 2006 elections. Gasoline prices continued to increase in 2007 to new record highs with expectations that they would go even higher (and they did through 2008, exceeding \$4.11 a gallon by early July before declining), creating a political context in which status quo on CAFE standards was no longer an acceptable alternative. Both the Bush administration and key congressional Republicans indicated a willingness to support some changes in CAFE standards as part of an overall energy strategy, although coupled with fossil fuel production provisions. Bush proposed an annual increase in CAFE standards beginning in 2010, but treated it as a goal, not a

¹⁷ NHTSA had made incremental increases in the standard for light trucks during the Bush administration. In 2006, it raised the standard to 24 mpg, beginning in 2011. The 1975 law did not set standards for light trucks but left those decisions to DOT.

requirement. And Ted Stevens (R AK), the ranking Republican on the Senate Commerce Committee introduced a bill calling for a 40 mpg standard as part of a package that included drilling in ANWR (Raju 2007). Meanwhile, Democratic congressional leaders designed a strategy to avoid splitting their membership on the issue and to limit the political costs of supporting a CAFE increase. They took advantage of bicameralism in an effort to address three energy issues--- CAFE standards, transferring tax subsidies for fossil fuels in the 2005 legislation to alternative energy sources, and requiring utilities to use a certain percentage of renewable energy sources in the production of electricity.

Because support for CAFE standard increase was stronger in the Senate than in the House and the reverse was the case with the other two provisions, Speaker Pelosi used bicameralism to her advantage and did not include CAFE standards in the House bill, instead allowing the Senate to deal with it. CAFE standards remained a difficult issue for House Democrats who had ties to two core Democratic interest group constituencies, environmentalists and organized labor, especially the UAW, that were initially on opposite sides on CAFE standards' issue. If they were forced to vote on CAFE standards, many House Democrats would anger one of these groups. The House leadership could hold enough member support to pass a meaningful increase in CAFE standards, but the margin would be narrow. Instead of Speaker Pelosi and her members incurring political costs, she persuaded Ed Markey, the CAFE standards' main sponsor, to withdraw his amendment in exchange for Democrats opposed to Markey agreeing to drop their weaker alternative. The bill that passed the House contained provisions on subsidies for alternative fuels and on the use of renewables for electric utility generation but nothing on CAFE standards. By the time that the bill reached the House floor, the Senate had already passed an energy bill that included CAFE standards' increases to 35 mpg by 2020 but without the subsidy

or electricity generation provisions. Assuming that the CAFE provision survived a conference or other negotiated House-Senate agreement, Democratic House members might be able to support an increase in CAFE standards without ever having to take a separate vote on a CAFE provision. In this way Speaker Pelosi's strategy insulated her party's members from potential electoral costs of voting for or against a CAFE increase. In the end, Pelosi held auto district Democrats after negotiating an agreement giving NHTSA greater authority than EPA in setting standards, as labor opposition to a significant CAFE increase diminished. On the key House vote concurring with the Senate amendment to the bill with an amendment (maintaining all three key provisions), only seven Democrats, all southern conservative and/or from oil producing states, voted against it.

The Senate's resistance to the electric utility generation provision and the Bush's administration's threat to veto the transfer of the tax break provision from fossil fuels to alternative sources meant that those two provisions were eventually dropped from the bill. The final passage vote of 314-100 in the House and the overwhelming support in the Senate on the cloture vote to concur with the House bill stripped to the two provisions understates the levels of controversy and the partisan conflict. Republicans blocked the tax subsidy for renewables and the electricity generation portions of the legislation. Blocking the CAFE change was no longer a viable political option, even for many conservative members who preferred the status quo to an increase in CAFE standards. The political dimension trumped the ideological one.

President Bush, who had wanted his administration to retain the authority over mileage standards and had stated in a White House position paper that "Congress should not legislate a particular numeric fuel economy standard," (Baker 2007) signed the bill and tried to share credit with Speaker Pelosi at the ceremony. As I will discuss below, although the legislation required

new numeric standards, the executive branch still had a role. Between the bill signing and the time Bush left office, however, neither he nor his Department of Transportation did much to expedite the implementation of the new CAFÉ standards.¹⁸

Obama Sidesteps Congress

As passed, EISA was designed to ensure that mileage for passenger and non-passenger automobiles for sale in the United States would increase to 35 mpg by 2020. It gave authority to the Secretary of Transportation to “prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard ratably beginning with the model year 2011 and ending with the model year 2020 (PL 110-140 2007, 121 Stat 1499).” Congress’ intent was that the executive branch would write regulations for auto manufacturers to reach that standard in a steplike fashion. The concern was that otherwise the executive would do less. So the law called for “beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of *at least 35 miles per gallon....*”¹⁹ In addition, for subsequent years 2021 to 2030, the legislation set the standard at “the maximum feasible average fuel economy for that model year (PL 110-140 2007, 121 Stat 1499).” It is fair to say that the parties to the legislation had assumed that as 2020 approached, DOT would put forth a proposal for additional steps over the following decade or that Congress might then revisit CAFE standards. Instead the Obama administration unveiled a more far-reaching interpretation of its authority under EISA than anyone involved in its passage in 2007 had or could have anticipated and did so without Congress playing a role. Aware of the growing difficulty of enacting legislation because of

¹⁸ The administration did propose to increase the target for vans, SUVs, and smaller pick-up trucks to 28.6 mpg by 2015 but discouraged states from adopting stricter mileage standards than provided for in the new law (Bettelheim 2008).

¹⁹ Italics added.

Congress' increased use of blocking tactics, the Obama administration acted unilaterally, using existing authority to achieve its policy goals.

The strategy the administration employed with CAFE foreshadowed what was to follow on a broad range of domestic policy programs. Because of Congress' more frequent and vigorous use of its blocking powers, the administration chose to avoid it whenever possible, effectively weakening congressional policy influence. In the course of doing so, the executive assumed another function that is frequently associated with legislatures in the policy process, interest aggregation.

When President Obama came to office in January 2009, the price of gasoline was less than \$2.00 per gallon, under half of what it had been six months earlier, prior to the economic collapse and hardly indicative of energy crisis conditions that had been necessary to enact major energy legislation in the past. Even with his party enjoying larger House and Senate majorities than any president since 1994, there was little expectation that Congress would welcome a request for President Obama to revisit CAFE standards, an issue that Congress had seemingly put to bed in 2007. Yet within four months of taking office, Obama made it clear that CAFE standards and the interlocking issue of greenhouse gas emissions from automobiles were very high in terms of policy priority for his administration.²⁰ Having struggled with Congress over a stimulus package immediately upon taking office, anticipating great difficulty in enacting health care legislation, and concerned with the potential of unified Republican opposition to most of its domestic policy initiatives, the Obama administration chose to sidestep Congress to implement the increases in CAFE standards far more rapidly than anyone would have assumed when Congress enacted EISA. In a May 19 Rose Garden ceremony, the President signaled a major

²⁰ Work on an agreement as complex and involving as many parties as this one must have begun shortly after the new administration took office, if not earlier, suggesting that it was a high priority issue.

change in the decade-long timetable for meeting the goal of 35 m.p.g. that EISA had set. Surrounded by nine corporate automobile leaders, the head of the UAW, and several administration officials, President Obama addressed an audience that included the governors of California and Michigan, key congressional Democrats, other UAW officials, and the heads of leading environmental and health groups. He announced a new policy agreement among all the parties. That agreement called for meeting a CAFE standard of 35.5 mpg by 2016 and for DOT and the Environmental Protection Agency (EPA) to set a single national standard on fuel efficiency and greenhouse gas emissions from automobiles and light trucks. In addition, all contending parties would agree to drop a series of pending lawsuits.

The President may have only exaggerated slightly in his remarks, when he noted, “Now, in the past, an agreement such as this would have been considered impossible. It’s no secret that these are folks who’ve occasionally been at odds for years, even decades. In fact, some of the groups here have been embroiled in lawsuits against one another.”²¹ When EISA passed in 2007, the auto companies and the UAW had argued that they would have trouble meeting the standard by 2020. Less than two years later, they were agreeing to exceed it by 2016.

Of course, with the federal government holding large ownership stakes in General Motors and Chrysler, neither they nor the UAW were in a position to object to the president’s actions. Still, there were a large number of other interests involved, including other auto manufacturers, over whom the administration did not have leverage. At a minimum, the administration could sell policy predictability to all players. Certainty about what mileage and emission standards would be and ensuring that different would accept the national standards allowed the auto

²¹ www.whitehouse.gov/the-press-office/Remarks-by-the-President-on-national-fuel-efficiency-standards, May 19, 2009.

companies to do the long term planning necessary to produce vehicles, including design, plant construction, and retooling.

It is fair to say that, in the past, one side or the other among the groups at the event would have been at the other end of Pennsylvania Avenue pleading its case with Congress to rein in the president's abuse of legislative authority and filing briefs in federal court. Beyond the symbolic handful of supportive Democratic House members and senators who were invited to the ceremony as observers, the role Congress was minimal. EPA and NHTSA would still need to conduct the appropriate rulemaking procedures, but it was for all practical purposes a fait accompli.²² The administration had been able to bring all the competing interests together and reach an accommodation on a major policy change. Interest aggregation started and ended in the executive branch. No player with a significant material stake in either the fuel efficiency or greenhouse gas standards for automobiles and light trucks threatened to take its case for more favorable treatment to Congress. Thus, in this exercise of unilateral authority the president had an insurance policy against either Congress or the courts blocking or resisting him. Beyond all the limitations that Moe and Howell (1999) discuss about the capacity of Congress or the courts to overturn presidential exercises of unilateral authority to achieve administration policy goals, getting the key interests to accept a change in CAFE standards meant that those groups would not be activating constituency pressure on House members and senators and that those with standing to litigate would not choose to do so.

The effect of the Obama administration's interest aggregation efforts was even more critical when the president announced the second phase of his CAFE changes. In 2010 the president had requested that DOT and EPA put together a CAFE proposal for the post 2016

²² Jody Freeman provides an excellent analysis of the coordinated rulemaking activity between EPA and NHTSA (Freeman 2011).

period. Speaking on a stage with the heads of thirteen major automobile companies in July 2011, he announced CAFE standards for cars and light trucks for the 2017-2025 model years with a goal of 54.5 mpg by 2025. In his speech the President pointedly observed: “And finally, this agreement ought to serve as a valuable lesson for leaders in Washington. This agreement was arrived at *without legislation*. You are all demonstrating what can happen when people put aside differences—these folks are competitors, you’ve got labor and business, but they decided, we’re going to work together to achieve something important and lasting for the country.”²³ That same day DOT Secretary, Ray LaHood, and EPA Administrator, Lisa Jackson, signed the appropriate document for publication in the Federal Register, and in early 2012 the agencies held a series of three field hearings.

With Republicans now firmly in control of the House and having taken every opportunity to register their policy differences with the administration on a full range of issues, one might have anticipated a major political conflict and greater resistance to the president exercising unilateral authority than had been the case in 2009. In fact, congressional response was muted and not all that different from what it had been following the 2009 announcement. Darrell Issa (R-Calif.), chair of the House Oversight and Government Reform Committee and a regular Obama administration critic, charged that the White House had engaged in a secret, and potentially illegal, deal that would increase the cost of automobiles. But in a speech at a battery plant in Michigan, President Obama mocked this criticism, declaring: “I brought together the world’s largest auto companies, who agreed, for the first time, to nearly double the distance their cars can go on a gallon of gas. That’s what we got done—and by the way, *we didn’t go through*

²³ www.whitehouse.gov/the-pres-office/2011/07/29/remarks-president-fuel. Italics added.

Congress to do it. But we did use the tools of government—us working together—to help make it happen (McCardle 2011).”²⁴

Few interest groups were available to complain about the policy. Initially, the National Association of Auto Dealers (and others involved in the retailing side of the automobile business) expressed opposition because of concerns about the effect of increases in vehicle prices on sales. The auto companies quickly persuaded them to rethink their opposition. The House Energy and Commerce Committee decided to defer any action until the agencies completed the regulatory process (McCardle 2011).²⁵ Aside from one hearing at a subcommittee level of the House Oversight Committee at which neither representatives of any of the auto companies or the UAW testified, there was little activity on Capitol Hill. Instead, congressional critics of the administration’s energy policy focused their attack on the Obama decision to delay approval of the Keystone XL pipeline, arguably a decision of lesser magnitude than the CAFE standards. As in 2009, there was seemingly nothing in EISA that prevented the administration from proceeding as it did. The “maximum feasible” standard allowed under the law certainly left the president a good deal of discretion. But no one would have anticipated a change of this magnitude. The initial standard set in 1975 called for moving the mileage level of autos from 18 mpg in 1978 to 27.5 by the 1985 model year. In fact, that level was not met until the 1989 model year where it remained until the EISA increase began 2011 with an assumption of gradual increases, eventually reaching 35 mpg by 2020 and then by some undefined amount in the following decade. Instead, the administration was going to exceed the first step in a little more than half the allotted time and nearly double the 1985 CAFE standard by 2025.²⁶

²⁴ Italics added.

²⁵ On August 28, 2012, LaHood and Jackson announced that the standards were finalized. The Energy and Commerce Committee took no action.

²⁶ In addition, the new standard covered light trucks.

Despite the Obama administration initiating the biggest change in energy policy in decades, Congress did not even play a supporting role in enacting or opposing the policy change. Rather than downplaying his use of unilateral action, the President was gleeful in pointing to it. Beyond broadly interpreting executive authority in setting CAFE standards, the Obama administration assumed a functional policy process role in which Congress had traditionally excelled, interest aggregation. Although the executive is not a stranger to dealing with interest group demands in the development of public policy, Congress has traditionally thrived at balancing and adjusting provisions in response to the competing claims of affected interests. The literature on Congress is replete with research on the symbiotic relationships between Congress and the interest group community (Lowi 1969 and Fiorina 1977). In this instance, the president aggregated interests as a means of undercutting potential congressional opposition. By resolving interest group concerns, the administration prevented most of the affected groups from appealing to either Congress or the courts.

One might reasonably argue that President Obama's decisions on CAFE standards did not require new legislation. Clearly, however, he stretched EISA beyond congressional intent. Congress might have challenged his actions as an overreach of executive authority. His ability to engage the support of all the interest group players, however, gave the process legitimacy that it would have otherwise lacked. Like the president, those groups preferred working with the executive branch rather than struggling with the delay and uncertainty of the contemporary congressional process. It is not just presidents who find it frustrating to work with a Congress that is more focused on exercising negative power than resolving policy differences.

A Broader Pattern?

It would be one thing if the Obama administration's sidestepping of Congress on CAFE standards was an isolated instance. Then, this chapter would just be a case study of the nearly forty year struggle over CAFE standards, ending with the president deciding to use existing authority rather than seeking new legislation to achieve the policy change he desired. In fact, CAFE is just one example of the Obama administration deciding to avoid Congress when possible to achieve its policy goals (although at times admitting it would be preferable to pass legislation). True, modern presidents have often found it convenient to use regulatory authority and executive orders to achieve their policy goals. What is different is the apparent frequency with which the Obama administration and perhaps other recent ones have sidestepped Congress and the openness with which it has admitted to doing so.²⁷

Although the frequency with which Obama has taken unilateral action seems to have increased after the Republicans won back control of the House in 2010, the administration did not reserve the tactic for periods of divided party control. Instead it appears to have been part of a deliberate strategy in place since early in the Obama's first term. In addition to CAFE standards, there is evidence that during its first two years in office the administration considered achieving immigration reform without congressional action. Four senior officials in Citizenship and Immigration Services of the Department of Homeland Security produced a draft memorandum for the agency director entitled "Administrative Alternatives to Comprehensive Immigration Reform."²⁸ Obama waited until June 2012 to issue the executive order designed to fulfill many of the Dream Act's policy goals. It should be noted, however, that the Senate

²⁷ Data across administrations on the use of executive orders in place of legislation would certainly be useful but goes beyond the scope of this paper.

²⁸ The draft memo is undated. It was later leaked to Senator Charles Grassley (R Iowa) and resulted in the resignation of one of its authors.

defeated the cloture motion on the legislation in December 2010 when the Democrats still held majorities in both houses of Congress.

The impetus to avoid potential congressional obstruction increased in the 112th Congress. In February 2011, the president ordered the Department of Justice to stop enforcing the Defense of Marriage Act after Congress had not responded to his request to repeal it. Then, beginning in the Fall of 2011 under the slogan of “We Can’t Wait,” the administration publicly announced its decision to use executive action (relying on existing authority) rather than trying to overcome congressional obstructionism. White House chief of staff, William Daley, declared: “We had been attempting to highlight the inability of Congress to do anything. The president expressed frustration, saying we have got to scour everything and push the envelope in finding things we can do on our own (Savage 2012).” The administration then followed with a stream of unilateral actions for legislation on which Congress was not acting, including jobs for veterans, drug shortages, and dealing with domestic violence. In each instance, the president made his bypassing of Congress a theme of his announcement. In cutting fees for federally insured mortgages, Obama noted: “If Congress refuses to act, I’ve said that I’ll continue to do everything in my power to act without them (Savage 2012).” Although some of these efforts were undertaken to highlight issues for the 2012 election, the trend continued after Obama’s reelection. Repeatedly in the his 2013 State of the Union Address, President Obama requested Congress pass legislation but indicated implicitly, and at times explicitly, that he would use existing authority if Congress did not act. In discussing the issue of climate change, he threatened: “But if Congress won’t act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce

pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.”²⁹

Some presidential threats to proceed, if Congress does not act, are undoubtedly for bargaining purposes or to place blame for policy inaction on Congress. But starting with CAFÉ standards, it is clear that the administration found that the costs of pursuing its policy goals through negotiations with Congress often imposed high costs and few benefits. As Congress has increased the use of blocking power to achieve policy influence, the executive has had a growing incentive to pursue policy change through means other than legislation.

Importantly, the Obama administration has claimed that it would prefer if Congress negotiate over the passage of legislation rather than requiring the executive to choose between inaction and the use of unilateral authority. Legislation has several advantages over unilateral executive action. First, passage of legislation may provide a greater sense of legitimacy. That may assist with public support for the program and with getting others to cooperate with its implementation. Second, in cases of changes that the president makes with executive orders, a president’s successor has the ability to reverse the policy with another executive order. Third, using unilateral action through existing authority may limit the available policy formulations and produce a sub-optimal outcome because of the legal constraints on existing executive authority. For example, when he was unable to get Congress to pass the Dream Act, Obama’s alternative for dealing with the immigration problems of undocumented young people through unilateral action did not resolve all the issues they faced or produce comprehensive immigration reform, as Tichenor’s chapter documents. The executive order did postpone for at least two years deportation of those it covered and also allowed them to obtain work permits but did not provide

²⁹ “Full Text: President Obama’s 2013 State of the Union Address,” <http://www.forbes.com/sites/beltway/2013/02/12/full-text-president-obamas-20>

for permanent residency or a path to citizenship. Finally, the congressional process might produce better public policy than the president does through unilateral action. The input of Congress in designing legislation can provide useful perspectives that might not be forthcoming when the deliberation is within the narrower confines of the executive branch. It is probably correct that presidents would prefer legislation to unilateral action in many instances, if the former is politically feasible.

Conclusion

Getting Congress to enact energy legislation over the past forty years has never been easy. Because proposals to make the United States less dependent on foreign sources normally imposed short-term costs on the public in exchange for long-term benefits, it was difficult to persuade House members and senators to support legislation that might increase their electoral vulnerability. Only when the costs of maintaining the status quo imposed significant political liabilities were the competing sides willing to resolve key issues and produce non-incremental policy change. Often the skill of congressional leaders in packaging the legislation in such a way as to persuade members that they could avoid traceability of costs was also an essential ingredient to the passage of legislation. Those conditions were met in both the mid-1970s and again in 2007 with CAFE standards. In the intervening years, efforts to deal with CAFE standards (and after 1980 with other major energy issues) faltered in Congress.

Perhaps surprisingly to many, the movement of parties in Congress to more closely approach the “responsible party government” ideal did not improve the capacity of Congress to enact energy legislation. Barbara Sinclair correctly concludes that during the 111th Congress with unified party control of government and sizeable party majorities in both chambers, many major pieces of legislation were enacted. And it does stand in stark contrast with the 112th and 113th

Congresses. But those results were achieved at substantial political and policy costs. (Oberlander demonstrates the political necessity of sacrificing cost controls in the enactment of the Affordable Care Act, for example.) The minority party has increased incentives to block proposals, even as a more unified majority party has given its leadership the power to hold members' support for party positions and as party loyalty has increasingly trumped committee loyalty. As Mann and Ornstein (2012) argue, the congressional parties have taken on the adversarial cast of parliamentary parties but are doing so in a constitutional system that limits the abilities of majorities to act. During period of divided party control, the effects of this mismatch have been exacerbated. Even when there is unified party control of government, however, the capacity of and the incentives for the minority to block significant policy change persist. The tight competition between the parties for majority status (the size of the party majority in the 111th Congress is the exception) has meant that the minority party has little reason to compromise. Resolving policy disputes may allow the majority to win governing credit and thus undercut the chances for the minority to gain majority status in the next election. Moreover, if the minority believes that it will be in a stronger position after the next election, it has few incentives to resolve an issue today because it believes that it will hold a stronger bargaining position after the election.

As it has become more difficult and costly for the presidents to achieve their policy goals through the congressional process, they find the exercise of unilateral authority a more attractive alternative. Instead of investing resources to build support for their legislation in Congress, presidents instead will invest to ensure that affected interest groups are on board with their proposals for unilateral action.

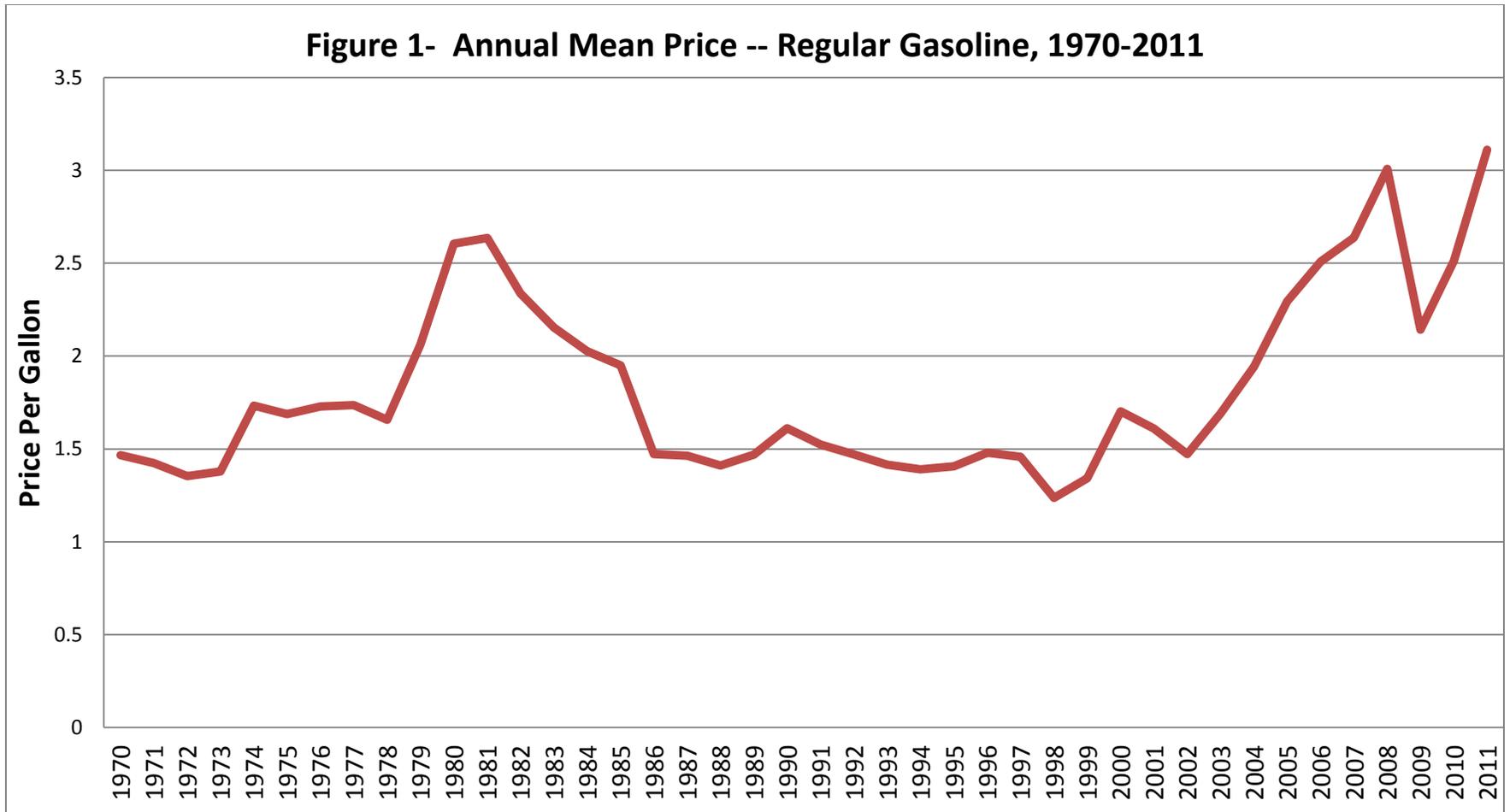
To some it may appear that Congress is exercising substantial policy influence when it blocks policy initiatives or uses its veto powers for bargaining purposes. But in fact, that is not the case. Instead, the president and the executive branch have decided to bypass Congress more frequently. As a strategic player, the president, faced with a very costly congressional process, has pursued other means to achieve desired outcomes. The analysis of the struggle over CAFE standards that I have presented in this chapter demonstrates how these changes have occurred over time from a period of relatively weak congressional parties to a period during which the parties became more homogeneous and polarized. In the former, policy change was not easy but could be achieved with bargaining at the committee and subcommittee level, compromises, attracting support from members of the other party, and without constant threats of filibusters, vetoes, and electoral revenge. By the 1990s the growing influence of conditional party government and the more adversarial stance of the parties further limited the room for building policy consensus and resolving issues in Congress. Faced with this dilemma, presidents may pursue unilateral action, as Obama did with CAFE standards. Unlike Harry Truman, who used a recalcitrant Congress primarily as a political foil, contemporary presidents possess far greater statutory and administrative authority. As Moe and Howell observed: "...it is crucial to recognize that the president is greatly empowered by the sheer proliferation of statutes over time. (1999:860)." Presidents often have other options available to change public policy than getting Congress to pass new legislation.

Importantly, the interest group community is often a sympathetic player in these efforts. Although Moe and Howell (1999) correctly point to the incentives for presidents to take unilateral action, their primary focus is on the strategic behavior of the president, Congress, and the courts. Interest groups and the mass public may play important roles as well. Unless their

preference is to preserve the status quo, interest groups with material, and not just ideological, stakes also find Congress increasingly frustrating. So offered the opportunity to resolve policy difference through non-legislative means that the president and the executive branch may offer, interest groups may gladly cooperate in this transition away from Congress. Where the executive branch once served primarily as an appeals court for interest groups dissatisfied without congressional outcomes, the executive is now their first stop. And part of the president's goal, as in the case of CAFE standards, is to ensure the interest groups' concerns are resolved in such a way that none of them appeals the outcome to Congress. Similarly, the mass public, desiring responsiveness from government, may accept unilateral presidential action rather than gridlock. The end result of these strategic changes has been a decline in Congress' policy influence and greater acceptance of new extensions of executive authority.

Of course, these conclusions are tentative. I have not presented data demonstrating that the frequency with which presidents sidestep Congress to achieve their policy goals has increased. Developing a method for measuring that over time is an important next step. What is clear is that the Obama administration is engaging in this behavior very publicly, even to the point of bragging about making major policy changes without Congress. In addition, I have not done detailed analysis of other policy areas to be completely comfortable in claiming that the case of CAFÉ standards is representative. Nevertheless, the analysis of the struggle over CAFE standards over nearly a four decade period hopefully provides useful insights into the impact that process changes have on the capacity of U.S. governmental institutions to address critical issues of public policy.

Figure 1- Annual Mean Price -- Regular Gasoline, 1970-2011



Data Source: U.S. Energy Information Administration, "Total Energy Annual Review," September 27, 2012.
1970-75 Leaded Gasoline. 1976-2011 Unleaded Gasoline.

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