

## ANWR and CAFE: Frustrating Energy Production and Conservation Initiatives over Three Decades

Bruce I Oppenheimer

### Abstract

Building on earlier work on Congress' struggle to enact energy legislation that focused largely on CAFE standards, this paper compares it with the parallel struggle over whether or not to remove the ban on oil exploration in ANWR over three decades. Three overriding conceptual arguments structure the narrative of these two energy issues. First, they provide evidence for my use of the concept of "government failure" to describe the inability of the United States to reach a policy goal of reduced dependence on foreign energy sources, a goal that all presidents and congressional leaders of both parties have shared since the OPEC embargo. Second, both issues demonstrate the difficulty Congress has in enacting legislation that has short term costs and long term benefits, except under unusual circumstances. Third, the historical analysis of both issues suggests that the move from a committee-centered Congress with weak parties to a far more party-centered institution has made the enactment of legislation more difficult. In addition, by examining an issue that proponents of a production approach favored (ANWR) as well one that proponents of a conservation approach favored (CAFE), I am able to demonstrate the frustration that both sides faced in trying to get Congress to enact legislation and the growing strength of blocking forces in the congressional process.

**Working Paper: 2-2014**

**Research Concentration:** Legislative Politics and Policymaking

“ANWR and CAFE: Frustrating Energy Production and  
Conservation Initiatives over Three Decades”

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Paper to be presented at the Congress and History Conference, University of Maryland, June 11-  
12, 2014

## Abstract

Building on earlier work on Congress' struggle to enact energy legislation that focused largely on CAFE standards, this paper compares it with the parallel struggle over whether or not to remove the ban on oil exploration in ANWR over three decades. Three overriding conceptual arguments structure the narrative of these two energy issues. First, they provide evidence for my use of the concept of "government failure" to describe the inability of the United States to reach a policy goal of reduced dependence on foreign energy sources, a goal that all presidents and congressional leaders of both parties have shared since the OPEC embargo. Second, both issues demonstrate the difficulty Congress has in enacting legislation that has short term costs and long term benefits, except under unusual circumstances. Third, the historical analysis of both issues suggests that the move from a committee-centered Congress with weak parties to a far more party-centered institution has made the enactment of legislation more difficult. In addition, by examining an issue that proponents of a production approach favored (ANWR) as well one that proponents of a conservation approach favored (CAFE), I am able to demonstrate the frustration that both sides faced in trying to get Congress to enact legislation and the growing strength of blocking forces in the congressional process.

This paper is an extension of an ongoing research project in which I analyze the more than four decade struggle over energy policy in the United States since the OPEC embargo of 1973. Although I have written about Congress and energy policy episodically throughout my professional career, I realized a few years ago that something might be gained from examining the struggle over a broader time frame than just looking at important cross sections in that struggle. As I took this historical perspective, I was struck by a certain irony in what has occurred. Throughout the time period, decision makers have broadly agreed on an overall policy goal of making the United States less dependent on foreign energy sources. Every president from Nixon through Obama has articulated the goal of “energy independence” or the more modest goal of reduced energy dependence. Congressional leaders of both parties in the House and the Senate have consistently favored that policy goal as well. And nearly every national convention platform of both parties throughout the period has included a plank favoring reduced energy dependence. Yet except for a few years in the early 1980s, the level of United States’ dependence on imported oil has been as high, and often higher, than it was at the time of the OPEC embargo. Only the economic recession beginning in 2008 and recent technological changes that have increased domestic production of oil and gas have stemmed the trend.

I label what has occurred a case of “government failure.” By that term, I do not mean it as some economists have used it in critiquing government regulation, producing a worse set of policy results than would have been achieved in an unregulated free market. Instead, my concern is with government’s inability to act and the resulting persistence or worsening of an acknowledged policy problem. (LeGrand 1991; Orbach 2012; and Keech et. al. 2012) Is there something either particular about energy policy or generalizable to a broader range of policy

areas that twenty Congresses and eight successive presidential administrations have been largely ill-suited to address?<sup>1</sup>

It is important to note that one cannot easily blame this failure to achieve a stated policy goal on contextual circumstances of party control. After all, since 1973, the United States has experienced every combination of party control of government—unified Democratic control, unified Republican control, divided control with Democratic presidents and with Republican presidents, and divided control with the party of the president controlling one house of Congress and neither house. Notably, the one missing contextual condition for much of this period, especially since the parties have become stronger and more cohesive, is that in periods of unified party control, neither party has had large majorities. As I will suggest later, when majorities are narrow, the strategic behavior of cohesive congressional parties may make reaching policy resolutions unusually difficult.

As a step in my overall effort to understand policy failure, in this paper I compare and analyze the struggles with setting and raising CAFE (Corporate Average Fuel Economy) standards and with those on whether to allow oil exploration and drilling in ANWR (Arctic National Wildlife Refuge). In a previous paper (Oppenheimer 2013), I used the CAFE case to demonstrate the hurdles that proponents faced in Congress from the initial enactment of standards in 1975 through first term of the Obama administration when the administration chose to sidestep Congress in expediting and raising fuel economy standards.<sup>2</sup> I include a good deal of that analysis in this paper. Because CAFE proponents preferred energy conservation approaches

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<sup>1</sup> Of course, one might make a counterfactual argument that energy dependence would be even greater if government had not done what it has done. Or one could claim that despite all the rhetoric about making the United States less energy dependent, political decision makers were being insincere.

<sup>2</sup> I focused a good deal of the analysis in that paper on the growing incentives for presidents to use unilateral authority to achieve their policy goals as the cost of getting Congress to enact legislation increased. That analysis built on arguments that Moe and Howell (1999) set forth.

as the means of addressing the energy problems facing the United States, I was concerned that the findings might not be generalizable to energy proposals for which the proponents were those favoring production-oriented approaches. These two sides have been an active presence throughout the more than four decades since the OPEC embargo. They have both had sizeable support in the public, in the interest group community, and among government decision makers in Congress and in the executive branch. Because differences in the political resources and skills of the two sides or in the nature of the policy solutions each side advocated may have affected the success of proponents, it makes sense to examine issues on which each side was the proponent of policy change. Accordingly, I decided to examine and compare the ANWR issue that had the backing of those advocating increased production as the path to reducing energy dependence with the CAFE case.

The issue of drilling in ANWR has a number of features that make it an appropriate choice. Its origins as an issue date back to the 1970s, although sustained efforts to allow drilling there did not fully manifest themselves until the late 1980s. Thus, it shares a similar historical time frame with CAFE standards. Second, both ANWR and CAFE have been high profile energy issues that mobilized both conservation and production forces in the broader energy policy debate. Third, at various times, some members of Congress tried unsuccessfully to build a compromise in omnibus energy legislation that would exchange the removal of the ban on drilling in ANWR for the raising of CAFE standards.

Before presenting a detailed analysis of the legislative histories of CAFE and ANWR, first let us consider some of the broader reasons why I contend Congress and a series of presidential administrations have had difficulty resolving energy issues.

## 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 issues generally are not the types of policies that legislatures and their members are comfortable in addressing.<sup>3</sup> 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.<sup>4</sup>

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 a way that facilitates persuading members that the costs are not traceable. This often involves supplying the benefits of programs in the near term while 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. Clearly, other players in the process and not just congressional party leaders may employ this strategy as well.

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<sup>3</sup> In this sense it is useful to think of policy as the independent variable affecting process.

<sup>4</sup> 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.”

To these two types, we might also add circumstances where majorities of both parties are willing to support policy changes that exact short term costs on constituents because broad bipartisan backing inoculates members 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 do not exhaust the types of legislation that members of Congress find it relatively easy to support, but they are the methods that political scientists most frequently mention.<sup>5</sup>

Most energy policy proposals, however, do not seemingly share any of these qualities, at least not in recent decades.<sup>6</sup> 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 prices, increased taxes, increased costs of consumer goods (cars, appliances, heating and cooling systems), higher levels of air and water pollution, unemployment, and safety. Support for such policies exposes members and their parties to potential electoral vulnerability. This is especially true because competing sides in the energy policy debate are highly critical of the policy proposals of the other side. (Yes, as will be evident in the CAFE and ANWR cases, proponents have at times tried to include pork barrel elements that concentrate benefits and disperse costs as a means of attracting additional support and to offset some of the political costs of supporting legislation.)

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<sup>5</sup> 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.

<sup>6</sup> 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).

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, Congress took until 1980 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. And, that is a story repeats over the forty years period. If one examines the trends in gasoline prices from 1973-2012, Congress passes and the president signs major energy legislation when there is a sustained period of high prices and/or limited supply. Then, political costs of inaction outweigh the short term cost of passing new legislation.

### **The CAFE Struggle**

Previous analysis of the struggle over establishing and then raising CAFE standards, much of which I include below, led me to offer four insights about the changing nature of various aspects of Congress's efforts to affect public policy and its relative influence vis-à-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 did not make it easier for the majority party to enact legislation and may, in fact, have made it more difficult;
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 greatly impact the ability to enact energy legislation;
3. Close party balance in Congress 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. 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.

### **Initial Enactment of CAFE Standards and Ban on Drilling in ANWR**

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 94<sup>th</sup> Congress. The recently adopted Subcommittee Bill of Rights had reduced the

power of committee chairs, but it had also 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 to reduce consumption. 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 93<sup>rd</sup> Congress that considered a variety of automobile fuel economy proposals. The end product was one largely developed within the committee, albeit one on which Democrats held sway. 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 recommitment 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, 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, even if it meant supporting, or at least not blocking, a policy position that was farther from their ideal point than was the status quo.

## **ANWR Ban**

The ban on oil and gas drilling in ANWR was initially a small issue in a much larger piece of legislation establishing national parks and wilderness areas in Alaska. As an outgrowth of the Alaska Native Claims Settlement Act of 1971, Congress had to make decisions about lands to be protected from development by 1978. When it appeared that the struggle between environmental and development forces would prevent the deadline from being met, the Carter administration placed certain lands under protection. This decision broke the legislative deadlock as pro-development forces in Congress preferred a legislative solution to the one that the Carter administration would otherwise implement. With the Reagan landslide in the 1980 election, the lame duck session produced a bill that moved the resolution of remaining controversies marginally away from those environmentalists' favor. In the case of ANWR it meant that the ban on drilling would not necessarily be permanent, allowing Congress to remove it after the Interior Department completed a study of the environmental impact and the potential for oil and gas production in ANWR. As with CAFE, legislating on ANWR and the broader issues of how much land to protect from development in Alaska was one of trying to reach compromises in which a range of cleavages and interests came into play that cut across party lines. Alaska's senators, Gravel and Stevens, threatened to block action at points in the process but largely in response to local issues, not national party positions.<sup>7</sup> Like some of the other energy issues in the immediate post-embargo years, the issue of banning drilling in ANWR and other issues covered in the Alaska National Interest Lands Conservation Act (ANILCA) were not ones Congress easily resolved. Parties played a role, as did the preferences of the Nixon, Ford, and Carter administrations. But they were not tightly cohesive and at no time did they seem to have

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<sup>7</sup> Aside from the conflict between pro-development and environmental groups, the positions of native Americans, the revenues to the state of Alaska from land use, and hunting and fishing rights came into play.

an incentive to block the various forces from achieving resolution. Interest group cleavages cut across parties, thus muting their role, instead of reinforcing existing party differences and serving as the basis for building electoral advantage.

### **Blocking Policy Change**

The second period is one during which an increasingly party-dominated Congress enacted few energy policy changes and most initiatives, including those to increase CAFE standards and to remove the ban on drilling in ANWR, 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. Even under the most favorable contextual circumstances in the 2001-06 period, Republicans were unable to overcome opposition to ANWR drilling.

## **The Struggle over CAFE Standards and the ANWR Drilling Ban, 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. 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.<sup>8</sup>

Similarly, it was hard for those who favored production approaches to engender much support for removing the ban on drilling in ANWR. The report on the environmental impact and potential oil and gas reserves in ANWR required years to complete. In 1987, the Reagan administration finally took a stronger posture on ANWR when Interior Secretary Hodel reported back to the Congress and recommended that the ban on leasing and drilling in ANWR be removed. Alaska's House member, Republican Don Young, became the major proponent for opening up ANWR and introduced legislation to do so that garnered 145 co-sponsors. House Interior and Insular Affairs Committee Chair, Mo Udall (D AZ) mobilized the opposition and offered legislation (with 88 cosponsors) to close ANWR permanently. Through the remainder of

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<sup>8</sup> 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.

the 100<sup>th</sup> Congress, a series of hearings on ANWR in four congressional committees and legislative markups demonstrated the jurisdictional stalemate. In the Senate, the Energy Committee reported a bill lifting the ban while the Environment Committee considered legislation naming ANWR a wilderness. And when a the House Merchant Marine and Fisheries Committee reported legislation that would phase in areas open to drilling in ANWR, it was sequentially referred to Udall's Interior Committee which buried the legislation. Committee Democrats did not want to take a tough vote on a bill that was not going to survive, and Senate Energy Committee chair, Bennett Johnston, a proponent of drilling in ANWR, was not going to push his bill to the Senate floor before the House acted.<sup>9</sup>

By the time the 27.5 mpg standard had been reached and the Reagan administration was recommending removal of the ban on drilling in ANWR, 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

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<sup>9</sup> In addition, Johnston was in a three candidate contest for Senate Majority Leader to replace Robert Byrd who was stepping down from that position at the end of the 100<sup>th</sup> Congress and knew ANWR was an issue on which he was at odds with the overwhelming majority of his caucus.

number of moderate Republicans from consuming areas in the Northeast declined.<sup>10</sup> In turn, party positions on energy policy hardened. (One major crosscutting cleavage persisted within the Democratic party among members with strong 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 after energy prices began to increase dramatically, one party or the other continued to prevent major energy policy change until 2007.<sup>11</sup>

This does not mean that there was a total absence of congressional activity on CAFE standards or ANWR. 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 ANWR, some congressional Democrats countered with proposals to raise CAFE standards. Shortly after the Iraq invasion 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

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<sup>10</sup> 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.

<sup>11</sup> Modest energy bills passed in 1991 and 2005, but both were stripped of controversial provisions.

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. Had it survived the Senate, it is unlikely that it would have passed the House because of the members from strong UAW and auto industry constituencies was proportionately greater than in the Senate.<sup>12</sup>

Proponents of ANWR made initial headway on removing the drilling ban early in 1989. The new Bush administration included revenues from ANWR leasing in its budget for fiscal 1990. And Johnston quickly moved a pro-ANWR bill out of the Energy Committee, largely with the support of the committee's Republican members. When the Exxon Valdez spill occurred on March 24, 1989, however, Congress "scuttled action" on ANWR for the next 18 months (Kurtz 1990). Only with the potential of a Mideast war in the fall of 1990, did the administration again renew its efforts to remove the ANWR drilling ban. Interior department assistant undersecretary Jim Hughes, however, acknowledged the disadvantage his pro-ANWR forces faced noting that environmentalists had "the home field advantage because all they have to do is block us. Blocking is always easier than doing something affirmative (Kurtz 1990a)."

In a multi-year effort to pass a major energy bill, Johnston, continuing in his position as Senate Energy Committee chair, 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

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<sup>12</sup> 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.

Senate. Party leaders, however, were no longer going to defer to committee decision making in crafting energy legislation. Majority Leader George Mitchell (D ME), who opposed the lifting of the ANWR ban, had already appointed a sixteen member party task force on energy that would require energy conservation provisions in any bill that reached the floor, including an increase in CAFE standards (Idelson 1991). President Bush, meanwhile, threatened to veto a bill that 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. As in 1989, even if a CAFE increase had been included in the Senate bill, it is unlikely that the House would have agreed to it

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. Yet, with Democrats in the majority in both houses, Bush did not have the capacity to pass legislation to allow drilling in ANWR or to control its place on the Senate agenda, even with the support of the key Democratic committee chair. 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 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.<sup>13</sup> 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).

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<sup>13</sup>Prior 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.

During the eight years of the Clinton presidency, the prospects of opening ANWR significantly diminished. Not surprisingly, the Clinton's energy package during the 103<sup>rd</sup> Congress did not include ANWR, and there was no impetus to add it in either the House or the Senate. In the year of euphoria after winning control of the House for the first time in four decades, Republicans made an unsuccessful effort to force Clinton to accede to removing the ban on ANWR drilling. The first involved Republican efforts in 1995 to include income from ANWR in the House and Senate budget resolutions and later in the reconciliation package. ANWR had previously been part of Bush budgets, but this was the first time it had survived as part of an omnibus reconciliation package and might become law, if a seemingly weakened president accepted Republican budgetary demands. When Clinton vetoed the package, it quickly became clear that the Republicans had overplayed their hand, more critically on their threat of a government shutdown but also on ANWR. In his veto message, Clinton specifically mentioned his opposition to removing the ban on drilling in ANWR as an example of the catch-all nature of the omnibus budget package. It was not until 2000 that Republicans again pushed ANWR in the budget resolution as part of a broader effort to increase offshore production. The Senate narrowly included the provision, but the House did not. ANWR again died.

With the election of President George W. Bush in 2000 and continued Republican majorities for six years in the House and for most of that time in the Senate the prospects for proponents of opening ANWR brightened considerably. As gasoline prices increased markedly, especially after the onset of the Iraq War in 2003, Republicans' 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. CAFE, conservation approaches, and the development of renewable sources were not the focus of the

Bush administration or Republicans in Congress. The administration was even reluctant to support ethanol incentives but recognized their necessity in garnering the support of farm states House members and senators. In the 107<sup>th</sup> Congress, neither the 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.<sup>14</sup> As I will discuss in greater detail below, that bill died in the Senate where Democrats briefly returned to majority status after Jeffords left the Republican party and organized with the Democrats. Again, in the 108<sup>th</sup> Congress, with Republicans back in majority control of the Senate, their energy 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.<sup>15</sup>

When Congress finally passed a modest energy bill in 2005, it did not have a provision on CAFE standards 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, perhaps for strategic reasons.

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, over a dollar a

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<sup>14</sup> 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.

<sup>15</sup> 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.

gallon higher than at the time of the OPEC embargo.<sup>16</sup> 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).

The story of ANWR during the first six years of the Bush administration is far more complicated than that of CAFE, and it proved very frustrating for the forces that favored removing the ban on drilling. Seemingly, the unified Republican control for the first time since 1954 for most of the six years following the 2000 election finally removed most of the obstacles to ANWR drilling. When Democrats held House and/or Senate majorities and during the Clinton presidency, the ability of ANWR opponents to defeat proposals to open it were hardly surprising. This was especially true as the parties took more uniformly production or conservation stances to resolving energy policy issues. Under the most politically favorable conditions to removing the prohibition against drilling in ANWR, opponents still successfully delayed, blocked, or defeated those efforts.

Even in both the 108<sup>th</sup> (2003-04) and the 109<sup>th</sup> (2005-06) Congresses with a Republican president who strongly favored drilling in ANWR, with Republican majorities in the House and Senate, and with high energy prices, the proponents of ANWR drilling faced repeated frustration in their quest to remove the ban. In the preceding Congress with Democrats briefly in control of the Senate following Jeffords' exit from the Republican ranks, Senate Democrats delayed

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<sup>16</sup> 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> .

consideration of the House-passed energy bill that included drilling in ANWR and the committee markup of the Senate's energy bill until the public outcry following 9/11 had subsided. In late 2001, when Senate Majority Leader Tom Daschle (D SD) announced that he would schedule debate on energy legislation in mid-February, *Congressional Quarterly* reported: "With gas prices at a yearly low and the California energy crisis at bay, members of both parties say the public is not clamoring for action on energy" (Adams 2001). Daschle no longer had to fear losing the support of a sufficient number of Democratic senators on a cloture vote on ANWR. When Frank Murkowski's (R AK) cloture motion came to a vote in April, 2002, it did not even garner a majority, losing 46-54. One of the five Democrats who voted with Murkowski, John Breaux (LA) observed: "We're continuing to show that we're good at doing nothing. We did nothing on (automobile fuel economy) standards; they were able to stop ANWR. We're doing very good at stopping things. We're not doing very good at doing things" (Bettelheim 2002).

Daschle again used his leadership powers to ensure that Daniel Akaka (D HA), who had supported cloture, was not named to the conference committee after the stripped down bill passed the Senate. Instead Daschle appointed Breaux after obtaining an agreement that he would support Daschle's position (Adams 2002). In the end despite numerous efforts in the conference to provide side payments in return for opening drilling in ANWR (including having the House accept the Senate's tripling of ethanol and a set aside of other wilderness areas), Senate Democrats persisted in making ANWR a deal killer (Adams 2002a). Daschle could use his powers as majority leader first to delay and then to block the efforts to open ANWR drilling.

But with pro-ANWR Republicans in control of the presidency and both houses of Congress following the 2002 elections, it did not mean that party leaders had the power to remove the ban on drilling. Despite using a range of legislative strategies to pass a pro-ANWR

provision in the 108<sup>th</sup> and 109<sup>th</sup> Congress, the end result was the same as in the 107<sup>th</sup>. The Bush administration and Republicans in Congress focused on a two pronged approach. One was to pass an omnibus energy bill that, similar to the one that failed in the 107<sup>th</sup> Congress, would include a provision opening up ANWR. The other was to employ the budget and reconciliation process and thus avoid the opportunities for the Democrats to filibuster ANWR. The budget resolution would include revenues from ANWR leases and royalty payments and then direct the appropriate House and Senate authorizing committees to lift the ban on drilling in ANWR as part of the reconciliation bill. In 1995, Congressional Republicans had included ANWR drilling in the reconciliation bill that President Clinton vetoed that led to the government shutdown and considered doing so again in 2000 but removed it when Clinton threatened a veto. Clearly, Bush's pro-ANWR position removed the veto problem.

In the 108<sup>th</sup> Congress, neither strategy worked. The closest Republicans came to removing the ban on drilling was when Ted Stevens (R AK) successfully removed House language from the fiscal 2003 omnibus spending bill that would prevent the Department of the Interior from even using any funds to study drilling in ANWR. The effort, however, to add drilling in ANWR through the budget process unraveled on the Senate floor, despite being part of the president's budget and in the resolution as reported from the Senate Budget Committee. On a floor vote of 52-48, the Senate deleted the ANWR provision from the budget resolution, as eight Republican senators (primarily moderates) voted against the President and more than offset the five Democratic senators who defected from their party's position.<sup>17</sup> With the stripping of ANWR from the budget resolution, Senate Energy Committee chair Pete Domenici (R NM), an

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<sup>17</sup> The eight Republicans were Chafee (RI), Coleman (MN), Collins (ME), DeWine (OH), Fitzgerald (IL), McCain (AZ), Gordon Smith (OR), and Snowe (ME). The five Democrats were Breaux and Landrieu (LA), Miller (GA), and Akaka and Inouye (HA).

ANWR supporter, decided against including ANWR in his formulation of an energy bill, instead depending on its inclusion in the House bill.

In the House, with the House Resources Committee membership heavily skewed with westerners, Ed Markey's (D MA) amendment stripping ANWR from the energy bill in markup was easily defeated (17-27), and the omnibus energy legislation that included the Resources Committee bill easily passed the House 247-175, with 40 Democrats supporting it and only 17 moderate Republicans voting against.

After struggling with a number of issues while trying to manage his committee's energy bill on the floor, Domenici aborted his energy bill and instead substituted what was essentially the Democrats' bill from the previous Congress as a vehicle that would allow him to work out a final bill in conference. Domenici indicated that he would support the House's language on ANWR (Goldreich 2003). Republicans, wanting to resolve intraparty differences over provisions in the bill, excluded Democrats from the conference negotiations and produced a report that included ANWR drilling (as well as an ethanol provision designed to attract the support of Midwest Democratic senators). Domenici remained publicly committed to ANWR because he had promised the Bush administration and House Republicans that he would do so, but he did not expect that the Senate would approve the agreement (Anselmo 2003). Eventually, Majority Leader Frist, Speaker Hastert, Senate Finance Committee Chair Grassley, and House Ways and Means Committee Chair Thomas brokered a deal that removed ANWR from the bill. Even with that concession, the Senate failed to invoke cloture on the conference report.<sup>18</sup>

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<sup>18</sup> In exchange for dropping ANWR, the House and the Bush administration insisted on a provision in the House bill that gave liability protection to the manufacturers of MTBE, a gasoline additive that was found to have negative environmental consequences. Defections primarily of five New England Republican senators were sufficient to defeat cloture, despite the votes that were garnered in favor of cloture from Midwest Democrats because of the generous ethanol provisions..

Through both the 107<sup>th</sup> and 108<sup>th</sup> Congresses, the Senate was the major obstacle congressional Republican and the Bush administration in removing the prohibition on drilling in ANWR. They were short the 60 votes needed for cloture on an energy bill that included ANWR, even after making a major concession on ethanol to attract the support of Midwest Democratic senators. And they were just short of a majority when faced with an up or down vote on keeping ANWR in the budget resolution. Seemingly, the results of the 2004 election provided the margin needed to get ANWR drilling through the Senate and the ban removed. Eight Senate seats switched party hands, with Republicans winning six that Democrats previously had held and Democrats replacing two Republicans. The gains for ANWR support were actually more modest because two of the Republicans replaced Democrats who had previously supported ANWR on the budget resolution vote.<sup>19</sup> The Republicans still might struggle to get the sixty votes needed for cloture on an energy bill that included ANWR, but getting ANWR through the Senate as part of the budget and reconciliation process certainly looked feasible. In an ironic twist, however, the House would present a new stumbling block for ANWR proponents in the 109<sup>th</sup> Congress.

Once again in 2005, the Bush budget included revenues from ANWR leasing as did the budget resolution that reached the Senate floor. This time the effort to strip it failed on 49-51. But in the House the unified opposition of Democrats to the Republican budget resolution meant that moderate Republicans, who opposed drilling in ANWR among other things in their party's budget resolution, were in a strong enough bargaining position that the leadership was forced to produce a budget resolution without an ANWR provision. As in the 107<sup>th</sup> and 108<sup>th</sup> Congresses, the House again comfortably passed an energy bill that included the removal of the ban on drilling in ANWR. The vote on the Markey amendment to strip ANWR from the bill was closer,

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<sup>19</sup> In addition, one of the Democrats replaced a Republican who had opposed ANWR.

but the defection of 29 moderate Republicans was offset by the 30 Democrats, largely Blue Dogs, who supported ANWR (but who remained with their party on budget resolution votes).

Senate energy bill managers, knowing that they lacked the votes for cloture on an energy bill if it included ANWR, formulated their bill without it and instead focused on the budget resolution conference and on reconciliation as the vehicles for removing the ANWR drilling ban (Evans 2005). Republican negotiators were successful in keeping ANWR in the budget resolution conference report. The conference report, however, barely survived on a 214-211 vote in the House with no Democrats supporting it, as Republican House leaders reduced the number of defections among their own members.

Keeping ANWR in the reconciliation bill proved a more formidable task. Twenty-four House Republican moderates, largely from the northeast, wrote a letter to Speaker Hastert and the chairs of the Budget and House Resources Committees urging ANWR's exclusion from reconciliation (Allen 2005). After the Senate kept ANWR in its reconciliation bill both as reported from its Budget Committee and in defeating a floor amendment to strip it, Republican House leaders dropped it in an early concession to moderates as they struggled to cobble together a majority to pass reconciliation. The leaders hoped to add ANWR back in conference. Even with ANWR removed and with other compromises, it took until mid-November before House Republicans were able to pass the reconciliation bill on a 217-215 vote after two members who threatened to vote against it unless ANWR was included cast deciding votes in favor.

With moderate House Republicans adamant in their unwillingness to support a reconciliation conference report that included ANWR drilling, Republican House leaders initially attempted to use side payments of hurricane relief to lure pro-ANWR House Democrats to vote for a reconciliation conference report (Dennis 2005). House Democrats, however,

remained unified in their opposition to the reconciliation package. To save the reconciliation bill, House Republican leaders had no choice but to insist on removing ANWR in conference after first getting Senator Ted Stevens (R AK), the most adamant ANWR advocate in the Senate, to agree. As chair of the Defense Appropriations Subcommittee, Stevens' alternative strategy was to attach ANWR to the Defense Appropriations bill. Although enough pro-ANWR House Democrats would vote for it so that Republican moderates would not be able to block, the problem for ANWR proponents was again the need to garner sixty votes for cloture in the Senate. But the anti-ANWR side prevailed 56-44.<sup>20</sup>

In an abbreviated fashion, much the same scenario repeated itself in the second session. The House again passed a bill providing for drilling in ANWR, but knowing there weren't enough votes for cloture, the Senate leadership did not even bring it to the floor. The Senate passed a budget resolution that had explicit directions for the Energy and Natural Resources Committee regarding inclusion of a provision for revenue generation from ANWR in the reconciliation bill, but the House did not include ANWR in its budget resolution. In the end the two chambers never agreed on a budget resolution.

The failure to remove the ban on ANWR in the 109<sup>th</sup> Congress effectively ended the push for it. The Bush administration went through the formality of assuming income from ANWR leasing in its fiscal 2008 budget, but Interior Secretary Kempthorne admitted that it had no chance of passage in a Congress with Democrats in the majority. During the Obama administration more of the Republican push to increase oil production has focused on the XL Pipeline issue rather than ANWR, although House Republicans did pass a bill in 2012 that

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<sup>20</sup> The vote was actually closer because Majority Leader Bill Frist (R TN) voted against cloture to preserve his right to move for reconsideration.

removed the ban on leasing and drilling in ANWR. With Obama's reelection, the prospects for opening ANWR remain bleak at least until 2017 at the earliest.

More than 30 years after the enactment of the initial CAFE standards (two decades after they were reached) and more than 25 years after Congress banned drilling in ANWR as part of the ANILCA, policies on these and a broad range of other energy issues remained unchanged and the U.S. was more dependent on oil imports than it had been at the time of the embargo. With increasingly unified and polarized parties in Congress, the capacity to block policy changes, whether the proponents were advocating conservation approaches or production approaches, persisted. Even when one party was in control for an extended period, as Republicans were for most of the 107<sup>th</sup>-109<sup>th</sup> Congresses, the majorities were not large enough to overcome procedural obstacles. The defection or the threats of defection by a small number of Republican House members or senators was enough to block their efforts on ANWR when the minority party was largely united in its opposition. And incentives to compromise on the part of either party were limited when each party could anticipate that party control might shift at the next election. That changed in 2007 when the proponents of increases in CAFE made a significant legislative breakthrough.

### **A CAFE Breakthrough in 2007**

As noted earlier, most of the efforts to increase CAFE standards from the late 1980s until 2007 had little chance of success. Three Republican presidents were publicly opposed to CAFE standards and would seemingly block efforts to increase them. An increase might have been feasible in 103<sup>rd</sup> Congress, but the Clinton administration's energy initiatives focused on issues other than CAFE.<sup>21</sup> And in the last three Clinton congresses, the Republican House leadership used an annual appropriations' rider to prevent the president from using authority from the 1975

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<sup>21</sup> It is likely that he would have met with opposition from auto district members of his own party.

act to increase CAFÉ standards unilaterally. Then, 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.<sup>22</sup> And Democrats were unwilling to leave the decision about increasing CAFE standards at the discretion of an administration that they viewed as being against significant increases.<sup>23</sup> 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.

With the return of Democratic control of Congress for the first time in twelve years after the 2006 election, increasing CAFE standards had 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 increased in 2007 to new record highs with expectations that they would go even

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<sup>22</sup> 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.

<sup>23</sup> 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.

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 they coupled their support with the requirement of also including fossil fuel production provisions. Bush proposed an annual increase in CAFE standards beginning in 2010, but treated it as a goal, not a 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 2007a). Meanwhile, Democratic congressional leaders designed a strategy to avoid splitting their membership on the CAFE issue and to limit the political costs of supporting an increase. They took advantage of bicameralism in an effort to address three energy issues--- CAFE standards, transferring tax subsidies for fossils 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 incurring political costs for her

members and herself, Speaker Pelosi 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 energy 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 conservatives 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 of 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 neither he nor his Department of Transportation did much to expedite the implementation of the new CAFE standards.<sup>24</sup>

### **Obama Sidesteps Congress**

As passed, the Energy Independence and Security Act of 2007 (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 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...”<sup>25</sup> 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

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<sup>24</sup> 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).

<sup>25</sup> Italics added.

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. Shortly after coming into office, 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 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.<sup>26</sup> 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 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.”<sup>27</sup> 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.

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<sup>26</sup> 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.

<sup>27</sup> [www.whitehouse.gov/the-press-office/Remarks-by-the-President-on-national-fuel-efficiency-standards](http://www.whitehouse.gov/the-press-office/Remarks-by-the-President-on-national-fuel-efficiency-standards), May 19, 2009.

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 all states would accept the national standards allowed the auto 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.<sup>28</sup> 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,

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<sup>28</sup> Jody Freeman provides an excellent analysis of the coordinated rulemaking activity between EPA and NHTSA (Freeman 2011).

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 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."<sup>29</sup> 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

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<sup>29</sup> [www.whitehouse.gov/the-pres-office/2011/07/29/remarks-president-fuel](http://www.whitehouse.gov/the-pres-office/2011/07/29/remarks-president-fuel). Italics added.

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 Congress* to do it. But we did use the tools of government—us working together—to help make it happen (McCardle 2011).”<sup>30</sup>

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 NAAD to rethink its opposition. The House Energy and Commerce Committee decided to defer any action until the agencies completed the regulatory process (McCardle 2011).<sup>31</sup> 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,

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<sup>30</sup> Italics added.

<sup>31</sup> On August 28, 2012, LaHood and Jackson announced that the standards were finalized. The Energy and Commerce Committee took no action.

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.<sup>32</sup>

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

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<sup>32</sup> In addition, the new standard covered light trucks.

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.

## **Conclusions**

This paper has been largely a narrative in which I summarize and compare the legislative struggle over two energy issues since the OPEC embargo and try to draw conclusions about the inability of U.S. government to address a national policy goal on which there has been broad agreement for four decades. One issue, CAFE, was in the forefront for proponents of conservation approaches as the means of reducing dependence on foreign energy sources, and the other, ANWR, was the issue that symbolized the efforts of proponents of production approaches to reduced dependence. In many ways the struggles have been remarkably similar. First, it has been very difficult to enact energy policy change whether it has been with conservation or a production approach or some compromise with mix of approaches. Because most of the legislation involved short term costs to achieve long term benefits, the bills carried potential electoral liabilities for members of Congress. They could be held electorally accountable for the costs without being able to demonstrate the benefits to their constituents. Only when there were sustained political costs from maintaining the status quo that outweighed the short term costs of policy change was Congress willing to pass major energy legislation. That was the case during the period from 1975-80 and again in the early 2000s, when there were sustained energy price increases and/or shortages. Of course, those conditions did not mean that energy legislation would automatically be enacted or that Congress would necessarily act quickly. Congress did not remove the ban on drilling in ANWR, even during the 2001-06 period

when Republicans seemingly had extended, unified party control. And most of the key energy legislation that did pass took several years of pulling and hauling and the use of considerable skill by party leaders.

The only exception in this pattern occurred when President Obama acted unilaterally to accelerate the timetable on CAFE beyond that which was anticipated when Congress passed EISA in 2007. At the time of both the 2009 and 2011 actions, energy prices were relatively low and had been so since the start of the recession. The same electoral constraints that affected Congress' ability to pass legislation did not limit the behavior of the president. Obama was willing to accept the short term costs of the policy change to achieve his desired long term policy benefits. He recognized, however, that he would not be able to make the policy changes in CAFE if he tried to do so legislatively. President Reagan or either of the two President Bushes might well have taken similar unilateral action in removing the ban on drilling in ANWR had they possessed sufficient existing legislative authority to do so. Despite the enormous growth of legislative authority to the executive branch over recent decades, it does not mean that presidents can always find the authority to act unilaterally when the costs of passing new legislation are too high or the chances of success in doing so are minimal.

Second, it does appear from both the CAFE and ANWR cases that the move to stronger congressional parties has made it more, not less, difficult to pass legislation. Although it took several years to pass the legislation of which initial CAFE standards and the ban of ANWR drilling were parts, the opponents to those bills did not employ the full range of blocking mechanisms. Instead they engaged in a bargaining process that produced legislation that was more acceptable. In the case of CAFE, it meant given the Secretary of Transportation the power to delay the final steps in the mpg increases. With the ban on drilling in ANWR, the opponents

won an inclusion of a study of the environmental effects and of the potential oil reserves with the chance then of removing the ban rather than placing ANWR in the untouchable, wilderness category. The filibuster was not used, and presidents did not threaten vetoes. In addition, the parties and their leadership did not mobilize to defeat legislation or to block committee-produced bills. By the late 1980s, however, as parties became stronger, parties and their leaders increasingly engaged in blocking activity. George Mitchell had a task force to counter the Senate Energy Committee bill that included drilling in ANWR, and then delayed scheduling the legislation until the Gulf War crisis had receded. Tom Delay placed a rider on appropriations bills to prevent the Clinton administration from pursuing CAFE increases. And the inability to invoke cloture blocked the lifting of the ANWR drilling ban when Republicans had unified control in much of the 2001-06 period. Senate Democrats viewed ANWR as a deal killer on any energy package and made good on the threat. And even pro-ANWR House Democrats would not break party lines to vote for a reconciliation bill that included opening up ANWR.

Third, and somewhat more speculatively, the narrow majorities in Congress since 1995 have also made the passage of energy legislation more difficult. Most obviously, because of the close divisions, the majority party has not held a large enough number of Senate seats to overcome minority party filibusters that have become commonplace since 1995. Only for a brief period in the 111<sup>th</sup> Congress has a party had as many as sixty senators since 1979. By contrast, the Democrats had sixty or more seats in seven of the ten Congresses from 1959-78. Even in the majoritarian House of Representatives, the narrowness of those majorities, especially since 1995 has meant that the majority party leadership has little margin to spare, even with an ideologically more cohesive party than at any point in the past century. From the election of the 104<sup>th</sup> to the election of the 110<sup>th</sup> Congress, the majority party never won more than 236 seats in a general

election. Under those circumstances, the majority party could not afford many defections without being rolled. According a small number of majority party members could demand concessions by threatening not to support party positions. In the 109<sup>th</sup> Congresses, two dozen moderate Republicans used that leverage to force their party leaders to remove ANWR and other provisions from the reconciliation bill.

In addition, there may be little incentive for the minority party to seek compromises rather than to block legislation. As mentioned earlier, the minority may believe, accurately or not, that it has a good chance of becoming the majority party after the next election and then achieving a policy result then that is closer to its ideal point. Also the failure of the majority party to produce legislation may be used in an upcoming campaign as evidence that it is incapable of governing effectively.

To the degree that the same patterns are evident in other policy areas, the findings of this research raise questions about the ongoing influence of Congress in the struggle over public policy. When presidents have the option of using unilateral action instead of engaging Congress, they may be more prone to do so. And as I argued in an earlier paper, both interest groups and the mass public may be willing to cooperate in these efforts.

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