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**Remarks to the Board of Trustees of the Natural Resources
Defense Council Symposium - The Phoenix Rises again: The
Nondelegation Doctrine from Constitutional and Policy
Perspectives: Democracy and Delegation**

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REMARKS TO THE BOARD OF TRUSTEES OF THE NATURAL RESOURCES DEFENSE COUNCIL*

*David Schoenbrod***

I look back with fondness on my years at the Natural Resources Defense Council (“NRDC”) and have looked forward to meeting with old friends today. I am going to review the triumphs and failures of pollution control, using the Clean Air Act¹ as an example, draw some lessons, and propose a basic reform.

I. TRIUMPHS AND FAILURES

When increasing air pollution created public concern in the 1960s, many states and cities enacted meaningful laws. To stave off control, auto manufacturers and electric utilities asked Congress to interpose an ineffectual federal bureaucracy. The result was the 1965² and 1967³ Clean Air Acts. In 1970, when the state and local laws were only beginning to take effect, severe smog struck the East Coast and California. Ralph Nader blamed Congress. Legislators responded by enacting the 1970 Clean Air Act,⁴ claiming that this time they made the hard choices.

The 1970 Clean Air Act did make a hard choice about new cars. They would have to be ninety percent cleaner starting with the 1975 model year. This rule was a stab in the dark, but Congress adjusted and tightened it in following years. Today new cars are amazingly clean.

As to all the other pollution sources—from giant industrial plants to corner dry cleaners—the 1970 Clean Air Act made no

* © 1997 by David Schoenbrod. The author delivered these remarks to the board and senior staff of the National Resources Defense Council on March 12, 1997, in Washington, D.C. He was an attorney with NRDC from 1972 to 1979.

** Professor, New York Law School. I am deeply indebted to Ross Sandler, former colleague at NRDC and present colleague at New York Law School, for his extremely helpful suggestions. I also thank Sena Kim-Reuter, New York Law School Class of 2000, for her research assistance.

¹ 42 U.S.C. §§ 7401-7671g (1994).

² Pub. L. No. 89-272, 79 Stat. 992.

³ Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

⁴ Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7401).

rule of conduct, no law. Rather, it delegated the job of making the laws to the Environmental Protection Agency ("EPA") and the states, telling them to reduce all pollutants to safe levels by 1977, regardless of cost.

This scheme largely failed. The pollutant most on the public mind in 1970 was lead in gasoline—as the bumper stickers read, "GET THE LEAD OUT." The ninety percent law for new cars forced them to use unleaded gas, but 100 million old cars would still use leaded gas in 1975. EPA quickly set out to use its delegated lawmaking power to reduce the lead in the gas that would be used by these old cars. But the agency was quietly warned off by members of Congress who had loudly supported the 1970 Clean Air Act starting in 1972. I filed lawsuits to force EPA to act and won. But EPA under Presidents Nixon, Ford, and Carter kept coming up with new excuses for delay. Only after most of the 100 million old cars had been junked, making the marketing of leaded gas unprofitable for large refiners, did EPA ban lead in gas. Our efforts produced some modest reductions in lead pollution over several years. But, by comparison, millions of infants would have been saved from heavy exposure to a mind numbing pollutant if Congress could not have passed the buck. Congress would have had to respond in some way to the popular outcry. The likely compromise would have required refiners to remove much of the lead in the early 1970s because adding more than a little lead is only marginally profitable. Instead of taking the heat for doing a good thing that would have pleased no one entirely, Congress told EPA to do the perfect thing—protect health without regard to cost.

The perfect stymied the good repeatedly under the Clean Air Act. EPA closed its eyes for twenty years to most carcinogenic air pollutants to avoid the political fallout of having to issue cost oblivious standards for them. Only in 1990 did Congress break the logjam by enacting a standard pegged to the emissions of the cleaner plants in each industry. But, of course, onto this good law Congress tacked further instructions requiring EPA to achieve future perfection.

The 1970 Clean Air Act purported to deal with interstate pollution by putting EPA in charge. Because it lacked the political muscle to take on contending states, EPA has never ruled against interstate pollution. Finally, in 1990 Congress enacted a rule for one kind of interstate pollution—power plant pollutants that contribute to acid rain.

While Congress promised in 1970 that EPA would make sure that the states achieve the national health standards by 1977, this deadline has been receding to a more distant future. Yet, EPA claims that the Clean Air Act was a great way to make progress because the states were forced to reduce major stationary source pollutants. However, the laws that the states imposed in the 1960s, when they acted of their own accord, reduced these pollutants three times more than those enacted in the 1970s, when EPA was in charge.

II. LESSONS

1. *Pollution control works best when the legislature makes the law.* The clear successes have come from legislatures: for example, the clean up of new cars and the legislated standards on toxic pollutants and acid rain in the 1990 Clean Air Act.⁵ No one thinks the legislature is perfect. Environmentalists worry that industry's money counts for too much. Industry worries that voters will not realize that they too pay for pollution control. In the end, environmentalists have done well when Congress has faced the hard choices. For example, a Brookings Institution study argues Congress has reduced new car emissions too much.⁶

2. *When Congress delegates, it cheats.* It cheated by pretending to decide how much to clean up, but covertly leaving this tough choice to EPA. For example, the authors of the 1970 Clean Air Act officially instructed EPA to protect health without regard to cost but wanted the agency to consider costs without implicating them.⁷ EPA has done so under Republicans and Democrats alike. Now, with the battle raging over revisions of the ozone and particulate standards, EPA is not being entirely forthright in claiming that it cannot consider cost. The "regulatory reform" bills that would put environmental protection on a cost-benefit standard also cheat, because that standard is so malleable.

Congress also cheated by claiming to do the states a favor by letting them apportion the clean up burden among polluters. This was no favor. Congress gets to take credit for promising a perfectly clean environment; states get to take the blame for imposing the costs.

3. *When Congress cheats, the people and the environment lose.*

⁵ Pub. L. No. 101-549, 104 Stat. 2399.

⁶ ROBERT W. CRANDALL ET AL., REGULATING THE AUTOMOBILE (1986).

⁷ See DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 65-66 (1993).

By cheating, Congress ducked the issues that it alone has the capacity to resolve, such as interstate pollution and leaded gas. Congress ducks the issue of priorities. It imposes costly environmental mandates on states and cities, ignoring that priorities must be set in the real world. Under these mandates, NRDC attorneys, myself included, filed lawsuits against New York City requiring action on air pollution, watershed protection, combined sewer outfalls, sludge disposal, and more. But, to pay for these and the many other mandates from on high, the city must take money from other appealing purposes such as education, hospitals, or public safety. Because each mandate is absolute, massive sums get spent without anyone deciding that the priorities make sense.

By cheating, Congress also promises that EPA will achieve more than its resources, time, and political support allow. When EPA proposes to make a hard choice, industry and environmental groups get legislators to pressure the agency. Under such political cross currents, EPA stalls. The rules that do eventually emerge are politics dressed up as science. Back in the early seventies, we used to think that EPA was so political because Presidents Nixon and Ford were in charge. But when President Carter brought our friends into high office, we learned that the problem is the institution, rather than the people. The political economy of EPA forces it to strike a balance between the cosmic political forces when its actions might provoke Congress to reduce its power. But when the agency would inflict only many small harms on powerful interests or big harms on weaker ones, Congress as a whole is unlikely to interfere. Individual legislators and White House operatives still exert pressure. But other forces that act upon the agency are perennial. Congress has written thousands of pages of detailed instructions into its delegations, taking no heed of the harm they may do because the blame will fall on the agency. EPA has 18,000 employees, all in search of what they consider meaningful roles. State bureaucrats, working through their professional associations, want EPA to wrest regulatory power and money for them from the state legislatures.

The consequence is a regulatory regime with which the best intentioned industrial corporations cannot hope to comply. When they do not, they get hit with fines disproportionate to fault or harm. Just ask the many NRDC alums who work on environmental compliance for these corporations. Worse off are the smaller businesses, the governments, the farmers, and the property owners. They cannot afford to hire NRDC or EPA alums to staff

a compliance office that will help them avoid the worst pitfalls of environmental regulation.

Environmental protection has taken a wrong turn against which the grandfather of modern environmentalism, Aldo Leopold, warned when he wrote of the kind of conservationist more taken with his own prowess than with nature. Among many others, he included the poets who write bad verse on birchbark and:

the professional, striving through countless conservation organizations to give the nature-seeking public what it wants, or to make it want what he has to give.

Why, it may be asked, should such a diversity of folk be bracketed in a single category? Because each, in his own way, is a hunter. And why does each call himself a conservationist? Because the wild things he hunts for have eluded his grasp, and he hopes by some necromancy of laws, appropriations, regional plans, reorganizations of departments, or other form of mass wishing to make them stay put.⁸

It is Congress that has turned environmental law into mass wishing—perfectly healthy air by 1977, zero discharges to the water by 1985, and other absurdities. It has been the only game that Congress has seen fit to set up in this town. NRDC has played that game with maximum advantage to the environmental side. Now is the time to see that it is the wrong game.

The mass wishing has not only failed, but it also endangers the environment. A public, otherwise sympathetic to environmental protection, is angry about overly fussy regulation and politicians who evade personal responsibility. Environmental law suggests the anger is reasonable. The consequences so far are the Unfunded Mandate Relief Act of 1995,⁹ and majorities in support of term limits and a balanced budget amendment. While these initiatives may fail, the anger and its causes will remain. Congress may respond in a way that does real harm to the environment, especially if hard times return.

The mass wishing also departs from the roots of environmentalism. Aldo Leopold set out to teach ordinary people about the environment because he believed that those who do not understand nature will make bad decisions about it. No understanding is needed for voters to wish or Congress to promise. Rather, the laws come down from the agency experts on high. Leopold, in

⁸ ALDO LEOPOLD, *A SAND COUNTY ALMANAC: WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 282 (Ballantine Books 1970) (1949).

⁹ Pub. L. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

contrast, wanted to save the environment from the bottom up. His vision was not unlike that of the Framers of the Constitution, many of whom were thoughtful naturalists. They sought to root the laws in popular support by requiring that they be made by elected legislators. Such laws will reflect human nature and so therefore will not be perfect. But, the quarter century since Earth Day has demonstrated a corollary to Leopold's teaching: those who cannot accept human nature will make bad decisions about how government should protect nature. I urge the National Resources Defense Council to include democracy among the natural resources it defends. In other words, it should continue to educate the public, fight for the necessary laws, and enforce them in court, but also to insist that the laws be made by legislators, and to the extent practicable by the legislators closest to the people.

III. PROPOSALS FOR REFORM

1. *Congress should stop delegating lawmaking power to EPA.* There are many possible means to this end. I will mention two. This morning, quite by coincidence, Senator Sam Brownback and Congressman J.D. Hayworth announced the introduction of a bill barring agency rules from going into effect unless enacted into law.¹⁰ The bill already has many sponsors. Their bill may seem heavy handed because the *Federal Register* includes many trivial as well as important rules. But that is just the point. Congress happily requires trivia because the delay, complexity, and confusion are suffered by agencies, states, cities, and the public, rather than the legislators themselves. Were Congress to feel the pain that it imposes, it would see the wisdom of simplifying what it imposes on others. A second approach would be for Congress to rewrite and simplify the various regulatory statutes, taking back lawmaking responsibility as it goes.

2. *Congress should tackle the issues that it alone can solve.* State regulation and interstate compacts will sometimes fail to control interstate pollution adequately. State regulations will also fail sometimes to protect adequately national treasures, such as the great national parks. Some goods, just as cars, may need to be regulated nationally. Congress has been slow to do its job and still is not done with it. Yet, it freely tells the states on how to do theirs.

3. *Congress should let states decide how to deal with the local*

¹⁰ See Congressional Responsibility Act of 1997, S. 433, 105th Cong.

pollution. The states reacted to environmental concerns in the 1960s more quickly than did the national government. Why, then, are the states—even those that led the way in the 1960s—so often in EPA's dog house? Congress has made it so. It claims credit but forces the states to take the blame for allocating the regulatory costs and paying for the improvements. It lets EPA force state legislatures to give their power over lawmaking and money to state bureaucrats. No wonder elected state officials have turned recalcitrant. The national government should stop imposing national pollution laws on local pollution problems. Instead, EPA should offer the states and the public information on local pollution levels, reports on their health consequences, and information on how to control pollution.

This reform would, I recognize, dismantle our whole way of making environmental law and, as such, raises many issues, which I would be happy to discuss. As pleased as I am that NRDC has initiated this dialogue today, it should be broadened to include the wider environmental community. It needs to begin to discuss how the environment can be protected in ways that are more democratically accountable and more responsive to the varying wishes of local communities. To launch that discussion, I propose that NRDC host a debate in its magazine. I volunteer to participate.¹¹

¹¹ This offer was not accepted.

