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An Open Letter to President-Elect Biden

David Schoenbrod

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BY DAVID SCHOENBROD

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Dear President-elect Biden:

I am writing to continue a conversation that we began in 1974 at a hearing you chaired on the Environmental Protection Agency's regulation of lead additives to gasoline under the Clean Air Act. You called me to testify as the attorney who headed the environmental movement's litigation campaign to get EPA to protect health from this threat. Our conversation, updated with what has surfaced since, shows why you, as president should urge Congress to enact a statute that forces its members to vote on whether major new regulations should go into effect.

It may seem strange to propose that a president seek to share with Congress the power to regulate yet making Congress responsible would be both good government and smart politics, as this letter demonstrates.

To refresh your recollection, refiners had long added lead to gasoline to cut refining costs. Yet, in passing the Clean Air Act of 1970, legislators knew that leaded gasoline must be banned in new cars starting with the 1975 models because lead would ruin the devices needed to comply with the statute's limits on emissions of three other pollutants. So, the statute authorized EPA to require these new cars to use only unleaded gasoline.

The more challenging choice was whether to limit the lead in the gasoline used by the pre-1975 cars, of which 100 million would be on the road in 1975 and most for years after. Warnings came from scientists that leaded gasoline harms health. Still, gasoline refiners, lead additive makers, and their scientists disagreed and asserted that limiting lead additives would increase driving costs. Congress skirted this hard choice by authorizing the EPA to limit lead in gasoline if needed to protect health and promising EPA would protect health by a statutory deadline—which was May 1976.

In 1973, EPA did ban the use of leaded gasoline starting with the 1975 cars but postponed deciding whether to cut lead in gasoline used by the older cars. On behalf of environmental, health, and anti-poverty groups, I petitioned the DC Circuit to end this delay. The court ordered the agency to decide by a deadline. It issued a regulation phasing down lead in gasoline but one so weak it would have no impact on lead emissions until 1977. Moreover, the federal regulation would preempt New York City's regulation of lead in gasoline, thereby tripling lead emissions in the city. Lead in gasoline had made the dust on the city's sidewalks and playgrounds as rich in lead as the ore extracted from lead mines. Doctors warned that children absorb large amounts of lead in dust through thumb sucking and other hand-to-mouth activities

In a case filed in federal district court in New York City, I argued that the agency had violated a duty under the 1970 statute to set and achieve a standard to "protect health" from airborne lead by the statutory deadline. During our discussion, you said you read one of my briefs on these issues and did not question its conclusion. (*Hearings on Automotive Lead Emissions, pt 1, 93d Cong., 2d Sess. at 377*).

After the hearing, the district court decided in our favor and the Second Circuit affirmed.

At the hearing, I also called your attention to documents written by EPA scientists concluding that lead in gasoline does harm health. You expressed uncertainty, stating "there may be a need to hold additional hearings on the health effects . . ." (*Id.*)

Now, decades later, we know without doubt that lead in gasoline harmed health grievously. Consider that in 2016 President Obama declared a state of emergency in Flint, Michigan, because *one-twentieth* of the children below the age of six had blood lead levels of at least 5. In the 1970s, the *average* blood lead level in children across the United States was 15. Today, the average is way below 5. While lead in drinking water and paint has had tragic consequences, outlawing lead additives to gasoline is the dominant reason for this population-wide drop in lead levels.

The topic that occasioned the lengthiest and liveliest exchange between us at the hearing is, what caused the ongoing statutory violation? My testimony blamed "the Executive Office of the President overruling the judgment of EPA's administrator." (*Id.*, 375.) I urged you to ask Deputy Administrator John Quarles, a witness at the hearing, to state who pressured the EPA Administrator to delay and then weaken the phase down of the lead content of

gasoline and why? (*Id.* at 376.) You responded that this topic was beyond the scope of the hearing you were authorized to conduct but that you would ask the chair of the Environmental Pollution Subcommittee to “pursue it there.” (*Id.* at 377-78.)

I know of no subsequent congressional inquiry into this topic. Nonetheless, today we know the answer. Former Deputy Administrator Quarles wrote a book in which he describes the pressure that the White House applied to the EPA to go easy on lead and other pollutants and Administrator Ruckelshaus’s threat to quit in protest. *Cleaning Up America: An insider’s view of the Environmental Protection Agency* (Houghton Mifflin, 1976), 117-18, 123-42. We also know that members of Congress from both parties, liberals and conservatives, pressed EPA to lay off airborne lead and that EPA did little more on lead in gasoline under President Carter than under Presidents Nixon and Ford, as I describe in *Saving Our Environment from Washington: How Congress Grabs Power, Shirks Responsibility, and Shortchanges the People* (Yale U. Press, 2005), ch. 4.

Indeed, as my book also describes, EPA got tough on lead in gasoline used by the older cars only in the 1980s after large gasoline refiners urged EPA to ban leaded gasoline. They changed sides because, as new cars requiring unleaded fuel replaced pre-1975 cars, the demand for leaded gasoline dropped enough that the cost of distributing two lines of gasoline—leaded and unleaded—no longer made sense. Yet, they feared that their unilaterally stopping the sale of leaded gas would result in the loss of market share to smaller refiners. So, they asked the EPA to ban it. EPA essentially did so in 1985 under President Reagan.

EPA cut lead much more slowly than EPA scientists recommended (*id.*, 375-76) because of the skewed incentives of elected officials whom agencies must heed because of their power over appropriations, appointments, and more. In passing almost unanimously the 1970 statute (which I realize took place before you came to Congress), members of both parties and President Nixon got to take credit for the promise that EPA would protect health completely by the mid-1970s. Still, the blame for the failure to do so and any regulatory burdens imposed would fall on agency officials. Meanwhile, elected officials could earn the gratitude of campaign contributors and other interests by privately lobbying the agency not to impose such burdens.

At its gala on December 6, 2020, NRDC mentioned first among its accomplishments over the past half-century our victories on lead in gasoline, noting that they cut lead exposure in

the U.S. and thereby spurred countries worldwide to do so too. I am proud of our work, even though it sped the cutting of lead in the U.S. only marginally. Nonetheless, I must acknowledge that elected officials' ability to claim credit and shift blame on lead slowed the removal of lead far more.

Consider what Congress would have done in 1970 on lead in gasoline if its members could not evade responsibility in this way. In the wake of the first Earth Day and the abject failure of past federal air pollution statutes, Congress had to legislate on air pollution and lead was the air pollution issue most on the public's mind. *Saving Our Environment* at chs. 3-4. As Ethyl Corporation executive Lawrence Blanchard Jr. stated, "'Get the lead out' has become a slogan in every household." Bumper stickers read, "GET THE LEAD OUT OF YOUR GAS." We cannot know exactly what Congress would have done on lead in gasoline but do know that it required auto manufacturers to cut new cars' emissions of other major pollutants by 90% from 1970 levels by 1975. Congress would not have taken all the lead out, but a cautious estimate is that Congress would have called for a 50% reduction in the lead content of gasoline by 1975.

In comparison to what happened, that measure would have, I estimate based upon EPA health data, saved about 50,000 lives and a hundred thousand children from brain damage that permanently reduced their IQs to below 70. *Saving Our Environment from Washington*, 35-38. Such numbers of deaths and gruesome injuries are comparable to American casualties in the Vietnam War, with the difference that many victims of lead were children.

Congress often ducks the hard choices, which is why the rules on immigration, healthcare, the environment, and much else change radically when a president of a different party gets elected. We suffer from law that is erratic. Worse still, to mask their failure to make hard choices, legislators write detailed statutes designed to maximize their credit and minimize their blame rather than benefit their constituents. The detailed statutes force agencies to promulgate complicated regulations. As your soon-to-be climate czar Gina McCarthy said of regulations under the Clean Air Act, "I hate that each sector has 17 to 20 rules that govern each piece of equipment and you've got to be a neuroscientist to figure it out." The detail in the statutes is particularly harmful because they are generally woefully out of date.

Congress has not amended the Clean Air Act in 30 years despite our learning how to get more regulatory protection bang for the buck. Almost all the other major environmental statutes are even more outmoded.

Congress requiring itself to vote on major regulations would prompt its members to amend regulatory statutes to give their constituents a better trade-off between regulatory protection and regulatory burdens. In a project organized by New York Law School and New York University School of Law in 2007, some fifty environmental law experts from across the ideological spectrum set out to show Congress how to update these obsolete statutes to protect the environment more effectively and efficiently. The project's leaders—Professor Richard Stewart, former chair of the Environmental Defense Fund, his colleague on the NYU faculty, Professor Katrina Wyman, and I—summarized the results in a book, *Breaking the Logjam: Environmental Protection That Will Work* (Yale U. Press, 2010). Democrats and Republicans on Capitol Hill told us in private they wished our reforms were already in the statutes, but that Congress would not enact them because doing so would require legislators to take responsibility. Yet, if they had to vote on the major regulations, they would want agencies to have the statutory authority to propose regulations that produce more protection at a lower cost.

Meanwhile, the outmoded statutes require regulatory agencies to promulgate suboptimal regulations, and then members of Congress blame the executive branch. To avoid such backbiting from Congress, James Landis, once the New Deal's leading expert on administrative law and later dean of Harvard Law School, suggested that it would be "an act of political wisdom to put back upon the shoulders of Congress" responsibility for major regulatory actions by requiring its members to vote on them before they go into effect. *The Administrative Process* (Yale U. Press, 1938), 76. This, he wrote, would "have the administrative as the technical agent in the initiation of rules of conduct, yet at the same time to have the legislative share in the responsibility for their adoption." (*Id.*)

Gridlock is no excuse for Congress's evading responsibility for regulation. As then-Judge Stephen Breyer showed, Congress could structure a statute to force its members to vote promptly on agency actions. "The Legislative Veto after Chadha," 72 *Georgetown Law Journal* 793 (1984). The statute would set deadlines by which the House and Senate must vote, limit debate, and bar amendments and filibusters on such votes. As you know, Congress currently uses this sort of fast-track approach to act decisively on proposals to close redundant military bases and make trade deals. The statute could allow for emergencies that require regulatory action before the deadline for votes in Congress by authorizing the president to put a regulation into effect until the votes.

The statute requiring major regulations to be approved through the Article I legislative process could set a future date to take effect to show that its purpose is to empower voters to hold elected officials accountable rather than disempower a particular president.

The obstacle is that some members of Congress prefer to avoid responsibility for hard choices. As you noted in 1995 in discussing Congress's failure to fix the War Powers Act so that war would require the approval of legislators: "they do not have the political courage to take a stand on whether or not we should go to war." The same cowardice keeps some "lawmakers" in Congress from shouldering responsibility for major regulatory laws. As Rep. Tom Cole of Oklahoma, the ranking Republican on the House Rules Committee stated at a recent hearing, "I have a lot of colleagues on both sides that like to rail against the administrative state, but they certainly wouldn't want to have to vote on all those rules and regulations, because they are high risk votes." So, for example, Republicans in the House make a pretense of wanting to shoulder responsibility by voting for the Regulations from the Executive in Need of Scrutiny Act or (REINS). Yet, by selling the bill as anti-regulation rather than pro-accountability, they ensure that it will not get the Democratic support needed to get enacted. Thus, REINS supporters can claim to be against regulatory burdens, but never are faced with voting against specific regulatory protections their constituents want.

You should call upon members of Congress to summon up the courage to shoulder responsibility. Rep. Cole and some Democrats who participated in the Rules Committee hearing want Congress to do so. Other members also want to take the responsibility for major policy choices that the Constitution assigns to them. That responsibility is the crux of "government of the people, by the people, for the people." No wonder that polls going back decades show that voters want Congress to bear such responsibility. A Scott Rasmussen poll posted on January 24, 2019 found that "[e]ighty-two percent (82%) of voters believe Congress should review and approve regulations rather than allowing agencies to set them up on their own." Support for Congress to shoulder responsibility was much the same regardless of party affiliation, race, or political ideology.

It is plain to see that the legislators fail to deliver the accountable government that their constituents want. In February of 2020, 70 former senators, including 47 Democrats, 19 Republicans, and 4 independents, stated in an open letter to current members of the Senate: "Congress is not fulfilling its constitutional duties. . . . To the extent that Congress

doesn't function as the Framers intended, policymaking is left to the less democratic executive and judicial branches." Congress's abdication, the letter continues, allows "the executive branch to effectively 'legislate' on its own terms through executive order and administrative regulation." No wonder too that voters overwhelmingly disapprove of this shirking Congress.

Whether or not Congress manages to summon the necessary courage, by calling upon it to shoulder responsibility, you would earn the people's respect and gratitude, paving the way for similar sentiments throughout the course of your administration.

Sincerely,

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