

Duke Law Journal

VOLUME 1990

NOVEMBER

NUMBER 5

CONGRESS TO ADMINISTRATIVE AGENCIES: CREATOR, OVERSEER, AND PARTNER†

REPRESENTATIVE EDWARD J. MARKEY*

I am pleased to give the *Duke Law Journal* Administrative Law Lecture and to join the list of illustrious prior contributors such as Justice Antonin Scalia, Solicitor General Kenneth Starr, and Judge Abner Mikva. I am particularly honored to be speaking on one of my favorite legal topics, administrative law. Congressmen do not often have the opportunity to propound their views of separation of powers or constitutional law. Nevertheless, I have always been drawn to administrative law, ever since receiving an A in that class in law school. Of course, the dirty little secret about that exam is that all I did was try to put the words "arbitrary and capricious" into as many different phrases as was humanly possible.

In my role as a subcommittee chairman, I deal with the topic of Congress and its relationship with administrative agencies on a practical level every day. I have learned that one must walk a tightrope when working with other branches of government. It is impossible to please all of the people all of the time—no matter what you do.

The title of this year's lecture, "Congress to Administrative Agencies: Creator, Overseer, and Partner" is particularly apropos. While protective of our role as creator, members of Congress, out of necessity, must remain vigilant overseers. But when appropriate, we also must act

† *Duke Law Journal* Administrative Law Lecture, delivered at Duke University School of Law, March 5, 1990.

* Democratic Congressman from Massachusetts since 1976. Chair of the House Subcommittee on Telecommunications and Finance for the Committee on Energy and Commerce. B.A., 1968, Boston College; J.D., 1972, Boston College. I want to thank Representative David Price for his welcoming remarks and also note my pleasure at being invited to deliver this Lecture by the Editor-in-Chief of the *Duke Law Journal* for 1989-90, Gerry Waldron, my former staffer. Although we never taught Gerry the joys of citechecking, I hope that his experiences in Congress helped prepare him for the now distinguished career he has set out upon.

as partners. I discuss the interrelationship among these roles and provide examples of the problems involved in the search for Washington, D.C.'s version of Truth—referred to in administrative law circles as congressional intent.

Ultimately, all questions of administrative law, judicial review of agency action, and the degree of congressional oversight revolve around attempts to discover where the true congressional intent lies. All of our congressional oversight activities seek to advance an administrative agency outcome that most reflects congressional understanding of the dictates of law.¹ In our system of government the non-legislative branches² all pursue the same goal—determining and ultimately following congressional intent. The system affords each branch a great deal of leeway to pursue its own view of congressional intent, and naturally each branch seeks to assert its own perspective as much as possible.³ In my opinion, from the vantage point of a congressional subcommittee chair, some views should be granted greater deference than others.

In overseeing the Securities and Exchange Commission and the Federal Communications Commission, I constantly deal with the relationship between Congress and administrative agencies, and have gleaned several key lessons from these dealings. First, the issue of interbranch relations and shared responsibility is not purely theoretical. Members of Congress do not sit at committee meetings and debate the philosophical niceties of *Pillsbury Co. v. FTC*⁴ or *Chevron U.S.A., Inc. v. NRDC*.⁵ Nevertheless, at a practical level the congressional-administrative agency relationship is vitally important. From a congressional perspective, this relationship ensures or undermines implementation of public policy.

Second, Congress' role as the creator of independent agencies leaves members with a feeling of paternal desire to maintain control of a newly engendered agency long after the child has left the congressional womb for the harsh world beyond. Agencies come into existence as a result of congressional action,⁶ and the statutory bounds defined by Congress de-

1. See, e.g., 121 CONG. REC. 29,957 (1975) (Remarks of Senator Dale Bumpers) ("Although [the doctrine of agency discretion] in its beginnings was healthy, designed to prevent unnecessary judicial interference with social policies adopted by Congress, it has long since exceeded proper boundaries.").

2. I am referring, of course, to the executive branch, the judicial branch, and the independent agencies.

3. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596-640 (1984).

4. 354 F.2d 952 (5th Cir. 1966).

5. 467 U.S. 837 (1984).

6. See U.S. CONST. art. I, § 8, cl. 18 (providing for Congress to take actions "necessary and proper" to carry "foregoing powers" into effect). Congress' power to delegate to other branches of government those powers that Congress may rightfully exercise derives from article I of the U.S.

limit agencies' freedom of action. Thus, given Congress' role as creator, we may ask ourselves, why do Congress and administrative agencies often find themselves at war with each other?

But this is the wrong question to ask, because agencies and Congress do not always find themselves at war—and for a surprising reason. In reality, Congress can oversee, in a vigorous fashion, relatively few of the day-to-day activities of the administrative agencies within its oversight boundaries. Congress is a stimulus-response body, and we need a lot of stimulus before taking action to rein in an agency and direct it to administer the law in a certain way. Perhaps the most notable example of such explicit guidelines came from my Committee, the Committee on Energy and Commerce, which established the 1986 amendments to the Superfund law.⁷

This law was enacted after a long and sordid investigation of Rita Lavelle and Anne McGill Burford, who had a “take-a-polluter-to-lunch” attitude at the Environmental Protection Agency (EPA).⁸ During that period, we used to joke that EPA stood for “Every Polluter’s Ally.” After seeing the mess that a grant of broad discretion to the EPA created, Congress stepped in and wrote very explicit laws. Indeed, at one point I remember debating for several hours whether we should demand a clean-up standard of 99.99 percent, or 99.9999 percent⁹ (known affectionately as the “6 9’s” amendment). We felt that we had to make this decision for the agency, since it lacked the credibility to make the decision itself.

Numerous practical constraints, including staffing resources, make the 1986 Superfund Amendments approach rare. For example, probably fewer than ten full-time committee professional staff persons in the House and Senate oversee the entire field of securities, although the Se-

Constitution. *See id.* § 1 & § 8; *see also* *Union Bridge Co. v. United States*, 204 U.S. 364 (1907) (because Congress' power to regulate commerce includes the power to control navigable waters the Congress may vest in the Secretary of War the power to determine if any structure over a navigable waterway amounts to an obstruction to navigation).

7. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at scattered sections of, among others, 42 U.S.C., 33 U.S.C., 29 U.S.C., 26 U.S.C., 10 U.S.C.).

8. *See* Shabecoff, *Former EPA Aide Cited for Contempt by the House*, 413-0, N.Y. Times, May 19, 1983, at A1, col. 1; Shabecoff, *Political Use of Toxic Cleanup Charged by Dingell*, N.Y. Times, May 20, 1983, at A17, col. 1.

9. *See* H.R. REP. NO. 69, 99th Cong., 2d Sess. 100, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2881-82 (House version of 1986 Amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) would have required the Administrator of the Environmental Protection Agency to set clean-up standards that “to the maximum extent practicable, require treatment technology that provides . . . a destruction and removal efficiency meeting or exceeding 99.9999 percent”).

curities and Exchange Commission employs over 2,250 people.¹⁰ Of course, Congress can rely on the expertise of the Congressional Research Service, the General Accounting Office, and the Office of Technology Assessment, but none of these are as effective as direct staffers. The ratios are similar in the communications field or virtually any other substantive area that involves administrative agencies.¹¹ The machinery of congressional oversight also includes numerous internal hurdles, which force Congress to pick and choose its oversight activities with care.¹² Nonetheless, there are circumstances that demand a prominent and pronounced congressional role well after the birthing stage of any agency.

How does Congress attempt to assert its views in the development of administrative law? Ideally and most obviously, Congress announces its views clearly and unambiguously in the initial crafting of a statute.¹³ Omniscient and precise directions would render administrative agencies accountable to congressional intent when these agencies acted beyond the scope of their rulemaking authority.

However, the scenario in which Congress provides precise, unchallenged direction is more or less impossible in today's world. First, it is practically impossible to anticipate all future changes in the external landscape that affect implementation of a statute. Second, Congress may choose to leave some issues unaddressed, either preferring to rely on the expertise of experienced agency personnel to resolve difficult questions or finding it easier to line up votes by obscuring some differences.¹⁴ Finally, even if Congress did have specific and unambiguous intent, one must never doubt the ability of regulators, litigants, and courts to find congressional ambiguity in any conceivable situation.

10. U.S. OFFICE OF PERSONNEL MANAGEMENT, FEDERAL CIVILIAN WORKFORCE STATISTICS: EMPLOYMENT AND TRENDS AS OF MARCH 1990, at 19, table 2.

11. See *id.* at 16-20.

12. See, e.g., McCubbins & Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-66, 176 (1984) (distinguishing between "police patrol" oversight, in which the legislature constantly monitors administrative activity, and "fire alarm" oversight, in which the legislature waits for interested parties to sound alarms; latter method more effective and less expensive); Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 777-79 (1983) (suggesting that congressional priorities shift as the individual make-up of the oversight committees changes).

13. See, e.g., *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (where Congress has directly addressed the question at issue, there is no issue as to agency or judicial interpretation of the statute). *Chevron* mandated that Congress express its views clearly ("unambiguously") or risk that the federal courts would defer to reasonable executive branch constructions of congressional enactments.

14. See Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 517. The Congress operates on compromise. Compromises, however, seldom work in favor of clear, unambiguous statutory language.

The dilemma of found ambiguity is most obvious in *Chevron U.S.A., Inc. v. NRDC*.¹⁵ In last year's Administrative Law Lecture, Justice Scalia focused on that seminal case. The Justice defended the unanimous decision that held courts must give deference to "reasonable" agency interpretations when a statute is silent or ambiguous on the specific issue.¹⁶ From a congressional viewpoint, the problem with Justice Scalia's analysis is that the scope of *Chevron's* applicability hinges entirely on how one interprets "ambiguity." Solving a statutory construction problem created by too much ambiguity through the use of an undefined notion of "ambiguity" is nonsensical. Instead of shedding light on the problem of statutory construction, an "ambiguity" test threatens to cloak the problem in a further layer of ambiguity. Thus, I am afraid that we are destined to live in a world in which Congress is often frustrated by inconsistent application of what Congress views as unambiguous pronouncements of law.

Given the likelihood of perceived ambiguity in congressional enactments, there is great opportunity for agencies to wander far afield of congressional intent. But in response to agency intransigence, Congress may utilize a variety of tactics to press its own views on agencies. For example, Congress can pass a new law and more clearly state its position on an issue previously seen as unaddressed or ambiguous. This method is not always effective or desirable. Often there are ponderous difficulties in trying to enact a new statute. Further, the demon of ambiguity may once again rear its ugly head.

Short of passing an endless series of ever-less ambiguous statutes, Congress can invoke a range of measures to inject its views into the administrative law process. For example, Congress can use its power over the budget to effect changes in the spending of appropriated money.¹⁷ Congress can hold oversight hearings to increase public pressure on a wayward agency and impress upon the agency's staff the importance of following Congress' views. At a lower level, Congress can inundate agencies with letters that press its point of view. Alternatively, these can be approached through more informal personal contact between staff on the Hill and agency staff and between members of Congress and agency heads. All of this activity moves an agency toward the achievement of Congress' own view of congressional intent.

15. 467 U.S. 837 (1984).

16. See Scalia, *supra* note 14, at 521.

17. See U.S. CONST. art. I, § 8, cl. 1 and § 9, cl. 7. See generally Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1360 (1988) ("Appropriations limitations . . . constitute a low cost vehicle for effective legislative control over executive activity.").

In general, Congress does not relish warfare with administrative agencies. I know from personal experience that mutual cooperation in the pursuit of functional policy goals is to be preferred over bitter conflict. Nevertheless, the legislative branch and administrative agencies have battled during the last decade.¹⁸ These encounters have cut right to the core of both the ability and desire of the independent agencies to honor the congressional intentions that underlie many laws.

In Congress a largely bipartisan consensus exists on the need for the existence of independent agencies. Yet even that consensus has been challenged by the administrative actions of the last decade.

Congress draws congressional committees along certain functional lines. For instance, the Ways and Means Committee taxes everybody. The Appropriations Committee spends all the money. The Energy and Commerce Committee regulates everybody.¹⁹ And so whether it be the Environmental Protection Agency, the Security and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, or the Food and Drug Administration, just to name a few, almost all regulation in some manner, shape or form, comes under the jurisdiction of the Energy and Commerce Committee.²⁰

I have had the personal responsibility for overseeing the Nuclear Regulatory Commission and Federal Energy Regulatory Commission as a Chair of the Subcommittee on Energy Conservation and Power, and the Securities and Exchange Commission and the Federal Communications Commission as Chair of the Subcommittee on Telecommunications and Finance. So, I have enjoyed an opportunity to examine these agencies closely. My position also has afforded me an opportunity to make more general observations as to what has been going on since 1976, when I was first elected to Congress. Throughout the 1960s and into the 1970s, there was a bipartisan consensus on the role of, and need for, regulations issued by the independent agencies. Regulation was recognized as a vehicle through which government could ensure a certain level of

18. See *infra* notes 31-65 and accompanying text. Citizens also have joined the fray in an attempt to force agencies to comply with congressional intent. However, those citizen efforts often have not fared well in the courts. See, e.g., *Hazardous Waste Treatment Council v. EPA*, 866 F.2d 433, 436-38 (D.C. Cir. 1989) (litigants lacked standing to pursue judicial review in situations in which agency allegedly expanded regulatory deadline contrary to congressional intent).

19. Specific jurisdiction of the Energy and Commerce Committee is provided by the Rules of the House of Representatives. HOUSE OF REPRESENTATIVES, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. H-940-2, 101st Cong., 2nd Sess. 3-9 (1990) (rules x(1)(l), x(2), x(3)(h), x(4)(f)-(i)).

20. This is in some part a by-product of having Sam Rayburn and John Dingell, among others, as chairmen of your committee. The Committee historically has been quite fortunate often to have the most able (and powerful) members of the House as its chair. This has helped ensure a healthy jurisdiction for the Energy and Commerce Committee.

safety, security, and stability in the economy and the marketplace.²¹ These are hardly the goals of left-wing, granola-chomping liberals. In fact, I believe that these goals reflect conservative values: One should remember that the EPA was created by the Nixon Administration.²² However, by the late 1970s a consensus formed around the belief that there was too much government regulation and that some reassessment was called for—and this helped to put Ronald Reagan in the White House.

President Carter actually began deregulation with the trucking and airline industries. It is important to remember, however, that President Carter's goal was to promote competition.²³ When he deregulated, it was to reduce barriers to market entry, while simultaneously maintaining consumer protection and antitrust goals. President Reagan's deregulatory goal, on the other hand, went far beyond President Carter's, and was contrary to the bipartisan consensus that had formed with regard to where regulation was needed. Instead of recognizing that a small amount of overregulation existed, President Reagan came in and effectively said that all regulation was bad.²⁴ The Reagan Administration advocated deregulation without even the desire to increase competition. It was the pursuit of deregulation for deregulation's sake in a deregulatory feeding frenzy. In fact, it was more than deregulation. Reagan attempted to deny any legitimate role for government in ensuring minimum marketplace standards for safety, health, and competition.

The independent agencies, as well as cabinet level departments, became arenas for waging the deregulation war. It was fought primarily

21. See C. SCHULTZE, *THE PUBLIC USE OF THE PRIVATE INTEREST 2* (1977) ("During the 1960s the belief took hold that some kind of . . . federal regulatory agency could be designed to deal with almost any social or economic problem.").

22. The EPA was established in 1970 by President Nixon in Reorg. Plan no. 3 of 1970, 3 C.F.R. 1072 (1966-1970), reprinted in 42 U.S.C. § 4321 app. at 965-68 (1988).

23. See J. CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT 69* (1982). According to former President Carter, his administration's

first major test in Congress [came in the form of] a bill authorizing the President to address the problem of the federal bureaucracy—its complexity, its remoteness when people needed help, its intrusiveness when they wanted to be left alone, and its excessive regulation of the major industries to the detriment of consumers.

Id.; see also *Senate Passes Trucking Bill*, N.Y. Times, June 21, 1980, § 1, at 30, col. 4; Shifrin, *Far-Reaching Changes in Store for Airlines; Air Deregulation Victory Surprises Backers; Winds of Change Sweep Airlines*, Wash. Post, Oct. 29, 1978, at F1, col. 1.

24. See D. STOCKMAN, *THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED 8-9* (1986) (describing the vision of the Reagan plan as resting on the productive potential of free men in free markets); see also Exeo. Order No. 12,291, 3 C.F.R. § 127 (1982) (setting forth numerous requirements to which agencies must adhere when promulgating new regulations and reviewing existing regulations, among the requirements were the preparation of cost-benefit analyses, descriptions of alternative approaches, and explanations of why such alternatives could not be adopted).

with three weapons. First, the fox was allowed to guard the henhouse: The Administration appointed people who wished to demolish quickly the regulatory structure that had been put in place during the first 200 years of the Republic.²⁵ Second, the grim reaper was brought into the halls of government: The Administration set up the Office of Management and Budget and the Presidential Task Force on Regulatory Relief to put a stranglehold on regulations already in place and to prevent any new regulations from seeing the light of day.²⁶ Third, the starvation diet was imposed: The Administration simply denied the agencies the money and staff needed to do their jobs.²⁷ Let me give some examples of how each of these weapons was used. Many people may not remember James Edwards, a South Carolina politician and a former dentist, who was named President Reagan's first Secretary of Energy. At a hearing in December of 1981,²⁸ Senator John Glenn asked Edwards whether, in being named Secretary of Energy, he had in fact been given the job of doing away with the Department of Energy. "Yes sir, I have," responded the dentist.²⁹ Glenn asked Edwards when he thought he could accomplish the task. Edwards replied (this is the future Secretary of Energy speaking), that he hoped a bill would be passed very rapidly so "maybe about April or May I could get back to South Carolina for spring fishing."³⁰ When told he was overly optimistic, Edwards said cheerily, "The fishing is good in June or July, too Senator."³¹ Edwards never succeeded. And eventually Reagan gave up and stopped trying to abolish the Department of Energy. But as it turned out, the Administration's regulatory policy became the equivalent of a "gone fishing" sign hanging on the door of most independent agencies and some departments.

Another anecdote also illustrates how the Administration used both the power of appointment and the power of the Office of Management and Budget (OMB) in its attempt to cripple an independent agency. Dr. John Hernandez eventually became Deputy Administrator of the EPA,³² but was first interviewed for the top job by two men from David Stock-

25. For example, it was the Reagan Administration that appointed people like James Watt and Samuel Pierce to high public office.

26. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982).

27. For discussion of Edwin Gray's testimony before the Senate that budget cuts left the Federal Savings and Loan Insurance Corporation (FSLIC) unable to perform its regulatory duties, see *infra* notes 46-49.

28. *Possibility of De Facto Dismantlement of Dept. of Energy Functions: Hearings Before the Subcomm. on Energy, Nuclear Proliferation, and Government Processes of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess.* 54 (1981).

29. *Id.*

30. *Id.* at 55.

31. *Id.*

32. See A. BURFORD & J. GREENYA, ARE YOU TOUGH ENOUGH? 83 (1986).

man's office at OMB.³³ Hernandez' description of his meeting with two people from OMB (as reported to Anne McGill Burford), who were to decide on his worthiness for appointment at the EPA reveals the Reagan Administration's motives:

My meeting was with Glen Schleede, the number three man at OMB, and Fred Khedouri, OMB's budget director for the EPA. I went into that interview very cautiously because I knew that these people wanted to make a lot of major cuts at EPA. So I was quite reluctant to say anything that I didn't believe in, in way of philosophy or approach. I was absolutely terrified of becoming the head of EPA and all that mess it was in, so it was in the forefront of my mind all during that meeting that anything I said to those guys I would have to live with if I became the Administrator.

And, finally, at one point, Fred Khedouri leaned over in his chair, and kind of quiet like, but dead serious, asked "Would you be willing to bring EPA to its knees?"

I was so startled that I kind of just laughed, as if I couldn't believe he said that. But he had said it, and I just demurred.

And when Anne was selected as head of EPA instead of me, I was very much relieved.³⁴

The EPA saga that subsequently unfolded illustrated the cavalier disregard for common sense and the public good that the Administration displayed when it came to regulation. It could also mean a cavalier disregard for the law—witness the example of Rita Lavelle.³⁵ Even after the EPA fiasco, the Administration continued to violate the first law of holes, which is that when you find yourself in one, you stop digging. In fact, its deregulatory policies could have dug a bottomless pit.

Part two of the grim reaper involved the Presidential Task Force on Regulatory Relief. Today, President Bush is the self-proclaimed "environmental president" and has made re-authorization of the Clean Air Act a top administration priority.³⁶ However, Vice-President Bush,

33. *See id.*

34. *Id.* at 83-84. This is Anne McGill Burford's version of what took place at the meeting.

35. Lavelle, who served as EPA's assistant administrator in charge of waste programs, was convicted by a federal grand jury of perjuring testimony before a congressional committee investigating misconduct at the EPA. Lavelle lied about her participation in matters affecting her former employer, Aerojet-General Corporation. The investigation found that the EPA's toxic waste management program had been undermined by misconduct such as favoritism to industries and politicians, and unwillingness to use available funds to clean up toxic sites. Anne McGill Burford and twenty other EPA administrators resigned under pressure from the committee's investigation. *See* Shabecoff, *Lavelle Verdict: E.P.A. Trial Over, But Not Inquiries*, N.Y. Times, Dec. 3, 1983, at A9, col. 1; Shabecoff, *Jury in E.P.A. Case Finds Lavelle Guilty of Perjury*, N.Y. Times, Dec. 2, 1983, at A1, col. 1.

36. *See* Berke, *Oratory of Environmentalism Becomes the Sound of Politics*, N.Y. Times, Apr. 17, 1990, at A1, col. 1. On November 15, 1990, the new Clean Air Act became law. Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399.

while supervising the deregulatory task force in 1981, allowed California oil refineries and other industries to operate despite Clean Air Act bans on new sources of air pollution in poor air quality areas.³⁷ In 1981, the task force also decided to relax EPA requirements on pollution by municipal sewerage systems and regulations of dangerous pesticides.³⁸ The task force decided to allow vehicles to emit greater amounts of carbon monoxide and other dangerous pollutants into our air,³⁹ and it relaxed a rule that would have limited worker's exposure to lead.⁴⁰ This is the environmental legacy of the Task Force on Regulatory Relief.

Now let me turn to the Reagan Administration's third weapon in the war on regulation—the cutting of staff and funding at independent agencies. Edwin Gray, prior to becoming head of the Federal Home Loan Bank Board (FHLBB), had a policy disagreement with the associate director of the OMB in the early days of the deregulatory drive in 1981.⁴¹ Gray notified the OMB about the potential problems that FSLIC faced with savings and loans and banks throughout the country. He told the OMB that FSLIC desperately needed more examiners in the Federal Home Loan Banks. Gray was told by the OMB that he obviously did not understand the administration's policy of deregulation—that policy meant reducing, not increasing, the size of the examination staff.⁴² Even-

37. On March 25, 1981, Vice President Bush announced that the Presidential Task Force would relax EPA pollution regulations for the timber industry, municipal sewerage systems, and certain dangerous pesticides. See Farnsworth, *EPA Plans to Ease Rules on Clean Air*, *Vice President Says*, N.Y. Times, Mar. 8, 1981, § 1, at 1, col. 1; Letter from Edward J. Markey to the editors, *Mr. Bush on the Environment*, Wash. Post, Sept. 8, 1988, at A20, col. 4; see also 42 U.S.C. §§ 7501-7508 (1988) (describing statutory requirements for state planning to achieve uniform ambient air quality in nonattainment areas).

38. Behr and Omang, *White House Targets 27 More Regulations for Review: More Regulations Target of Administrative Review*, Wash. Post, Mar. 26, 1981, at A1, col. 2. See *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary, Part 3*, 98th Cong., 1st Sess. 2739, 2751 (1984) [hereinafter *Regulatory Reform Act*].

39. *Regulatory Reform Act*, *supra* note 38, at 2738-39 (allowing waivers for higher nitrogen oxide emissions from diesel manufacturers, lowered limit on carbon monoxide emissions from 3.4 grams per mile to 7 grams per mile, relaxed limits on solvents that can be released from automobile paint shops); *id.* at 2749-51 (proposing rules relaxing EPA standards on hydrocarbon and carbon monoxide emissions from heavy trucks; eliminating the high altitude requirement for auto emissions; relaxing the acceptable failure rate for assembly line testing of truck emissions; relaxing the particulate emissions standards for diesel automobiles; excluding methane from calculations of hydrocarbon emissions).

40. See *id.* at 2758 (relaxed an OSHA regulation specifying permissible levels of occupational exposure to lead by extending compliance time to 2.5 years, by requiring only feasible controls and by exempting certain industries).

41. S. PIZZO, M. FRICKER & P. MUOLO, *INSIDE JOB* 179-80 (1989).

42. *The Impact of Gramm-Rudman-Hollings Reductions on the Supervisory and Regulatory Roles of the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the Office of the Comptroller of the Currency, and the National Credit Union Administration: Hearing before*

tually, the OMB was generous enough to offer FSLIC thirty-nine new examiners nationwide just as massive deregulatory policies in the Federal Savings and Loan Bank area were being introduced.⁴³ Unfortunately, as we found out by 1986, FSLIC needed more than 750 new examiners.⁴⁴ As a result, the nation inherited a legacy of disaster—runaway financial collapse with the government incapable of overseeing and responding adequately. Consequently, last year Congress was forced to enact one of the most expensive government/taxpayer bailouts in history.⁴⁵

When the FSLIC experience is compared to the Securities and Exchange Commission (SEC) experience the resemblance is striking. Wall Street was booming through the 1980s. Since 1980, the number of registered investment companies has increased an estimated 146% and the number of registered investment advisers has increased an estimated 217%.⁴⁶ The number of registered broker-dealer firms has increased an estimated 88% and sales on the United States Securities exchanges have increased 157%.⁴⁷ But as you might expect, complaints to the SEC also increased.⁴⁸ In 1987, the SEC received 40,000 complaints from disgruntled investors—a 230% increase over the number received in 1982.⁴⁹ And yet throughout the 1980s, the SEC consistently was given fewer employees than it needed to fulfill its mandate.⁵⁰ If activity increases in the marketplace because of deregulation and fewer personnel are on duty to

*the Subcomm. on General Oversight and Investigations of the Comm. on Banking, Finance and Urban Affairs, 99th Cong. 2d Sess. 52-56 (1986) (prepared statement of Edwin J. Gray, Chairman of the Federal Home Loan Bank Board) (reporting that proposed Fiscal Year 1987 budget cuts would result in immediate staff reductions, seriously impairing the effectiveness of the Bank Board) [hereinafter *Impact on FDIC*]. See Edwin Gray on the S & L Crisis: 'This was a Self-Inflicted Disaster,' Wash. Post., Oct. 9, 1988, at H9, col. 1 (describing Gray's fight with OMB to obtain more bank examiners) [hereinafter *S & L Crisis*]; O'Shea, *Taxpayers Target of Financial 'Time Bomb'*, Chicago Trib., Sept. 25, 1988 at 1, col. 3 (describing OMB's stiff resistance to proposal for more examiners); Trigaux & Barnes, *Gray Requests Increased Aid for Bank Board*, AM. BANKER, Feb. 21, 1985 at 3 (Gray submitted request to OMB and to the House appropriations committee asking for more bank examiners); see also *Final Oversight Hearings on the Savings and Loan Industry in the 100th Cong. Before the Comm. on Banking, Housing and Urban Affairs, 100th Cong., 2d Sess. 164-65 (1988)* (prepared statement of Edwin J. Gray, former Chairman, Federal Home Loan Bank Board).*

43. See *S&L Crisis*, *supra* note 42.

44. See *Impact on FDIC*, *supra* note 42, at 52-56.

45. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of the U.S.C.); Nash, *Conferees Agree on Savings Bailout Bill*, N.Y. Times, July 28, 1989, at D1, col. 3 (House and Senate agree on \$166 billion bailout of savings and loan industry).

46. *SEC Reauthorization, 1989: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 12 (1989)* (statement of SEC Chairman David Ruder) [hereinafter *SEC Reauthorization Hearing*].

47. *Id.* at 11.

48. See *id.*

49. *Id.* at 13-14.

50. See *id.* at 11, 15.

monitor it, then activity that endangers investor confidence in the financial marketplace is bound to flourish.

The events of October 19, 1987, Black Monday, came as a surprise to many.⁵¹ But the handwriting was on the wall long before October 19, and the lesson is the same with FSLIC. The real question is not whom to blame, but who pays in the long run?

The particular examples that I have used so far⁵² are illustrative generally of problems caused by the deregulatory drive, but there is no better example in the Reagan era than the Nuclear Regulatory Commission (NRC). The Reagan and Bush era and their effect on the NRC can best be described by paraphrasing a quote by President John F. Kennedy:⁵³ The NRC has weakened any regulation, changed any rule, befriended any utility and ignored the health and safety of every citizen to keep this nation's nuclear power plants running. This was the record of the NRC under the Reagan Administration and it continues under President Bush. Staffed with ideological zealots, the NRC has become wedded to the Reagan and Bush Administrations' nuclear policies.

This corruption of the NRC was clearly demonstrated in the case of the Seabrook Nuclear Power Plant. In a monumental mistake, this plant was sited virtually on top of the beach in Seabrook, New Hampshire.⁵⁴ Over eighty percent of New Hampshire is forested and underpopulated,⁵⁵ but the nuclear power plant was built in the middle of the only populated area, on a beach, with just one two-lane road to evacuate, in the event of an accident, a population that by some estimates reaches 300,000 in the summer months.⁵⁶ In the event of an accident or meltdown, research has proved that it would be impossible to evacuate the citizens who live within the ten-mile radius of the plant.⁵⁷

51. See *Business Digest: Tuesday, October 20, 1987*, N.Y. Times, Oct. 20, 1987, at D1, col. 1 (city ed.).

52. The EPA, FSLIC, the Vice President's Task Force, and the SEC.

53. See PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, 1961, at 1 (1962) (Inaugural Address). "Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and success of liberty."

54. See D. STEVER, SEABROOK AND THE NUCLEAR REGULATORY COMMISSION 52-58 (1980) (maps showing the geography and population distribution surrounding the site).

55. See RAND McNALLY, COMMERCIAL ATLAS AND MARKETING GUIDE 72, 76 (1986); 29 THE NEW ENCYCLOPAEDIA BRITANNICA MACROPAEDIA: KNOWLEDGE IN DEPTH 283 (1989). The urban centers, where 52% of the population lives, are all located south of the White Mountains in the south and southeastern regions of the state—all within roughly 60 kilometers of Hampton Beach. *Id.*

56. See Kittredge, *Seabrook Evacuation Plan for N.H. OK'd*, Boston Globe, Jan. 3, 1989, § 1, at 1, col. 5.

57. See D. STEVER, *supra* note 54, at 66-67, 70-74 (beach's isolation from transportation corridors and the difficulty of traveling in and out from the beach make evacuation plans difficult to

Both Massachusetts and New Hampshire have spent hundreds of thousands—if not millions—of dollars trying to design adequate emergency response plans. Regulations were adopted after Congress passed legislation that required emergency evacuation planning—effectively giving state officials veto power over nuclear plant operation if they cannot adequately provide for the safety of their citizens. The first time a state reached that conclusion, the NRC changed its regulations. The Reagan NRC was so determined to get Seabrook and Shoreham on line that it changed the rules on emergency evacuation planning after the states had already invoked their rights under the existing regulations.⁵⁸

Current statutes require that the NRC base its licensing decisions on safety.⁵⁹ Economics and cost balancing are not mandated by the law. The utilities now claim that the inexorable pressure of an unwise investment made twelve years earlier should override any and all safety considerations. According to proponents, compelling economic necessities mandate that the plant should be licensed and regulations to the contrary should be waived; state reliance upon these regulations is now deemed irrelevant.

Thus, even after the accident at Three Mile Island (and Chernobyl) and in spite of the consensus that public safety concerns mandated greater protection, the Reagan NRC tried to block public participation in the rulemaking process in order to accommodate the nuclear industry.⁶⁰ Instead of limiting public participation in the decisionmaking process, a better approach would have sought to foster a working relationship with the communities in which the plants operate.

On the floor of the House in August of 1987, I opposed ignoring the emergency organization planning question and I set forth my opposition by way of a proposed amendment.⁶¹ My amendment was very simple—do not change health and safety rules to fit a dangerous site. Change the site to fit the rules. The amendment lost after heavy lobbying efforts

formulate); see also J. PRICE, *THE ANTI-NUCLEAR MOVEMENT 89-90* (rev. ed. 1990) (the Federal Emergency Management Agency twice rejected evacuation plans and found serious deficiencies during a mock evacuation).

58. See Exec. Order No. 12,657, 3 C.F.R. §§ 611-614 (1989). For a discussion of the costly delays resulting from Shoreham's inadequate emergency evacuation plans, see J. TOMAIN, *NUCLEAR POWER TRANSFORMATION 47-51* (1987).

59. See Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1988); National Environmental Policy Act, 42 U.S.C. §§ 4331-4335 (1988); see also 10 C.F.R. § 2 app. A (1990); 10 C.F.R. § 51 subpart A (1990).

60. Exceptions to Notice and Comment Rulemaking Procedures, 50 Fed. Reg. 13006 (1985) (to be codified at 10 C.F.R. § 2) (final rule creating exceptions to 10 C.F.R. § 2, asserting the Commission's discretion to make exceptions to the general requirements for public notice and opportunity for comment on rulemaking).

61. See 133 CONG. REC. H7156, 7162 (daily ed. Aug 5, 1987) (statement of Rep. Markey).

against it.⁶² I imagine that many utility executives called their Congressperson on this issue. It serves as an example of the economic and political power of the utility lobby prevailing over public safety.

Under President Bush, the NRC licensed Seabrook's opening, but the dispute will continue and probably will be litigated to the Supreme Court. Once again, the federal courts will be required to examine the proper deference owed by the executive branch to congressional policy choices. The fundamental question presented by the Seabrook licensing dispute is the ability of federal agencies—independent agencies—to play games with regulations that have been relied upon by states and Congress.

And finally, as the Chairman of the Subcommittee on Energy Conservation and Power over the years, I can tell you with complete confidence that Congress intended safety to be foremost on the NRC agenda. Safety-based standards were Congress' deliberate response to the Atomic Energy Commission, which had failed to discharge its responsibilities as a regulator and had instead become a promoter of nuclear power. Congress established the NRC as a separate agency just to address the issue of safety. Nevertheless, the NRC ignored that agenda. The agency once again became captive to the very parties from whom we had sought to free the agency.

My responsibilities in overseeing the Federal Communications Commission (FCC) have taught me similar lessons about the dangers of administrative agencies gone haywire. Through the Nixon, Ford and Carter years, a consensus developed on the need for sound, sensible regulations. It did not make a lot of difference whether it was a Democratic or Republican administration. People tried to work collectively to produce policy decisions that reflected consensus. But, with the elevation of Mark Fowler to the chair of the FCC in 1981⁶³ and his statement that a television is nothing more than a toaster with pictures,⁶⁴ the congressional leadership realized that he would not have the same view as we do of the role technology plays in shaping values.

There is a balance that must be struck between the free market and the unintended consequences of the free market. When the FCC decided

62. 133 CONG. REC. H7156, 7158 (daily ed. Aug. 5, 1987) (vote 160 ayes to 261 nays, Roll No. 309).

63. Holsendolph, *F.C.C. Change Promised*, N.Y. Times, May 19, 1981, at D2, col. 5 (Fowler sworn in as new F.C.C. Chairman).

64. Mayer, *FCC's Chief's Fears: Fowler Sees Threat in Regulation*, Wash. Post, Feb. 6, 1985, at K6, col. 4. For a general news account of the complexities of communications deregulation, see Boyer, *The Media Business: The Hard Issue of Opening Cable TV to the Baby Bells*, N.Y. Times, Nov. 28, 1988, at D14, col. 1 (city ed.).

in 1987 to repeal the fairness doctrine,⁶⁵ we began to realize that even though Congress had voted 302 to 102 to maintain the rule,⁶⁶ there was an ideological agency agenda that sought to override popular support for the doctrine. This conservative agenda would lead the FCC to pursue deregulation in the face of broad-based Democratic and Republican congressional consensus in opposition.

The decision to vitiate the fairness doctrine was as shocking on procedural grounds as it was as a matter of substance. In 1986, Congress attached a rider to an appropriations bill that ordered the FCC to provide a report to Congress on alternative methods of enforcing the fairness doctrine before acting to repeal it⁶⁷—an action Congress clearly anticipated. Early the next year, the House and Senate voted to maintain the fairness doctrine, an action subsequently vetoed by President Reagan.⁶⁸ Yet on August 4, 1987, the FCC reported to Congress that there were no constitutionally permissible alternatives to the fairness doctrine.⁶⁹ And on the same day, before this report could even be physically placed into the hands of congressional overseers, the FCC voted to abolish the fairness doctrine.⁷⁰ In one fell swoop an agency abrogated a forty-year-old doctrine that had overwhelming support in Congress and in doing so, ignored congressional procedural requirements for such an action. This lack of respect for Congress is a surefire scenario for outright war on the Hill.⁷¹

Both the Reagan and Bush administrations have witnessed great confrontations between Congress and administrative agencies. The great battles of this time have been characterized by instances of rigid adherence to an ideological agenda by administrative agencies, which in turn has created countervailing pressures for rigidity by a Congress that views its legal mandates under attack. When Congress is faced with the direct and heavy-handed undermining of its intent—whether expressed clearly

65. The fairness doctrine is a 40 year old rule that sought to ensure that the public would have access to the airwaves to discuss important public policy issues. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-77 (1969) (tracing the origins of the fairness doctrine).

66. 133 CONG. REC. H4159 (daily ed. June 3, 1987) (recording vote on fairness doctrine).

67. H.R.J. Res. 738, 99th Cong., 2d Sess., 132 CONG. REC. H10,599 (1986).

68. S. 742, 100th Cong., 1st Sess., 133 CONG. REC. S8438 (daily ed. June 23, 1987) (President's Message to Congress Regarding Veto of S. 742, The Fairness in Broadcasting Act).

69. See 133 CONG. REC. H7205 (daily ed. Aug. 5, 1987) (Executive Communication No. 1906 from the Chairman of the Federal Communications Commission evaluating the fairness doctrine). See also 133 CONG. REC. S11529 (daily ed. Aug. 6, 1987) (comments of Senator Hollings condemning the FCC's evaluation of the fairness doctrine); Johnson & Mansinerus, *Ideas & Trends; F.C.C. Decides to End the Reign of The Fairness Rule*, N.Y. Times, Aug. 9, 1987, § 4, at 7, col. 1.

70. See Johnson & Mansinerus, *supra* note 69.

71. The general lack of respect accorded the Congress is every bit as much the problem as any particular agency action.

or ambiguously—Congress must respond in the strongest fashion possible. Congress has responded with heightened use of the most prominent weapons in the congressional arsenal: oversight hearings, strongly-worded letters, and press conferences. The difficult process of legislation becomes even more hazardous when Congress and the executive branch are controlled by competing parties.

Despite recent battles, no one prefers interbranch warfare as the standard method of congressional interaction with administrative agencies. Many members of Congress—in conjunction with our role as overseers—would like to work as partners with the administrative agencies. This is best exemplified through my recent experience with the SEC on the issue of market reform legislation.

The history of the market reform issue traces back to the 508 point crash of October 1987.⁷² In the aftermath of that crash, the Reagan Administration appointed a Presidential Commission—the Presidential Task Force on Market Mechanisms—to examine its causes and recommend appropriate remedial measures.⁷³ The Chairman of that Commission, Treasury Secretary Nicholas Brady, reported that the lack of an answer for the tenuous regulatory condition of our financial markets has the United States “looking down the barrel [of a gun], and the gun is still loaded.”⁷⁴ Among other things, the Brady Commission recommended a single regulator—such as the Federal Reserve Board (Fed)—for all securities and securities-related products, emergency authority at the Fed to shut down markets in highly volatile times, and greater regulatory authority for the Fed to examine the financial condition of companies associated with broker-dealers.⁷⁵ I introduced legislation to implement many of these recommendations and similar authority was sought by the SEC. But the Reagan Administration refused to support the conclusions of its own Brady Commission.⁷⁶

Two years and another October crash later, the SEC today has become the strongest partner in our Subcommittee’s effort to enact market reform legislation. Initially, the position of the Administration with re-

72. See *supra* note 51 and accompanying text.

73. See Exec. Order No. 12,615, 3 C.F.R. § 258 (1988); Sterngold, *Stock Plunge Leads to Look at the Safety Net*, N.Y. Times, Dec. 14, 1987, at A1, col. 1.

74. Hinden, *Brady Says Markets Need One Regulator*, Wash. Post, Mar. 18, 1988, at B1, col. 1.

75. REPORT OF THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS 69 (1988). See also Vise, *Market Plunge Wipes Out New Year's Rally: Presidential Commission Urges United Stock, Futures Agency*, Wash. Post, Jan. 9, 1988, at A1, col. 1.

76. H.R. 4997, *Securities Market Reform Act*, 134 CONG. REC. E2285 (daily ed. July 7, 1988) (inserted remarks of Representative Markey, introducing the Securities Market Reform Act of 1988).

gard to the final legislative package was unsettled,⁷⁷ but the SEC, under its Chairman Richard Breeden, has adopted an independent stance.⁷⁸ The SEC's current policies are divorced from the rigid free-market ideologies of the last administration. This position is necessary if the agency wants to pursue meaningful reform. The SEC and I still will have our differences with regard to a range of other matters. However, on the critical question of market stability, the SEC in its own independent assessment of the needs of the marketplace agrees strongly with the prevailing view in Congress that the SEC needs important new legislative authority. After Congress adopts a reform package, I hope I am still able to speak so positively about the SEC's role in promulgating the necessary implementing regulations.

In summary, let me emphasize again that Congress will, whenever possible, seek to assert its views in the administrative law arena. I think that such efforts are not only constructive, but also necessary to the most efficacious functioning of our administrative agencies. All three branches have to exist in this government together. If Congress and administrative agencies view each other as partners, rather than as mortal enemies, we can avoid a repeat of the grave mistakes of the last decade. Both Congress and the agencies can move forward together to reduce a most frightening danger—rampant legal ambiguity.

77. Subsequently, the Market Reform Act of 1990 was enacted into law. Pub. L. No. 101-432, 104 Stat. 963 (1990) (codified at scattered sections of 15 U.S.C and 12 U.S.C.).

78. See Vise, *Beyond Crisis Management: SEC Chief Breeden Hopes to Ease Way for Investment, Stock Purchases Abroad*, Wash. Post, Dec. 3, 1989, at H1, col. 2 (Breeden has spent hours on the phone negotiating market reform legislation with Representatives Markey and Rinaldo (R-NJ)). See, e.g., Cranford, *Panels Target Wide Swings in Stock Market Prices*, CONG. Q., Mar. 10, 1990, at 728, 730 (Breeden told the Senate Banking Committee on March 2, 1990, that market-reform provisions—such as restricting program trading, emergency market closings, reporting of large trades, and SEC regulation of clearing and settling of secured transactions—were “essential in order to know whether a liquidity crisis is imminent.”).