

CHECKS AND BALANCE: LIMITATIONS ON THE POWER OF CONGRESSIONAL OVERSIGHT

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I

INTRODUCTION

Professor Lazarus's paper, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*,¹ includes an excellent review of the origins, structure, nature, and tensions of congressional oversight of the Environmental Protection Agency ("EPA" or "Agency"). Regarding what may be called "tangible" causes of increased oversight, Professor Lazarus correctly cites the growing influence of outside interest groups, increased media coverage of environmental issues, and the proliferation of subcommittees and subcommittee staff.

Of particular interest, however, is his analysis of what I will call the "intangible" factors. One "intangible" cause of the increase in congressional oversight is the decrease in judicial scrutiny of agency action—the demise of the "hard-look" doctrine.² The significance of this factor cannot be overstated.

Other intriguing concepts can be found in Professor Lazarus's review of the challenges that are inherent in fashioning environmental policy and his conclusion that these "embedded" factors have virtually guaranteed both the intensity and highly adversarial quality of congressional oversight.³

Two related observations deserve attention. First, Lazarus suggests that much of the friction between EPA and Congress can be traced to "the collision between the aspirations of the early federal environmental laws and the resistance of institutional and cultural forces to the changes those laws require."⁴ Congress repeatedly has passed environmental laws with goals that are ambitious, and, on occasion, unattainable. Generally, these laws

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1. Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 L & Contemp Probs 205 (Autumn 1991).

2. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L & Contemp Probs 249, 286-88 (Autumn 1991).

3. Lazarus, 54 L & Contemp Probs at 221-26 (cited in note 1).

4. *Id.* at 224.

include requirements that will impose significant costs on at least some sectors of the economy.

Once these complex, controversial laws are enacted, EPA is left with the unenviable task of implementing them, frequently without adequate staff or financial resources and on the basis of incomplete scientific understanding of the problems. EPA has to contend not only with Congress and the laws it passes, but with powerful, well-funded, and often reluctant regulated industries. In addition, EPA is part of the executive branch and is accountable, first and foremost, to the president and the overseers who work for the president at the Office of Management and Budget ("OMB") and other agencies. This leads to the second point that warrants emphasis: that there has been "a marked lack of consensus" between the executive and legislative branches concerning the proper direction of federal environmental policy.⁵ In fact, much of the congressional oversight directed at EPA is really directed at OMB and the president.

In congressional oversight hearings, EPA often is forced to defend positions with which it does not agree. It is ironic that congressional panels often use EPA memoranda prepared for internal executive branch arguments in oversight hearings. That EPA took the "right position" within the executive branch (and ultimately "lost" the argument) rarely diminishes the intensity or adversarial nature of congressional oversight.

II

THE "DISADVANTAGES" OF OVERSIGHT

Although Professor Lazarus does an excellent job of explaining and criticizing the congressional oversight process, his paper left me with an uneasy feeling. Something about it did not ring true. At first, I thought his suggested reforms, such as placing limits on the number of hearings that could be held or instituting similar procedural hurdles designed to make oversight a more orderly, rational process,⁶ were the source of my unease. Such reforms may make sense but, as Professor Lazarus acknowledges, they are politically unrealistic and of questionable substantive importance.⁷

The suggested reforms were not the source of my unease, however; it had deeper roots. After reviewing the list of "disadvantages" of congressional oversight⁸ and concluding that I disagreed with five of the seven, the problem became apparent. Professor Lazarus's paper is based on the erroneous premise that congressional oversight is a powerful tool that can make or break EPA and unduly influence the implementation of federal environmental policy. Another article by Professor Lazarus that is included in this volume provides a more accurate, detailed assessment of the panoply of factors that

5. *Id.*

6. *Id.* at 232.

7. *Id.* at 235-36.

8. *Id.* at 226-30.

contribute to the difficulties encountered by EPA in implementing environmental laws. In that article,⁹ Professor Lazarus recognizes that intense, adversarial congressional oversight is only one of many factors influencing the implementation of federal environmental policy. When compared with the other factors, congressional oversight in the form of letters, meetings, press conferences, hearings, and similar tools of intimidation is exposed as a relatively weak factor.

A review of the seven "disadvantages" cited in *The Neglected Question of Congressional Oversight* and my responses to them follow.

Disadvantage 1. Oversight helps create and perpetuate EPA's image problem and erodes public confidence in the Agency.

Response. EPA's problems with the public have little, if anything, to do with congressional oversight. How many people who live outside Washington, D.C. know when Congress holds an oversight hearing or when a group of congressmen send EPA a scathing letter?

EPA's image problem and the lack of public confidence in the Agency may be in part a result of EPA being too sophisticated. For example, a community located near a Superfund site wants to see crews of workmen at the site beginning immediate clean up. Residents do not understand why it takes three years to produce studies called "RIFs" and "RODs" before the bulldozers can get to work. Furthermore, EPA consistently fails to address the expectations and assuage the fears of the community. This failure to communicate has more to do with creating and perpetuating EPA's image problem than any oversight hearing, even one that is featured on the national evening news.

Similarly, a recent report shows little connection between EPA's priorities and those of the public.¹⁰ This difference in perspective is a significant problem for EPA and does more to erode public confidence than does congressional oversight.

Disadvantage 2. Oversight retards the evolution of environmental law, and leads to more prescriptive statutes, wasteful expenditures for pollution control and "missed opportunities."

Response. This issue merits an entire symposium of its own. Suffice it to say that, as reflected in recent statutes, Congress and EPA react differently to scientific uncertainty.¹¹ Congress is more likely to err on

9. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L & Contemp Probs 311 (Autumn 1991).

10. Science Advisory Board, *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* (Sept 1990) (Report to EPA Administrator William K. Reilly).

11. A March 4, 1986, letter to EPA Administrator Thomas from 11 of the 17 conferees who wrote the 1984 amendments to the Resource Conservation and Recovery Act exemplifies this difference. The letter, which was prompted by publication of EPA's proposed regulation to implement the land ban requirements of the law, noted that

use of a "decision rule," such as that being proposed by EPA, was considered by Congress. EPA would have been authorized to determine on its own initiative that a prohibition on the land disposal of a specified waste was not necessary to protect human health and the

the side of caution and to risk "wasteful expenditures." The alternative often has been little or no spending on environmental protection, and continuing environmental degradation, while EPA works to reduce the level of "uncertainty."

Disadvantage 3. The threat of oversight chills decisionmaking and innovation at EPA.

Response. EPA is always free to propose new approaches to Congress. This can be done in the context of a proposed rulemaking developed in consultation with the "feared" congressional overseers or as a formal or informal legislative proposal.

A good example of this consultative approach is the recently enacted acid rain program.¹² It is innovative. It was proposed by EPA and the president, and was approved by Congress. In fact, the Agency's experience with pollution prevention programs shows that whatever chilling does occur results not from congressional oversight but from internal executive branch disputes. For example, EPA's legislative proposal on pollution prevention was held up at OMB for several months.¹³ When it became clear that OMB was not going to approve the EPA proposal, it was abandoned as a legislative initiative.

Disadvantage 4. Oversight diverts valuable, scarce Agency resources.

Response. This is true.

Disadvantage 5. Congressional oversight has tended to skew EPA priorities.

Response. Is this bad? What makes EPA the sole arbiter of what should be our nation's environmental priorities?

For better or worse, Congress is more responsive to the public and, as a public agency, EPA must respond to public concerns of the moment. The alternative is a paternalistic approach where EPA claims to know what is best

environment. However, we ultimately rejected such an approach. Because of the scientific uncertainty inherent in decisions of this kind, Congress adopted . . . a statutory presumption against the land disposal of untreated hazardous wastes and in favor of treatment The decisionmaking process set forth in the law stresses the long-term uncertainties associated with land disposal Treatment standards were selected by Congress as substitutes for health based standards [EPA's proposal] to use a health based threshold as a means of avoiding "excessive" treatment standards has some intuitive appeal. However, such an approach assumes that a concentration level below which leachate is "safe" can be identified. This is an assumption that we were unwilling to make EPA's proposal to "cap" treatment standards with a health based threshold erroneously construes the requirement to "minimize" threats to human health and the environment as a requirement to "reduce such threats to an acceptable level." It is precisely this type of subjective analysis that we were trying to avoid.

Letter from John D. Dingell, et al, to EPA Administrator Lee M. Thomas (March 4, 1986) ("Dingell Letter").

12. Clean Air Act Amendments of 1990, Pub L No 101-549, §§ 403 et seq, 104 Stat 2399 (1990).

13. See *Envir Rptr (BNA)* 1246 (Nov 2, 1990) (reporting on the development by EPA of a pollution prevention strategy after the Agency's failure to fashion a pollution prevention bill).

and decides what the public needs. If EPA cannot garner public support for its priorities, those priorities *should* be “skewed” by congressional oversight.

Disadvantage 6. Oversight affects employee self-esteem and Agency morale.

Response. Sometimes this is true but more often than not the EPA staff feels betrayed from within. The best information for oversight usually comes from disgruntled employees who welcome “EPA bashing.” They do not view congressional oversight in the form of hearings, press conferences, meetings, and letters as criticism; rather they see it as vindication of their positions.

Disadvantage 7. Fragmented oversight exacerbates the problems Congress has in speaking with a coherent and consistent voice.

Response. This is true.

There is no question that Congress bears equal responsibility with EPA for both the successes and failures of federal environmental policy. The legislation written in the 1970s and rewritten in the 1980s¹⁴ has been sweeping, bold, and ambitious. Maybe too sweeping, too bold, and too ambitious.

Whatever the shortcomings of federal environmental legislation, congressional “oversight” in the form of hearings, press conferences, meetings, and letters is not the cause of EPA’s problems. Rather, oversight is a mirror reflecting problems that exist independently. The reflection may intensify, magnify, or distort the image, but it does not create the image.

III

THE LIMITATIONS OF OVERSIGHT

The real question that needs to be answered is whether Congress has the institutional capability to engage in *effective, constructive* oversight that can produce *significant* changes in EPA’s implementation of federal environmental policy. For several reasons, the answer is “no.”

First, oversight work is detailed, complex, and tedious. On any given day, a senator or representative may have meetings and votes on issues such as war in the Mideast, aid to Eastern Europe, child care, farm support, abortion, taxes, pornography, or the spotted owl. The list is endless and mind-boggling. Micromanaging the technical work of EPA is the last thing members of Congress want to do.

Second, Congress is not a single entity. It is 535 separate voices. While a liberal senator from New England is urging EPA to take tougher stands on wetlands issues, a caucus of Southern congressmen is meeting with EPA to

14. See, for example, Clean Air Act, 42 USC §§ 7401 et seq (1970); Clean Air Amendments of 1990 (cited in note 12); Clean Water Act, 33 USC §§ 1251 et seq (1987); Comprehensive Emergency Response, Compensation and Liability Act of 1980, 42 USC §§ 9601 et seq (1986); Resource Conservation and Recovery Act, 42 USC §§ 6901 et seq (1984).

complain about its "overzealous" wetlands protection program. What is the effect of conflicting messages from the "overseers"? Either the messages cancel each other out or the Agency gets whip-sawed.

Third, other than threatening to cut off funds or passing new legislation, what sort of oversight powers does Congress have? The Court of Appeals for the D.C. Circuit shed light on the nature of congressional oversight powers in 1989 in one of the series of cases entitled *Hazardous Waste Treatment Council v. U.S. EPA*.¹⁵ EPA had proposed a rule to control implementation of the land ban that was part of the 1984 amendments to the Resource Conservation and Recovery Act ("RCRA").¹⁶ In March 1986, in a rare display of bipartisan, bicameral support for a single position, eleven of the seventeen conferees who wrote the land ban portion of the 1984 amendments sent a detailed letter to the EPA administrator objecting to the proposal and asserting that it was contrary to congressional intent.¹⁷

On the basis of the letter, EPA changed the proposal. The Chemical Manufacturers' Association, an industry group that preferred the original proposal, challenged in court EPA's change in position. In a per curiam opinion, the court of appeals considered the conferees' letter and EPA's reliance on it to justify its change in position.

It should go without saying that members of Congress have no power, once a statute has been passed, to alter its interpretation by post-hoc "explanations" of what it means; there may be societies where "history" belongs to those in power, but ours is not among them. In our scheme of things, we consider legislative history because it is just that: *history*. It forms the background against which Congress adopted the relevant statute. Post-enactment statements are a different matter, and they are not to be considered by an agency or by a court as legislative history. An agency has an obligation to consider the comments of legislators, of course, but on the same footing as it would those of other commenters; such comments may have, as Justice Frankfurter said in a different context, "power to persuade, if lacking power to control."¹⁸

The matter was then remanded to EPA with instructions to formulate a justification that did not rely on the letter from Congress.

IV

CONCLUSION

The traditional forms of congressional oversight designed to intimidate the agency are used regularly and, on any given day, may be used by several members of Congress with competing interests and goals. These tools of intimidation include letters, meetings, and various public displays, such as press conferences and hearings.

15. 886 F2d 355 (DC Cir 1989).

16. 42 USC §§ 6901 et seq (1984).

17. See note 11.

18. *Hazardous Waste Treatment Council*, 886 F2d at 365, quoting *Skidmore v Swift & Co.*, 323 US 134, 140 (1944). A similar point was made by the Supreme Court in *Bowsher v Synar*, 478 US 714 (1986). The Court held that, once it has enacted legislation, "Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id* at 733-34.

With respect to the hundreds or thousands of relatively minor decisions confronting EPA, congressional oversight, or the mere threat of oversight, can be used to alter agency behavior and to change decisions. With respect to the major policy decisions, however—decisions that shape federal environmental policy—traditional forms of congressional oversight have limited effect. Behavior may be altered, but rarely are decisions altered solely as a result of congressional oversight. When a major policy question is working its way through the system (first within EPA and then within the executive branch as a whole), the voices heard from Congress in the name of “oversight” are treated just like those from any other interest group.

Over the past twenty years, it has become apparent to members of Congress who want to influence major policy decisions at EPA that the most effective form of oversight is detailed, prescriptive legislation. For example, the original 1970 Clean Air Act¹⁹ was reportedly only thirty-five pages long. The 1990 amendments to the Clean Air Act²⁰ include more than 350 pages of specific legislative directives to EPA, a tenfold increase.

There is a faint ray of hope for those who question the wisdom of 300- and 400-page reauthorizations. Just before the 101st Congress adjourned, Superfund was quietly and efficiently reauthorized without amendment for three years as part of the budget agreement. This feat, however, is not likely to be repeated often.

The trend toward more specific, detailed environmental legislation is the result of many factors, including the demise of the hard look doctrine mentioned earlier and the related, increased tendency of courts to interpret the environmental laws of the past twenty years in a manner that grants EPA considerable discretion. Even in cases where Congress took great pains to include specific statutory mandates and to eliminate agency discretion, the courts have found “ambiguity” and granted EPA discretion that was not intended by the authors of the statute.

For example, in *Hazardous Waste Treatment Council v. U.S. EPA*,²¹ despite the 1986 letter from a bipartisan, bicameral majority of the authors of the 1984 RCRA amendments (in which the senators and representatives argued that EPA’s original proposal for implementing the 1984 land ban provisions was not authorized by the law and that the approach outlined by EPA was specifically rejected by the conferees), the court suggested that EPA’s original proposal would have been upheld.²² If the courts continue to frustrate the intent of those who write the laws by finding discretion even where none was intended, it should not surprise anyone to find lawmakers writing new laws that are even more prescriptive and that state with greater clarity the limits of EPA’s discretion.

19. 42 USC §§ 7401 et seq (1970).

20. Clean Air Act Amendments of 1990, Pub L No 101-549, §§ 101 et seq, 104 Stat 2399 (1990).

21. 886 F2d 355 (DC Cir 1989).

22. *Id* at 362-64.

Viewing congressional oversight in the broadest context—as a combination of intimidation tactics and the enactment of new legislation—and recognizing that the 1980s was a decade that produced massive, detailed legislative revisions of the federal environmental laws first enacted in the 1970s, there are two questions we should ponder. First, were the 1980s simply a reaction to the combined factors of (1) abuse and corruption at EPA during the early years of the Reagan Administration and (2) congressional underestimation of the scope and complexity of the problems in the early 1970s? Second, is the 1980s trend toward ever greater legislative detail a sign of things to come?