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Rule by Decree

Obama has discovered a dangerous gap in the Constitution's system of checks and balances.

The same week that the burning *Deepwater Horizon* rig collapsed through its pontoons and sank to the bottom of the sea, Fred Hiatt of the *Washington Post* admiringly observed that Obama accomplishes "usually by executive action" those priorities that he can't achieve through the normal political process. Hiatt didn't know the half of it.

America's economic strength has always depended upon a healthy legal climate for business activity — an environment in which rights and obligations are legally enforceable. Obama has discovered that, using federal regulatory action to create uncertainty and prohibitive risk for private commerce, he has almost unchecked power to advance his green-energy agenda by shutting down entire sectors of the U.S. economy. And there isn't anything that any court or any legislature can do about it — at least, not fast enough to make a difference.

On May 28, Obama declared a sweeping moratorium on existing and future offshore drilling below the depth of 500 feet — in other words, the vast majority of all new offshore oil development in the United States. Just a few weeks later, a federal district court in Louisiana struck down the moratorium, calling it "arbitrary and capricious." Then the government's interlocutory appeal sped to the Fifth Circuit, where it was summarily dismissed. There was simply no logical justification for a moratorium on offshore drilling that didn't take into account each rig's compliance with safety measures or how close it might be to a high-pressure oil and gas reservoir. As far as the judicial branch of the federal government was concerned, Obama had no right to declare such a sweeping moratorium.

The administration promptly issued a new decree, replacing the ban on drilling below 500 feet with a ban on drilling from floating platforms. But as the government's own lawyers had explained to the Fifth Circuit panel, the purpose of the 500-foot threshold was to ban drilling by the most common floating platforms — which are used for almost all projects at depths greater than 300 feet. If anything, the change of focus from the depth to the type of drilling apparatus only expanded the moratorium.

Meanwhile, in the Gulf of Mexico, not a single stopped rig has started drilling again. For businesses and working families along the Gulf Coast, Obama's officially "arbitrary and capricious" moratorium is a looming disaster. It has already wiped out thousands of jobs. According to one study, even if the moratorium lasts only until November, it will eliminate more than 8,000 jobs — nearly 2,500 in Texas alone. But the risk horizon is longer: Unless Obama reverses course, the cloud of prohibitive uncertainty will not be lifted until the litigation has run its course in 18 months. In Louisiana, 20,000 jobs could be lost — eventually affecting most of the 15 percent of household income statewide that depends on the offshore-oil industry. According to one recent study, more than 400,000 American jobs could be lost if the moratorium is not lifted soon.

Courts are supposed to protect rights from infrimgement, but there is little courts can do when the injury stems from government actions that create clouds of legal uncertainty over economic activity.

Alas, in their own version of "creative destruction," Obama and his supporters may see that as a good thing. As Obama said in his Oval Office address, the crisis is an incentive to end "America's century-long addiction to fossil fuels." Comprehensive energy and climate legislation has been part of Obama's green policy ever since he ran for senator, and one way to get there is to make oil uneconomical. Hence, Obama may be trying to advance his agenda by causing a fuel shortage.

The moratorium is just one piece of a larger puzzle. The browbeating of BP into disgorging assets regardless of actual liability; the EPA's de facto revocation of licenses for most of the refineries in Texas by means of shutting down a state permitting program that it had found acceptable for 16 years; the Interior Department's failure to process license renewals for a slew of shallow-water wells, which are much less dangerous than those in deep water — all these actions bespeak a desire to create a hostile regulatory environment for oil extraction.

Many of Obama's supporters seem to think that a severe oil shortage is precisely what we need to save the environment and kick-start the transition to green energy. Gov. Bobby Jindal (R., La.) tells me that when he complained to Obama about the impact of the offshore-drilling moratorium on Louisiana's jobs and businesses, the president suggested, apparently in unsmiling seriousness, that the losses could be compensated from the $20 billion BP spill-liability fund that he had just seized control of. Tens of thousands of families face ruin as a result of Obama's illegal moratorium, and the only thing that really seems to trouble him is how to make sure they get handouts.

"We don't want handouts in Louisiana," says Jindal. "Louisianans are hard workers. We want to get back to work." Obama's attitude is highly revealing, not just of his worldview, but perhaps also of his intellectual maturity. For Obama, apparently, working families need money, but they don't necessarily need to work. And who would let legal technicalities stand in the way of a fine opportunity to confiscate money from an evil corporation and give it to the poor?

Back in the real world, the administration has effectively shut down offshore drilling, and there isn't a thing any court can do about it until Obama changes his mind or the litigation comes to a conclusion next year.

Every day that a drilling rig sits idle costs its operator between $250,000 and $1 million. Many of the exploration and production companies that have leased drilling rigs have already invoked *force majeure* clauses in their contracts to get out of the leases. The moratorium will therefore hit particular slices of the oil industry disproportionately: The big oil companies that actually develop the wells will be spared, while owners of drilling rigs, and contractors that service drilling operations, could soon be facing bankruptcy. Many drilling assets will move to other parts of the world, perhaps permanently; rigs have already left the Gulf for Egypt and Congo. In the words of a former Shell CFO, “You are beginning to destroy the infrastructure of offshore drilling in the Gulf of Mexico.”

A third of America’s domestic crude oil — and most of the Gulf’s oil — comes from wells that are “deep water,” using the administration’s definition. The moratorium does not affect existing wells, but by freezing out virtually all new offshore wells, it will prevent some 200,000 barrels per day of output next year, and perhaps 340,000 barrels per day — 20 percent of total U.S. production — by 2015, with the amount increasing every year after that.

This turn in U.S. energy policy could not have come at a worse time. Decades of underinvestment in production, tanker, and refining capacity, followed by years of surging demand from emerging markets such as China and India, have created a dangerously volatile situation in the world oil market. Demand for oil shows very little elasticity along a wide range of prices — in other words, people will buy it even if it gets very expensive. Combine that with the frightfully small amount of spare capacity and what you have is a recipe for “marginal scarcity pricing,” in which tiny swings in demand or supply can have a catastrophic impact on prices. This explains why a modest increase in global energy demand starting in 2002 caused gasoline prices to quadruple by 2008.

Left to their own devices, American oil companies tend to dampen these fluctuations. There is little love lost between them and OPEC, and when prices rise, they move quickly to invest in expanding production, thereby helping to lower world oil prices. As prices fall, the members of OPEC face a strong temptation to increase production to keep the cash rolling in, so cartel discipline collapses, further pushing down prices. This is what kept prices low during the 1980s and 1990s. The world’s private oil companies — of which a majority are American — are the greatest obstacles to the cartel discipline that OPEC needs in order to maximize profits by reducing supply.

Unfortunately, Obama’s policies — along with the perennial Democratic calls for windfall-profit taxes — create a great disincentive for companies to expand production. Their effect will be to increase America’s reliance on foreign sources of oil, already at 60 percent (which is especially ironic from an environmental point of view, since much more oil has been spilled by tankers than by oil rigs). So “if you’re talking to a Saudi friend in the oil business,” says the former Shell executive, “he’s pretty happy with Obama right now.”

Meanwhile, thousands — perhaps tens of thousands — of working families along the Gulf Coast, especially in Louisiana and Texas, face the end of their livelihoods and way of life as a result of the president’s heavy regulatory hand. The federal courts have proclaimed that the president has no right to decree an end to such a broad a swathe of economic activity, but that is cold comfort to those offshore-drilling businesses now paralyzed by fear of further adverse regulatory action. Obama may not have the right to shutter their businesses, but he has the power to do it, and the will.

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