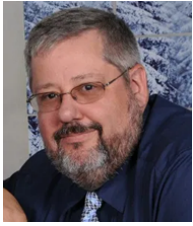


Regulating Your Life



By Paul Engel

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- Does the federal government have the legal authority to regulate anything it wants?
- The Department of Energy has decided they can regulate your dishwasher and washing machines.
- In the case of *Louisiana, et. al. v. U.S. Department of Energy*, it appears the DOE may have bitten off more than it can chew.

Have you noticed how often the government of the United States decides how you should live your life? It seems everything from food and drugs to the lightbulbs in your home are regulated by Uncle Sam. And whenever some bureaucrat deems it necessary, they simply roll out another “rule” or “regulation” to clamp down on the American people. It seems though, that one of those agencies may have bitten off more than they could chew, at least according to the Fifth Circuit Court of Appeals. In the case [Louisiana, et. al. v. U.S. Department of Energy](#) the court decided that one of the DOE’s rules was illegal, but was it unconstitutional?

Regulatory State

When Congress decides it wants to exercise a power not delegated to it by the Constitution, it usually reaches for the General Welfare Clause:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

[U.S. Constitution, Article I, Section 8, Clause 1](#)

They seem to forget the fact that this clause empowers Congress to collect taxes, not to regulate. They also seem to ignore that it only allows Congress to collect taxes for the general welfare of the United States, the very same proper noun used in the Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[U.S. Constitution, Amendment X](#)

Does this clause of the Constitution allow Congress to do whatever it thinks would be good for America? Not according to James Madison.

If Congress can apply money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare, they may take the care of religion into their own hands; they may establish teachers in every state, county, and parish, and pay them out of the public treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post roads; in short, every thing, from the highest object of state legislation, down to the most minute object of police, would be thrown under the power of Congress; for every object I have mentioned would admit the application of money, and might be called, if Congress pleased, provisions for the general welfare.

[Bounty Payments for Cod Fisheries, \[6 February\] 1792](#)

Looks like Mr. Madison was correct. Once Congress believed they could apply money indefinitely to the general welfare, they took over everything, including regulating dishwashers and washing machines.

They're Coming for Your Dishwashers

In 2022, the Department of Energy tightened the regulatory regime surrounding America's dishwashers and laundry machines. Petitioners sued. The Department's actions were arbitrary and capricious. So we grant the petition and remand to the Department.

[Louisiana, et. al. v. U.S. Department of Energy](#)

What led up to the 2022 decision by the Department of Energy to tighten regulations for dishwashers and laundry machines? Why did several states including Louisiana, Alabama, Arkansas, Kentucky, Missouri, Montana, Oklahoma, South Carolina, Tennessee, Texas and Utah file suit?

In 2018, the Competitive Enterprise Institute ("CEI") submitted a petition for rule making to the Department of Energy ("DOE" or the "Department"). ... According to CEI, the Department's burdensome energy regulations made dishwashers incapable of, well, washing dishes. CEI asked the Department to define a new class of dishwashers under the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, codified (as amended) at 42 U.S.C. §§ 6201 et seq. ("EPCA"). CEI proposed that the new class should be comprised of dishwashers with a normal cycle duration of under one hour. ... CEI anticipated that the new class might offer better performance than currently available machines in part because it would not need to comply with the energy and water restrictions otherwise applicable to consumer dishwashers today.

[Louisiana, et. al. v. U.S. Department of Energy](#)

Apparently the Competitive Enterprise Institute thought of a way to get around the DOE's restrictions on energy and water usage. The petitioned the DOE to make a rule that would create a new class of dishwasher that would not need to comply with DOE's energy and water restrictions.

DOE responded favorably to CEI's petition. It published a Notice of Proposed Rulemaking ("NPRM") under the Administrative Procedure Act ("APA"). ... The NPRM proposed the new dishwasher class that CEI had requested. ... In October 2020, the DOE adopted a final rule defining the class as "standard residential dishwashers with a cycle time for the normal cycle of one hour or less from washing through drying." ... (the "2020 Dishwasher Rule").

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The DOE adopted the rule proposed by CEI. Apparently, DOE liked the rule so much, they created another rule for laundry machines, or what most of us call washing machines.

On its own initiative, the Department then decided to take analogous action on laundry machines. ("2020 Laundry NPRM"). ... DOE explained that both of its 2020 rules "re-affirmed the Department's recognition of cycle time as a valuable consumer utility."

[Louisiana, et. al. v. U.S. Department of Energy](#)

Does the DOE think it's valuable to consumers to minimize cycle time in such appliances? Apparently the DOE is more interested in how long an appliance runs than how well. So far so good, until the Biden Administration takes office.

On the day of his inauguration, President Biden issued an Executive Order directing DOE and other agencies to reconsider certain rules, including the 2020 Dishwasher Rule and the 2020 Laundry Rule. ... A new final rule, which we call the Repeal Rule, was issued in January 2022. It revoked both the 2020 Dishwasher and the 2020 Laundry Rules.

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In come the politicians, apparently overriding the rules of the bureaucrats, this time to the detriment of the people who

actually purchase and use dishwashers and washing machines. Then a group of states decide to stand up and, if not come to the rescue, at least push back on the repeal of these new rules.

A group of States, led by Louisiana, petitioned our court for review of the Repeal Rule

[Louisiana, et. al. v. U.S. Department of Energy](#)

What was the basis of the state's lawsuit? What was the Fifth Circuit asked to decide?

Now the merits. While the States make various contentions, we need only consider one: that the Repeal Rule is arbitrary and capricious.

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Arbitrary and Capricious

Part of the law Congress passed to regulate how agencies create rules and regulations is known as the Administrative Procedures Act or APA.

Section 706 of the APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

[Louisiana, et. al. v. U.S. Department of Energy](#)

If a court finds that an agency acts in an arbitrary or capricious way, or beyond their legal authority, it must hold those actions as unlawful, therefore deciding for the plaintiff who sued.

The Repeal Rule falls short of these standards. We (1) discuss the Department's inadequate consideration of important aspects of the energy conservation program. Then we (2) discuss the

Repeal Rule's reliance on purported legal error.

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Things aren't looking so good for the Department of Energy at this point.

The 2022 DOE was required to reasonably consider the relevant issues and reasonably explain its decisions in the Repeal Rule. ... It failed to do so. Specifically, it (a) is unclear that DOE has statutory authority to regulate water use in dishwashers and clothes washers. But even if DOE has water-usage authority over the relevant appliances, the Department (b) failed to adequately consider the negative consequences of the Repeal Rule, including the substitution effects of energy-and-water-wasting rewashing, prewashing, and handwashing. And in all events, the 2022 DOE (c) failed to adequately consider the impact of the energy conservation program on "performance characteristics."

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Basically, the court found that the DOE tripped over itself in two primary areas; their legal powers and the impact of the Repeal Rule. Let's look at these individually.

Statutory Authority

In promulgating the Repeal Rule, DOE stated that its energy conservation program must promote "water conservation" and regulate "water use." See 87 Fed. Reg. at 2684–85. But it is unclear how or why DOE thinks it has any statutory authority to regulate "water use" in dishwashers and washing machines.

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First, there is the question of whether or not the Energy Policy and Conservation Act of 1975 delegates to the Department of Energy the authority to regulate water use.

The EPCA allows DOE to regulate energy use by some products and water use by others. ...

The EPCA does not appear to contemplate overlap between the products subject to “energy” regulation and those subject to “water” regulation. Energy first. The EPCA defines “energy use” as “the quantity of energy directly consumed by a consumer product at point of use.” ... And it defines “energy” as “electricity[] or fossil fuels” or “other fuels.” ... Dishwashers and laundry appliances obviously use “energy” as the EPCA defines that term. So it makes sense that DOE can regulate the amount of energy used by those appliances.

But the statute defines “water use” as “the quantity of water flowing through a shower head, faucet, water closet, or urinal at point of use.” ... And the four explicitly enumerated water products do not use “energy” as that term is defined in the EPCA. That explains why Congress said “energy use, or, . . . water use.”

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So first, the court found that the Department of Energy did not have the statutory authority to regulate water use in these appliances under the EPCA. (See the Constitutionality of the DOE for more on this.) What about the second problem the court found?

Impact

Even if DOE could consider dishwashers’ and clothes washers’ “efficiency” in both “energy use” and “water use,” the 2020 Rules likely promoted greater efficiency in both categories than the Repeal Rule. Assuming both energy conservation metrics are on the table, the States argue, and DOE does not appear to dispute, that one important aspect of that problem is whether appliance regulations actually reduce energy and water consumption. Yet the administrative record contains ample evidence that DOE’s efficiency standards likely do the

opposite: They make Americans use more energy and more water for the simple reason that purportedly “energy efficient” appliances do not work. ... So Americans who want clean dishes or clothes may use more energy and more water to preclean, reclean, or handwash their stuff before, after, or in lieu of using DOE-regulated appliances.

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Strike two for the Department of Energy. It appears that not only has the DOE gone beyond its statutory powers, but in the name of being energy efficient, their latest rules actually promote the use of more energy and water to do the same job.

Court Decision

According to the court, since the Repeal Rule was outside of the DOE’s statutory authority and did not fulfill the requirements of the policy, that policy is arbitrary and capricious, and therefore did not comply with the Administrative Procedures Act.

In sum, it is unclear that DOE has any statutory authority to regulate water use in dishwashers and clothes washers. But even assuming the Department has that authority, the Repeal Rule is arbitrary and capricious for two principal reasons. (1) It failed to adequately consider appliance performance, substitution effects, and the ample record evidence that DOE’s conservation standards are causing Americans to use more energy and water rather than less. (2) It rested instead on DOE’s view that the 2020 Rules were legally “invalid”—but even if true, that does not excuse DOE from considering other remedies short of repealing the 2020 Rules in toto.

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While the striking down of the Repeal Rule is a good thing, there’s one very important point the court missed.

Constitutionality of the DOE

While the court looked at the statutory power of the Department of Energy, they never looked at its constitutionality. Congress stated the purpose of the Energy Policy and Conservation Act of 1975 within the legislation

The purposes of this chapter are-

- (1) to grant specific authority to the President to fulfill obligations of the United States under the international energy program;
- (2) to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;
- (3) Repealed. Pub. L. 106-469, title I, §102(2), Nov. 9, 2000, 114 Stat. 2029 ;
- (4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;
- (5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;
- (6) Repealed. Pub. L. 106-469, title I, §102(2), Nov. 9, 2000, 114 Stat. 2029 ;
- (7) to provide a means for verification of energy data to assure the reliability of energy data; and
- (8) to conserve water by improving the water efficiency of certain plumbing products and appliances.

42 USC §6201

Look all you want, but you will not find the power to conserve energy supplies, improve energy efficiency, or conserve water as a power delegated to the United States. You may be thinking, but what about the international energy program, that was probably done via treaty, which makes it the supreme law of the land, right?

No. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

[U.S. Constitution, Article VI](#), Clause 2

Only treaties made under the Authority of the United States are the supreme law of the land. The United States does not have the authority regulate energy or water supplies. Therefore, any treaty that may have been signed is not within the authority of the United States, not the supreme law of the land, and as an unconstitutional act, void.

In fact, since regulating energy is not a power delegated to the United States, the legislation that created the Department of Energy is an unconstitutional act, and therefore also void.

Conclusion

So while the court came to mostly the right conclusion, their failure to consider the constitutionality of the Department of Energy leave the American people with the false belief that the Department of Energy is legitimate and that their regulations have the force of law. This in spite of previous court decisions to the contrary.

An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed.

[Norton v. Shelby County :: 118 U.S. 425 \(1886\)](#)

Rather than dealing with the unconstitutionality of the Repeal Rule, they merely turned it back over to the illegal agency that created it in the first place.

For the foregoing reasons, the petition for review is GRANTED. And the matter is REMANDED to DOE for further proceedings consistent with this opinion.

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This is why it's so important for you to read and understand the Constitution for yourself. Not only so you can recognize these unconstitutional acts, but so you can prepare yourself to defend and assert your rights, including the right to have the supreme law of the land faithfully enforced.

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