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## Administrative Rulemaking (Testimony)

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# Administrative Rulemaking

BY DAVID SCHOENBROD

**M**Y NAME IS DAVID SCHOENBROD. I AM HERE TO TESTIFY THAT Congress and the president should end the practice of delegating to executive agencies the power to make the laws.

Although I believe that such delegation violates the Constitution, the genesis of my recommendation is practical experience in the ways of Washington. My first job here was working for Senator Hubert Humphrey on the staff of the Senate Committee on Small Business in the summer of 1962. I worked for him again in 1963 and 1965, when he was Vice President. Subsequently, I clerked for a judge on the U.S. Court of Appeals for the District of Columbia Circuit, where much of the caseload is reviewing agency rulemaking. Then, I was one of the attorneys who founded the Natural Resources Defense Council. Through most of the 1970's, I handled a case load that today would be described as in the field of "environmental justice." Overall, this experience has given me a clear view of what really happens when Congress and the president turn over their joint lawmaking power to agencies. My understanding of how delegation really works led me to question whether it really is in the public interest. To come to grips with that question, with the chief example being my book: *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale U. Press, 1993)(1-800-YALEUPS).

Let me start by telling you about one campaign that I lead for the environmental side while at NRDC, the campaign to control airborne lead pollution, chiefly from lead additives to gasoline. Today, official Washington congratulates itself on how it handled the airborne lead problem. In his 1996 State of the Union message, President Clinton applauded that "lead levels in children's blood have been cut by 70 percent" through a "generation of bipartisan effort". I have a different story to tell in which delegation by Congress and the president delayed meaningful response to an important health hazard.

In 1970, when Congress was debating the Clean Air Act, one of the most insistent public demands was to reduce lead additives to gasoline. Of course, the chemical companies that made lead additives and the petroleum refiners that put them in gasoline opposed any such move. With the benefit of hindsight it would have been best if Congress received reports from the experts in the federal agencies, taken testimony, and then decided whether to enact a law itself to reduce the lead content of gasoline. I have no illusions that the result would have been highly rationalized or scientific. Rather, it would have been a political response to political facts and the political facts were these. Congress and the president felt under great pressure to show progress on air pollution. Lead in gasoline was a major symbol of the problem. Bumper stickers reading "Get the Lead Out" were prevalent. Refiners would not have felt great pain in substantially reducing, but not eliminating, lead in gasoline because adding more lead per gallon produces diminishing economic benefits. Without delegation, the upshot would, I think, have been a law that substantially reduced the content of gasoline in the early 1970's.

What Congress and the president did, of course, was to enact the Clean Air Act of 1970, which delegates their lawmaking powers to EPA wholesale, yet with exacting specifications about how it should make the law. Despite all the verbiage in the act, the hard choices about lead in gasoline and just about every thing else were left to EPA. Nonetheless, members of Congress and the president told their constituents that they had made the "hard choices" such that every harmful pollutant would be brought down to safe levels within the next several years.

As to lead, EPA promptly moved to require that lead free gasoline be used in the new cars with the emission control devices, but that was to protect the emission control devices from lead, not to protect children from lead. The children were not being protected because there were tens of millions of old cars on the road that still used leaded gasoline, and the refiners were making up for the ban on lead in the gasoline for the new cars by putting more lead in the leaded gasoline for the old cars. EPA realized that the health risk continued and initially proposed to reduce the lead content of gasoline. But, the chemical and refining industries mobilized members of Congress, including some liberal Democrats, to pressure EPA not to act and the regulation of airborne lead to protect health was put on hold.

At this point, in 1972, I began to file a series of law suits to force EPA to regulate lead in gasoline and to establish a national ambient air quality standard for lead. I won the law suits and the courts ordered EPA to exercise the authority delegated to it. At this point, the public was supposed to get the pay off from delegation: a technical issue would be resolved by the experts looking at the data. The problem was that studies did not provide clear answers, but rather showed the health consequences of lead in the air depended upon a series of questions as to which scientists clashed. On the record, EPA dealt with this uncertainty through a series of guesstimates. In reality, the guesstimates were shaped to allow the agency to come up with a result responsive to the political pressures applied to the agency to come up with a result responsive to the political pressures applied to the agency by members of Congress and White House acting at the behest of constituents and contributors.

So far, my story shows that the main rationale for delegation — let the experts decide the technical issues — is hogwash. There are seldom clear technical answers. In this town, all knowledge is politicized. In any event, the questions at bottom are not technical ones but rather questions of values — for example, the balance to be struck between health and economic considerations. Moreover, the people making the final decisions at the agencies tend to be lawyers, just like many members of Congress. With the advice of experts, Congress does vote on technical issues when it is politically convenient.

The other great rationale for delegation is supposed to be that agencies are able to resolve controversial issues with dispatch. As I have already indicated, it took years of litigation to force EPA to pick up this hot potato. It took years more of administrative processing, and more trips to court, to get EPA to conclude its rulemaking proceedings. There, in turn, were subject to time consuming judicial review. And, when that was over, EPA under both democratic as well as Republican administrations initiated additional rulemaking proceedings to postpone implementation of the lead in gasoline regulations. The agency proposed rulemaking weakening or strengthening the regulations once in 1976, twice in 1979, once in 1980, four times in 1982, three times in 1983, once in 1984, four times in 1985, and once in 1986. Before EPA ever resolved the lead in gasoline dispute, most of the old cars that had still could use leaded gasoline in the early 1970's had gone to the scrap heap so that petroleum refiners no longer cared to bother marketing leaded gasoline. As a result, EPA under President Reagan issued a regulation eliminating lead from gasoline in 1986. In sum, over a decade in a half, the lead in gasoline issue became moot before EPA ever resolved it.

In sum, the theory that delegation is a way to resolve issues with dispatch simply does not square with reality. Agencies cannot resolve controversial issues with dispatch because all the political pressures that Congress would have to wrestle with in resolving an issue are also felt by the agency and, in addition, Congress imposes upon the agencies extremely time consuming procedural requirements and then fails to give them sufficient funding to do fulfill these requirements.

The delay occasioned by delegation meant that the major decreases in the lead content of gasoline did not take place until the late 1970s and early 1980's. As a result, the tens of millions of children who went through early childhood after the early 1970's were unnecessarily exposed to harmful levels of lead in gasoline. Now that lead is out of gasoline, we know that it increased fourfold the lead burden carried by the average young children, with measurable adverse health consequences.

Having used the story of lead to suggest why delegation is unnecessary, let me explain why it undercuts democracy. The Constitution was designed to allow voters to hold the lawmakers they elect accountable for the laws by requiring that they be enacted by majorities in both houses and signed by the president (subject of course to the provision for overriding presidential vetoes). This way, lawmakers are supposed to take individual responsibility for controversial laws through their publicly recorded notes. Delegation allows our elected lawmakers to pass responsibility for the laws along to unelected bureaucrats. But, in delegating, members of Congress and the president do not give up their power over the laws, just their responsibility. They retain their ability to influence the laws by pressuring agencies in the course of doing Casework, unlike votes on statutes, is not recorded in the Congressional Record and members can do casework on both sides of a controversy.

Defenders of delegation say that it is nonetheless consistent with democracy because Congress and the president can enact a statute to reverse a law made by an agency. But, usually, no such bill ever reached the floor. As a result, laws are sustained through the collective inaction of Congress and the president. The upshot is that the elected lawmakers bear no individual responsibility for the laws.

Earlier in this session Congress enacted as part of the Small Business Regulatory Enforcement Fairness Act of 1996 a procedure that would make it easier to bring to the floor a bill to revoke a law promulgated by an agency. While the new procedure is a step in the right direction, the proper destination is compliance with the Constitution. While the Constitution requires the House, the Senate, and the president to enact a new law, the new procedure requires the House, the Senate, and the president to revoke a new law. The Constitution requires joint action to make a law to ensure that law are made only if there is broad political support. In comparison to the Constitution, the new procedures tilts towards more regulation.

Moreover, under the new procedures, ways will be found to avoid voting on many controversial rules. If all the controversial rules are to be voted on anyway, why not follow the lawmaking procedure ordained in the Constitution?

There is a final, and to me, overpowering reason to think that Congress and the president should require that laws be made only through the means ordained in the Constitution. To explain why, I return to the Clean Air Act. Air pollution laws must necessarily balance health and economic considerations. If Congress and the president themselves make the laws, they inevitably must strike the balance. But, if they delegate, they can promise, as they did in the 1970 Clean Air Act, that the agency will make laws that protect health and protect the economy — that we will have guns and butter, that we will have our cake and eat it too. With Congress and the president having legitimated conflicting political expectations, whatever the agency does will stir disappointment in some constituency, which members of Congress and the White House will relay to the agency. The result is delay, complexity, and confusion — delay inprotecting health, complicity in the form of endless agency proceedings for which taxpayers, shareholders, and consumers end up footing the bill, and confusion in the sense that industry does not know what its responsibilities will be. And because being able to promise guns and butter is so politically irresistible, Congress is induced, with the best of intentions, to enact more and more regulatory schemes. In this sense, delegation is a kind of political addiction. The new procedures do not kick the addiction, but rather offer a way to say “I’m sorry” for just a few of consequences. There is an obvious solution. Just say “no” to delegation.

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*Committee on the Judiciary*

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