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WASHINGTON POLICY STRATEGY

Potomac Perspective

July was expected to be a busy month with Congress trying to complete a Build Back Better 2.0 bill and put the finishing touches on a China competition bill, but two weeks into the month, it now appears possible that neither bill passes.

Among the monumental decisions handed down by the U.S. Supreme Court in June was a case that struck down an EPA rule related to coal. That case signaled a willingness by the Court to rein in federal agencies, which has potential implications for every economic sector.

BBB/USICA – YOU'LL GET NOTHING AND LIKE IT

For weeks, key Democratic senators have been negotiating a slimmed down version of Build Back Better (aka Build Back Manchin or BBB 2.0). Simultaneously, bipartisan negotiations have been taking place in order to resolve differences between House and Senate versions on the United States Innovation and Competition Act (USICA). Both bills could go down in flames. First up, USICA.

Recently, Senate Republican Leader Mitch McConnell (Kentucky) said that Republicans would not support the USICA bill if Democrats proceed with BBB. Republicans oppose Democrats use of reconciliation rules for BBB, which allow the bill to pass the Senate via a simple majority vote, but which also include restrictions on what may or may not be included in such legislation. Following Sen. McConnell's threat, all work on the USICA has stopped, which leaves Democrats with several options on how to proceed:

1. Have the House drop its version (which passed in February 2022) and accept the Senate bill (which passed in 2021). Pursuing this option is straight forward, and there is little McConnell can do to stop it. However, some House Democrats oppose various provisions in the Senate bill and given a four-vote majority in the House and the likelihood that all House Republicans would oppose the bill, it is unlikely the original Senate bill could pass the House.
2. Take what the bipartisan negotiations had produced before talks ceased, cobble together a new bill, and force Republicans to oppose it. This might be a smart political move and could play well in some races in November, but Senate Republicans are likely to be united behind McConnell, so the probability of success under this option is low.
3. Strip out the funding in the Chips Act portion of the bill ($52 billion to subsidize domestic chip manufacturing) and pass that as a stand-alone bill. There appears to be some momentum for this approach, but there is also bipartisan opposition. Notably among Democrats, Senator Bernie Sanders (Vermont) opposes giving a subsidy for large corporations unless there are significant strings like limits on stock buybacks. Some Democrats might have a tough time accepting this approach given that one of their top priorities in BBB, an expanded child tax credit, has been dropped. Taxpayer funding for corporations but no new money for kids will not sit well with progressives.

It is possible that if BBB 2.0 fails, negotiations on USICA could resume and Congress could possibly pass a bill during a lame duck session. However, the lame duck session will likely be focused on a spending bill for fiscal year 2023 and the annual National Defense Authorization Act. It is more likely that USICA would be punted to 2023 when House Republicans think they can write a bill more to their liking. Odds of passing USICA in 2022 are below 50/50.

Meanwhile, talks between Senate Majority Leader Chuck Schumer (D-New York) and Senator Joe Manchin (D-West Virginia) seem to have produced an agreement (at least) on a prescription drug price section, as language has been submitted to the Senate Parliamentarian to have it reviewed for compliance with reconciliation rules. No other sections have been finalized, and an agreement does not seem imminent. There are multiple landmines between any agreement and passing a bill. The other sections of the bill would presumably include tax hikes, climate legislation, and some level of deficit reduction. There has been some speculation that a bill could also include extending subsidies for Obamacare policy premiums that were passed as part of COVID relief legislation, and which are scheduled to expire at year end – thus increasing premiums.

Inflation has been Sen. Manchin's stated concern all along, and the June Consumer Price Index report (released on July 13) will make it even more difficult for him to agree to a deal with the rest of the Democratic caucus. The tax section presents additional challenges. It would presumably include a corporate alternative minimum tax, an extension of the net investment income tax to all business income for pass-through entities, as well as a global minimum tax regime for corporations. It is not clear whether Senator Kyrsten Sinema (D-Arizona) has signed off on this section. Sen. Sinema forced the tax section of an earlier version of BBB to be rewritten and her support is critical. Also, a group of moderate House Democrats who have advocated for expanding the State and Local Tax (SALT) deduction have renewed their threat to oppose the bill if it does not include SALT relief – no SALT; no deal. It is also unclear whether progressives would support a bill that includes deficit reduction when their priorities in the climate section have been dropped, not to mention that the bill would not include an expansion of the Child Tax Credit.

The calendar is also a significant challenge. Congress is scheduled to take its usual August recess from August 8 until September 6. Chances are low that a BBB 2.0 bill could be finished by the start of the recess. The recess could be delayed if Democrats are close to a deal, but two Senate Democrats are currently out with COVID and a third, Senator Patrick Leahy (D-Vermont), is recovering from hip surgery which serves as a reminder of the precarious status of the Democrats' Senate majority. It is possible that a bill could be passed in September, but Congress will be out on September 26 for Rosh Hashana, and the ultimate deadline is September 30 when the Budget Resolution, which allows the use of reconciliation rules and passing the bill by a simple majority vote, expires.

Many Democrats believe that even a skinny BBB is important for their prospects in the midterm elections, which is why Democrats keep working on the bill. They also realize that if Republicans win at least the House in November their legislative agenda will be shut down, and none of BBB will be passed. Odds are against the bill passing, but it will be among the dominant issues in Congress through September 30.

LONG-TERM IMPLICATIONS FROM THE SUPREME COURT'S EPA DECISION

Before the July 4 holiday, the Supreme Court issued a decision in *West Virginia v the Environmental Protection Agency* that has potential ramifications beyond this particular case. In West Virginia v the EPA, the Court ruled that the EPA had exceeded the authority granted by Congress when the agency promulgated its Clean Power Plant rule. The case signals that the Court might be looking to curtail the ability of federal agencies to expand on powers that Congress has given them. Congress typically writes statutes under which it delegates the power to an agency to write new regulations on a specific issue. However, for cases like the EPA case which involve major questions of economic and political significance, the Court ruled that the agency must point to clear congressional authorization for the authority it claims. Under this "major cases" doctrine, the Court signaled that agencies have to stick close to what Congress actually authorized rather than using novel theories and approaches to expand their authority. This case has the potential to force agencies to rethink their approach to drafting rules to make sure that they are not straying too far from congressional mandates. There is no clear road map forward, but regulated entities in every sector can be expected to review every new rule proposal to make sure it fits within the authority explicitly granted by Congress. The Court seems to have indicated a new willingness to rein in the administrative state.

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