

THE NEGLECTED QUESTION OF CONGRESSIONAL OVERSIGHT OF EPA: *QUIS CUSTODIET IPSOS CUSTODES* (WHO SHALL WATCH THE WATCHERS THEMSELVES)?

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I

INTRODUCTION

The United States Environmental Protection Agency ("EPA") and the federal environmental protection laws within its charge have received much attention in the literature during the past twenty years. Commentators have frequently considered the relationship of EPA to the courts, including the advantages and disadvantages of both more and less exacting judicial review of agency decisions.¹ Scholars have likewise periodically examined the peculiar way in which Congress has drafted the federal environmental protection laws to ensure their achievement of policy goals.² These laws have

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In my plenary review of EPA's first twenty years, reproduced later in this volume, I describe more fully the collision of institutional forces (including those unleashed by Congress) that have surrounded EPA, why they developed, and how they have affected both EPA and the evolution of federal environmental law. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L & Contemp Probs 311 (Autumn 1991). This article explores in greater depth the causes and effects of congressional oversight of EPA, a specific topic for discussion at the Symposium on EPA sponsored by the Duke University and Washington University Schools of Law in November 1990. The article benefitted greatly from the comments I received at the symposium, especially those offered by Joel Aberbach, Don Elliott, Anne Shields, and Steve Shimberg. Kathleen Lindenberger and Cathy Varley provided valuable research assistance.

1. See, for example, R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Brookings Inst, 1983); James Oakes, *The Judicial Role in Environmental Law*, 52 NYU L Rev 498 (1977); Richard Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 Iowa L Rev 713 (1977); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U Pa L Rev 509 (1974); see also Clayton Gillette & James Krier, *Risk, Courts, and Agencies*, 138 U Pa L Rev 1027 (1990); Cass Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 Duke L J 522.

2. William Rodgers, *Lesson of the Owl and the Crows: The Role of Deception in the Evolution of Environmental Statutes*, 4 J Land Use & Envir L 377 (1989); Richard Stewart & Bruce Ackerman, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 Colum J Envir L 1 (1988); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Regulatory Reforms*, 37 Stan L Rev 1267 (1985); E. Donald Elliott, Bruce Ackerman & John Millian, *Toward A Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J L Econ & Org 313 (1985); David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L Rev 740 (1983).

typically regulated EPA in the first instance by mandating that it achieve ambitious environmental quality objectives within relatively short periods of time.³ Commentators have also noted how, following EPA's repeated failures to accomplish initial statutory mandates, Congress has amended those federal laws to make them even more prescriptive in their commands to EPA.⁴ Finally, in recent years, valuable scholarship has addressed the propriety and efficacy of EPA's oversight by other executive branch agencies, especially the Office of Management and Budget ("OMB").⁵

One significant aspect of EPA's institutional experience has, however, been largely overlooked in legal scholarship. Commentators have mistakenly defined EPA's relationship with Congress almost exclusively in terms of the statutory provisions that Congress has passed and placed within EPA's jurisdiction. Those laws, however, are just the more prominent strands in a detailed web of congressional efforts to oversee EPA's work that has profoundly affected the agency and the development of federal environmental protection policy.

The amount and character of congressional oversight of EPA are both remarkable. Congress appears to engage in more intense and pervasive oversight of EPA than it does of other agencies. In addition, the character of congressional oversight of EPA appears to be consistently adversarial and negative. There are many reasons for these phenomena. Some relate to changes that occurred in Congress during the 1960s, 1970s, and 1980s that are wholly unrelated to EPA and its mandate. Others, however, may stem from the kinds of challenges brought to bear upon our governmental institutions by environmental protection issues. Although the net disadvantages of oversight are not likely to be greater than the corresponding net advantages, they are substantial enough to warrant significant reform of congressional practices.

This article describes the extent and character of congressional oversight of EPA, explains why that oversight has been so intense and adversarial, assesses its impact on EPA, and suggests possible congressional reforms to remedy oversight's adverse effects.

3. John Dwyer, *The Pathology of Symbolic Legislation*, 17 *Ecol L Q* 233 (1990); Schoenbrod, 30 *UCLA L Rev* 740 (cited in note 2).

4. See, for example, Sydney Shapiro & Robert Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 *Duke L J* 819; J. William Futrell, *Hazardous Wastes and Toxic Substances: Lessons from Superfund, RCRA, and Other Environmental Laws*, 24 *Houston L Rev* 125 (1987); James Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980s*, 3 *Yale J Reg* 351 (1986).

5. See, for example, V. Kerry Smith, *Environmental Policymaking under Executive Order 12291: An Introduction*, in V. Kerry Smith, ed., *Environmental Policymaking under Reagan's Executive Order* (U North Carolina Press, 1985); Erik Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking under Executive Order 12291*, 4 *Va J Nat Res L* 1 (1984); see also *Presidential Management of Rulemaking in Regulatory Agencies* (Nat'l Acad Pub Admin, 1987) ("NAPA, Presidential Management"); Christopher DeMuth & Douglas Ginsburg, *White House Review of Agency Rulemaking*, 99 *Harv L Rev* 1075 (1986); Alan Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 *Harv L Rev* 1059 (1986).

II

EXTENT OF CONGRESSIONAL OVERSIGHT OF EPA

A. Origins of Congressional Oversight

Legislative oversight of executive agencies is a relatively modern phenomenon in the United States. Historically, "legislative suspicion and reluctance were reflected in the detailed character of statutory law."⁶ Federal jurisdiction touched on only a few discrete areas, which allowed congressional committees to develop the expertise necessary "to control the particulars of administration and policy" through detailed statutory provisions.⁷ The federal bureaucracy was not especially large and was mostly ministerial in its duties. The need for congressional oversight of administrative implementation therefore appeared slight.

Ironically, as congressional authority expanded in the late nineteenth century, Congress's domination of federal policymaking was threatened. Congress could no longer, it seemed, dictate the details of government. The New Deal legislation of the 1930s and 1940s left no doubt on that score. Federal bureaucracies became large; broad statutory delegations required agencies to decide between competing interests based on their own political value judgments;⁸ and Congress became more susceptible to the criticism that it was failing to ensure against federal agencies' abdicating their statutory responsibilities. It was in the wake of such criticism that Congress passed the Legislative Reorganization Act of 1946, which formally directed congressional committees to oversee executive branch implementation of federal laws.⁹

The 1946 law conferred on each standing committee the responsibility to "exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee."¹⁰ The new law also sought to strengthen the committee system generally by reducing the number of committees and clarifying their jurisdictional bounds. When a discernible increase in oversight did not result, oversight became known as Congress's "neglected" function.¹¹

6. Arthur MacMahon, *Congressional Oversight of Administration: The Power of the Purse*, in Theodore Lowi, ed, *Legislative Politics U.S.A.* 186 (Little, Brown, 2d ed 1965).

7. Joel Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* 20 (Brookings Inst, 1990) ("*Watchful Eye*"); see also Jeremy Rabkin, *Micromanaging the Administrative Agencies*, 100 Pub Interest 116, 117-18 (1990).

8. Senate Committee on Government Operations, 2 *Study on Federal Regulation: Congressional Oversight of Regulatory Agencies* 6 (1977) ("*Senate Study on Federal Regulation*").

9. Legislative Reorganization Act of 1946 ch 753, 60 Stat 832 (1946), codified at 2 USC § 190(e) (1982); *Congressional Oversight of Regulatory Agencies: The Need to Strike a Balance and Focus on Performance* 15 (Nat'l Acad Pub Admin, 1988) ("*NAPA, Oversight Study*").

10. 60 Stat 832 (cited in note 9); see generally Morris Ogul, *Congressional Oversight: Structures and Incentives*, in Lawrence Dodd & Bruce Oppenheimer, eds, *Congress Reconsidered* 318 (Cong Q Press, 2d ed 1981).

11. See Aberbach, *Watchful Eye* at 25-34 (cited in note 7); NAPA, *Oversight Study* at 15 (cited in note 9).

In 1970, the year of EPA's creation, Congress renewed its effort to improve and expand oversight of the executive branch. Congress authorized the hiring of additional committee staff, empowered the General Accounting Office ("GAO") to evaluate agency statutory implementation, and required most committees to issue regular reports on their oversight activities.¹² A few years later, in response to a House report concluding that oversight remained inadequate, the House further sought to encourage oversight through several rule changes. Under these reforms, the House assigned special oversight responsibilities to its Government Operations Committee, granted oversight powers to other committees, and generally encouraged House committees to establish oversight subcommittees.¹³

Although a perception remained during the 1970s that Congress continued to neglect its oversight responsibilities (largely because individual members lacked sufficient incentive to make oversight a priority),¹⁴ oversight dramatically increased during that time. Between 1968 and 1976, the number of oversight hearings per Congress quadrupled in the House and doubled in the Senate.¹⁵ Further, the number of days of hearings and meetings congressional committees devoted to oversight rose from 187 days in 1971 to 587 days in 1983.¹⁶ As a percentage of total days of congressional committee hearings and meetings, oversight was 9.1 percent of the total in 1971 and 25.2 percent in 1983.¹⁷

B. The Structure of Congressional Oversight

In its most standard form, congressional oversight occurs when a committee holds a public hearing on an agency's implementation of a federal program within the committee's jurisdiction. High ranking agency officials testify at the hearing, as do other interested parties whose representatives express the same or conflicting views on the issues raised. Other witnesses typically include neutral "experts," who describe the results of their studies of the agency's work, and ordinary citizens, who describe the impact of the agency's programs on their lives.

12. In the Legislative Reorganization Act of 1970, Congress also substituted "review and study" for "continuous watchfulness" in its 1946 definition of congressional oversight responsibility. Pub L No 91-510, 84 Stat 1156 (1970). Each standing committee of the House and Senate is instructed to "review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws the subject of which is within jurisdiction of that committee." *Id.*; see generally Morris Ogul, *Congress Oversees the Bureaucracy: Studies in Legislative Supervision* 189 (U Pittsburgh Press, 1976).

13. Aberbach, *Watchful Eye* at 27-28 (cited in note 7); NAPA, *Oversight Study* at 16-17 (cited in note 9).

14. Aberbach, *Watchful Eye* at 30-31 (cited in note 7); NAPA, *Oversight Study* at 17 (cited in note 9).

15. John Chubb, *Interest Groups and the Bureaucracy* 47 (Stanford U Press, 1983).

16. Aberbach, *Watchful Eye* at 35 (cited in note 7).

17. *Id.* Former Attorney General Griffin Bell recently speculated that the "oversight function in Congress . . . probably occupies more than 50 percent of Congress' time." Comments of Griffin Bell, *Panel on Congressional Control of the Administration of Government: Hearings, Investigations, Oversight, and Legislative History*, in *Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers*, 68 Wash U L Q 595, 595 (1990).

Congress, however, also conducts effective agency oversight through other less formal and less public techniques. The committees hold their own informal meetings to discuss the relevant agencies. They frequently request the assistance of various investigative arms of Congress, including the Congressional Research Service of the Library of Congress, Office of Technology Assessment, GAO, and Congressional Budget Office, which are authorized to prepare reports on aspects of the agencies' operations.¹⁸ These reports may form the basis of subsequent formal hearings.

Finally, the most frequently used oversight technique is also the most informal. While the members of Congress themselves sometimes telephone or meet with agency heads, the more pervasive practice is for committee staff to communicate with high ranking agency staff.¹⁹ These informal contacts can be very useful for information gathering and for influencing agency policy.

Invariably, multiple committees have authority to oversee each agency's operations.²⁰ These committees include the appropriations committee with jurisdiction over the agency's budget; any authorization committee (or committees) with jurisdiction to initiate legislation pertaining to the agency's program; and the government operations committee in each chamber²¹ with general jurisdiction to review the effectiveness and quality of the operations of the federal government.²² Within each committee, there may also be more than one subcommittee that can claim oversight authority. In the House, for instance, most committees have a subcommittee on oversight, which possesses independent authority (but not to the exclusion of that otherwise possessed by other subcommittees) to oversee activities within the standing committee's jurisdiction.²³

Congressional oversight can be triggered in a variety of ways. Congress itself can supply the trigger. For instance, Congress often includes in its enactments a requirement that an agency report to Congress on a particular topic. Oversight hearings and meetings are also frequently initiated in response to an apparent scandal or policy crisis.²⁴ The committee staff may itself discover the problem; in many cases, however, the national news media, or a disgruntled constituent, interest group, or agency employee first brings

18. Bernard Rosen, *Holding Government Bureaucracies Accountable* 75-77 (Praeger, 2d ed 1989); Lawrence Dodd & Richard Schott, *Congress and the Administrative State* 248-62 (Wiley, 1979). For instance, during the 1987 fiscal year, GAO issued 672 reports to Congress, 95 reports to agencies, and testified 161 times before Congress. NAPA, *Oversight Study* at 10-11 (cited in note 9).

19. Aberbach, *Watchful Eye* at 130-34 (cited in note 7).

20. See note 34 and accompanying text.

21. The formal name of the committee in the House is the "Committee on Government Operations"; in the Senate, it is named the "Committee on Governmental Affairs."

22. See Dodd & Schott, *Congress and the Administrative State* at 165-68 (cited in note 18); Rosen, *Holding Government Bureaucracies Accountable* at 69-71 (cited in note 18).

23. NAPA, *Oversight Study* at 11-12 (cited in note 9).

24. Both members of Congress and their staff listed malfeasance (scandal) and policy crisis as the two most important factors triggering oversight. Aberbach, *Watchful Eye* at 111-14 (cited in note 7). They listed the reauthorization process as the next most important. *Id.* They also listed publicity potential as one of the least important factors, *id.*, which arguably casts some doubt on the veracity of the responses.

it to the committee's attention.²⁵ Committee staff commonly establish a network of contacts in the agency to learn about internal agency controversy.²⁶

Oversight also occurs during the course of a committee's consideration of new legislation or its reauthorization of an existing statute. Annual budget hearings provide another opportunity for individual members of Congress to question an agency's existing practices,²⁷ as do confirmation hearings held by the standing Senate committee responsible for reviewing presidential nominations for high-level agency appointments.²⁸

Finally, the use of inspectors general within each agency is a relatively new phenomena and has the potential for triggering even more congressional oversight.²⁹ Inspectors general of agencies such as EPA are appointed by the president and possess sweeping oversight authority, extending to virtually all aspects of the agency's work.³⁰ While these inspectors are subject to removal by the president, the head of the agency is expressly barred from preventing that agency's inspector general from performing his or her work,³¹ and, in removing an inspector, the president must communicate to Congress "the reasons for any such removal."³² Finally, the Inspector General Act of 1978 promotes congressional oversight by providing for notification of an inspector general's findings to the appropriate congressional committees and subcommittees.³³

C. Congressional Oversight of EPA

Whatever the accuracy of the view that Congress has historically shirked most of its responsibilities to oversee agencies, no such neglect is evident in the case of congressional oversight of EPA. As described above, EPA came

25. Id at 86-90.

26. Id at 90-93.

27. Rosen, *Holding Government Bureaucracies Accountable* at 62-64 (cited in note 18); *Senate Study on Federal Regulation* at 42 (cited in note 8) (appropriations process described as "most potent form of Congressional oversight").

28. Rosen, *Holding Government Bureaucracies Accountable* at 71-75 (cited in note 18); NAPA, *Oversight Study* at 12 (cited in note 9).

29. Pursuant to the Inspector General Act of 1978, as amended (substantially in 1988), there are presidentially appointed inspectors general within each federal "establishment," which includes all the cabinet agencies and other agencies such as EPA, and administratively appointed inspectors general for each designated federal "entity," including organizations such as ACTION and the Federal Reserve System. See 5 USC App §§ 8E(a)(2) (App 3), 11(2); see generally HR No 100-771, 100th Cong, 2d Sess (1988); HR No 100-1020, 100th Cong, 2d Sess (1988); Margaret Gates & Marjorie Knowles, *The Inspector General Act in the Federal Government: A New Approach to Accountability*, 36 Ala L Rev 473 (1985).

30. 5 USC App § 4(a).

31. Id at § 3(a).

32. Id at § 5(b).

33. Id at §§ 5(b), (d). The inspectors general themselves are also not immune from congressional oversight. See Martin Tolchin, *Senators Accuse Inspectors of "Pattern of Wrongdoing,"* NY Times A26 col 1 (Sept 8, 1990) (Senate investigators reported a "disturbing pattern of wrongdoing" by inspectors general.); Allan Gold, *E.P.A. Office Faces Inquiry in House,* NY Times A37 col 1 (Dec 9, 1989) (House subcommittee inquiry into whether EPA inspector general engaged in "questionable investigative practices" when considering charges of misconduct by EPA Administrator).

into existence just as Congress sought to use its oversight authority to strike a new balance of power between the executive and legislative branches. The result has been a persistent struggle between the two branches for control of EPA.

Indeed, because EPA's jurisdiction has affected so many interest groups, the demand for the agency's oversight has grown exponentially among the committees and subcommittees in Congress, as has the number of oversight hearings regarding the agency's work. Most committees can find a nexus between their assigned jurisdiction and an aspect of EPA's work. At present, at least eleven standing House and nine standing Senate committees and up to 100 of their subcommittees share jurisdiction over EPA.³⁴ Those committees utilize the full panoply of oversight tools in supervising EPA's work.

Congressional supervision of EPA each year includes lengthy and rigorous appropriations hearings on the agency's budget,³⁵ numerous appearances by EPA officials at hearings,³⁶ between 100 and 150 congressionally commanded EPA reports to Congress,³⁷ approximately 5,000 congressional inquiries to the agency, and doubtless even more frequent, less formal agency contacts. It also includes as many as forty GAO reports to Congress about EPA and its programs,³⁸ and, when presidential appointments are made to the agency, confirmation hearings on those nominations. Finally, the Office of the Inspector General at the EPA (which was created in 1978) has played an active oversight function within the agency; EPA inspector generals' reports have

34. William Reilly, *The Turning Point: An Environmental Vision for the 1990s*, 9 (Nov 27, 1989) (address by EPA administrator to the Natural Resources Defense Council) (copy on file with the author); see Department of the Environment Act of 1990, S Rep No 101-262, 101st Cong, 2d Sess 27 (1990) (EPA overseen by 34 Senate and 56 House committees). The number of committees and subcommittees is, however, somewhat misleading. The degree of fragmentation appears less pronounced, for instance, if one considers just the standing committees that have jurisdiction over specific laws within EPA's jurisdiction. On the Senate side, the vast majority are within the jurisdiction of the Senate Committee on the Environment and Public Works; other standing committees include: Commerce and Science; Agriculture, Nutrition, and Forestry; Energy and Natural Resources; and Commerce, Science, and Transportation. On the House side, there is significantly more fragmentation, as the laws are more evenly split between the Committees on Energy and Commerce; Public Works and Transportation; Merchant Marine; Science and Technology; Agriculture; and Interior and Insular Affairs. Of course, these listings do not include the government operations or appropriations committees in either chamber, both of which exercise considerable oversight authority.

35. See text accompanying notes 66-73.

36. See text accompanying notes 40-45.

37. Id; see Thomas Adams & M. Elizabeth Cox, *The Environmental Shell Game and the Need for Codification*, 20 Envir L Rptr 10367 (Sept 1990).

38. My own survey of GAO annual indices of reports during the last decade showed the following number of reports on EPA programs each year: 1980 (28); 1981 (18); 1982 (40); 1983 (26); and 1984 (27); 1985 (12); 1986 (26); 1987 (21); 1988 (26); and 1989 (17). There were far fewer reports on EPA during the first decade of EPA's existence. It is also not surprising that the largest number of reports occurred during 1982, which was the only full year that Anne Gorsuch served as EPA administrator. The number of reports on EPA compared to the total number of GAO reports in any one year does not appear to be relatively high. In fiscal year 1987, when GAO issued somewhere between 21 and 26 reports on EPA, GAO issued 767 reports in all. See NAPA, *Oversight Study* at 10 (cited in note 9).

frequently triggered, or otherwise been the subject of, formal congressional oversight.³⁹

Perhaps most remarkable is the number of times EPA officials testify before Congress.⁴⁰ From 1971 to 1988, EPA officials appeared before each Congress between ninety-two and 214 times, testifying on 142 occasions in the first session of the 101st Congress alone.⁴¹ Other federal agencies have appeared far less often. According to a Senate study, during the 93rd and 94th Congresses, EPA appeared 208 times,⁴² while, for example, the Federal Trade Commission appeared 114 times and the National Labor Relations Board only thirteen times.⁴³ Even the Defense Department has appeared less often than EPA in some sessions of Congress.⁴⁴ The National Academy of

39. Oversight of the Environmental Protection Agency's Enforcement Program, Hearings before the Senate Committee on Environment and Public Works, 101st Cong, 1st Sess 23-29 (1989) (testimony of John Martin, EPA inspector general); Contracting at Environmental Protection Agency and Its Effect on Federal Employees, Hearings before the House Committee on Post Office and Civil Service, 101st Cong, 1st Sess 27-60 (testimony of John Martin, EPA inspector general); EPA's Implementation of Laws Regulating Asbestos Hazards in School and in the Air, Hearings before the House Committee on Govt Operations, 100th Cong, 2d Sess 3-40 (1988) (testimony of Donald Kirkendall, EPA deputy inspector general); International Export of U.S. Waste, Hearings before the House Committee on Govt Operations, 100th Cong, 2d Sess 12-34 (testimony of John Martin, EPA inspector general).

40. Of course, not every appearance by an EPA official before Congress inevitably involves congressional oversight of an EPA program. It nonetheless provides a readily available and at least roughly accurate measure of the relative degree of such oversight.

41. EPA officials testified 92 times during the 92nd Congress (1971-72), 113 during the 93rd (1973-74), 127 during the 94th (1975-76), 172 during the 95th (1977-78), 212 during the 96th (1979-80), 182 during the 97th (1981-82), 148 during the 98th (1983-84), 145 during the 99th (1985-86), and 214 during the 100th (1987-88). Frequency of testimony per congressional session is outlined in Table 1. These statistics are derived from those prepared by EPA's Office of Legislation, Legislative Division, which has compiled formal statistics on the number of times EPA officials have testified before Congress for 1971-78 (by Congress) and for 1984-87 (by session of Congress), and a computer search of the Congressional Index Service for the remaining years, which provides for a less precise, but approximate number. The relatively low number of hearings at which EPA officials appear to have testified in 1982 is surprising given that 1982 was both the only full year of Administrator Gorsuch's tenure and a highly controversial year. It also contrasts with the exceedingly high number of GAO reports on EPA that same year (see note 38). Finally, my computation for 1979 (115) differs from that suggested by Administrator Costle in 1980 when he testified before Congress that EPA officials testified in 1979 more than 200 times before 40 congressional committees and subcommittees. Department of Housing and Urban Development—Independent Agencies Appropriations for 1981, Hearings before a Subcommittee of the House Committee on Appropriations, 96th Cong, 2d Sess 4 (1980) (testimony of EPA Administrator Douglas Costle); see also Dodd & Schott, *Congress and the Administrative State* at 263-64 (cited in note 18).

42. That number is somewhat less than that provided to me by EPA for those same Congresses. See numbers recited in note 41.

43. *Senate Study on Federal Regulation* at 81 (cited in note 8). The Civil Aeronautics Board appeared 55 times, Consumer Product Safety Commission 25, Federal Power Commission 90, Federal Trade Commission 114, Food and Drug Administration 80, Interstate Commerce Commission 70, National Labor Relations Board 13, Nuclear Regulatory Commission 21, Occupational Safety and Health Administration 20, and Securities and Exchange Commission 65. See also NAPA, *Oversight Study* at 32 (cited in note 9) (FTC and SEC appear at far fewer oversight hearings than EPA).

44. In 1984, which was one of EPA's lowest years, Defense Department officials testified in approximately 45 hearings, compared to 58 for EPA. The number of standing committees and subcommittees with jurisdiction over the Defense Department (107) appears to be slightly greater than that for EPA. L. Gordon Crovitz, *The Presidency and Congress: Constitutionally Separated and Shared*

Public Administration recently studied the degree of congressional oversight of EPA and other federal agencies and concluded: "EPA is in a unique situation, given the pervasiveness of environmental hazards and the large number of committees with jurisdiction over the agency."⁴⁵

To be sure, EPA's appearances are not evenly divided between these committees. There are standing committees and certain of their subcommittees before which EPA officials testify much more frequently. This fact is apparent from a breakdown of the standing committees before which EPA testified during 1984-86, provided in Table 1. The degree of fragmentation in the House, however, is markedly greater than in the Senate.

TABLE 1

EPA APPEARANCES BEFORE CONGRESSIONAL COMMITTEES (1984-86)⁴⁶

<u>House Committees</u>	1984	1985	1986
Agriculture	1	1	2
Appropriations	1	1	1
Armed Services	1		
District of Columbia	1	1	
Energy and Commerce	10	15	12
Foreign Affairs			1
Government Operations	4	1	7
Interior and Insular Affairs	2	2	3
Judiciary	1	1	
Merchant and Marine Fisheries	3	5	1
Post Office and Civil Service	1		1
Public Works and Transportation	9	4	
Science and Technology	4	10	6
Small Business	1	2	4
Ways and Means	1	2	
Budget Task Force			1
Northeast Midwest Cong Coalition	1		1
<u>Senate Committees</u>			
Agriculture, Nutrition, and Forestry	1		
Appropriations	2	1	1
Commerce, Science, and Transportation			1
Energy and Natural Resources	2		3
Environment and Public Works	10	24	11
Finance	1		1
Governmental Affairs		2	1
Judiciary	1	3	
Small Business	1		
TOTAL	59	75	58

Note: These numbers represent congressional hearings at which EPA was requested to present a formal statement.

Powers, 68 Wash U L Q 598, 600 (1990). The Defense Department also receives far more official written congressional inquiries per year (100,000) than does EPA. *Id.*

45. NAPA, *Oversight Study* at 30 (cited in note 9). NAPA also referred to the "lack of consensus over priorities" in environmental protection policy, "the great costs that [environmental laws] impose on regulated industries," and "uncertainty about their consequences" as additional features contributing to the large amount of congressional oversight of EPA. *Id.*

46. *Id.* at 22. The total columns reflect the correction of apparent computational errors in the source document. (The total columns in the source document read 56, 79, and 63.)

The significance of Congress's oversight of EPA is not confined to its intensity; it has also been remarkably and consistently negative. EPA bashing has been commonplace on Capitol Hill as the agency has become "every elected official's favorite whipping boy."⁴⁷

The congressional practice of condemning EPA finds its roots in congressional oversight predating EPA's creation. Senator Edmund Muskie's Air and Water Pollution Subcommittee of the Senate Committee on Public Works was strongly critical of one of EPA's predecessor agencies,⁴⁸ the National Air Pollution Control Administration, as was Representative Paul Rogers's Subcommittee on Public Health and Welfare of the House Committee on Interstate Commerce.⁴⁹ After EPA was created, Senator Muskie's subcommittee quickly staked out its position as the agency's critical overseer. Muskie and others sharply criticized agency officials in widely publicized hearings in the early 1970s.⁵⁰ The legislators strongly counseled the officials about the importance of consulting with the subcommittee prior to making important agency decisions.⁵¹ They also were sharply critical of any indication that either the White House or OMB was having undue influence on the agency's implementation and enforcement of the laws.⁵²

Such critical practice became the hallmark of Muskie's subcommittee but did not remain confined there, or even to the Senate. It spread to both chambers and has persisted over the last twenty years. Representatives John

The table does not reflect the degree of fragmentation occurring within the subcommittees of the standing committees. The total number of EPA appearances reflected in this table also differs slightly from my own tabulations for those same years. See note 41. The number of standing House committees before which EPA appeared during those years (15) is also greater than the number of standing House committees thought to have jurisdiction over EPA (11). The most probable explanation is that those appearances were not all based on the committee's jurisdiction over EPA's programs, but were instead simply informational in character.

47. Melnick, *Regulation and the Courts* at 322 (cited in note 1); see Department of Housing and Urban Development—Independent Agencies Appropriations for 1987, Hearings before the Subcommittee of the House Committee on Appropriations, 99th Cong, 2d Sess 161 (1986) (testimony of Administrator Lee Thomas) ("Everybody is accountable and nobody is accountable under the way [Congress] is setting it up, but they have got a designated whipping boy."); William D. Ruckelshaus, *EPA*, 16 *EPA J* 14, 15 (Jan/Feb 1990).

48. The Committee on Public Works created the Air and Water Pollution Subcommittee in 1963 and named Senator Muskie as its first chair. See *History of the Senate Committee on Environment and Public Works*, S Doc No 100-45, 100th Cong, 2d Sess 10 (Dec 1988).

49. See Charles Jones, *Clean Air: The Policies and Politics of Pollution Control* 125-35 (U Pittsburgh Press, 1975).

50. See Implementation of the Clean Air Act Amendments of 1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong, 2d Sess Pts 1-3 (1972); see generally Jones, *Clean Air* at 261-63 (cited in note 49); Melnick, *Regulation and the Courts* at 32 (cited in note 1).

51. Christopher Foreman, *Signals from the Hill—Congressional Oversight and the Challenge of Social Regulation* 83 (Yale U Press, 1988); Melnick, *Regulation and the Courts* at 32 (cited in note 1).

52. Implementation of the Clean Air Act Amendments of 1970—Part 1: Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong, 2d Sess 236, 243, 324-28 (1972); Federal Regulation and Regulatory Reform, Report by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong, 2d Sess 121-25, 134, 148 (1976); see generally Foreman, *Signals from the Hill* at 182 (cited in note 51) (much of claim that bureaucracy "run amok" "originate[s] in simple political disagreement reflected in conflict within Congress, between Congress and the White House (or OMB), and ultimately, of course, with society at large").

Dingell and James Florio, among others, adopted similar styles in the House. When EPA failed to meet statutory deadlines, these and other members of Congress held hearings in which they chastised the agency for neglecting the public trust.⁵³ Conversely, when EPA made politically unpopular decisions in an effort to comply with its statutory mandates, other members of Congress promptly joined in the public denunciation.⁵⁴

Indeed, EPA's past twenty years have been marked by persistent allegations of corruption, scandal, and abuse of public trust. Early on there were congressional accusations of improper White House interference with pending litigation.⁵⁵ There have been continuous congressional allegations that EPA has improperly allowed OMB to influence the substance of EPA rules.⁵⁶

53. See, for example, Federal Insecticide, Fungicide, and Rodenticide Act, Hearings before the House Committee on Agriculture, 95th Cong, 1st Sess Part 31 (1977); Extension of the Federal Insecticide, Fungicide, and Rodenticide Act, Authorization Hearings before the Subcommittee on Agriculture, Nutrition and Forestry, 95th Cong, 1st Sess 89 (1977); Resource Conservation and Recovery Act, Hearings before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce, 96th Cong, 1st Sess 1 (1979); Hazardous Waste Disposal, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 96th Cong, 1st Sess 2 (1979); Oversight of Hazardous Waste Management and the Implementation of the Resource Conservation and Recovery Act, Hearings before the Subcommittee on Oversight of Governmental Management of the Senate Committee on Governmental Affairs, 96th Cong, 1st Sess 1 (1979); Hazardous Waste Matters, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 96th Cong, 2d Sess 46-49 (1980).

54. See, for example, 119 Cong Rec 41127-29 (1973) (remarks of Rep. Hudnut); 119 Cong Rec 41728 (1973) (remarks of Rep. Boland); 119 Cong Rec 41305 (1973) (remarks of Rep. Kazen); see generally John Quarles, *Cleaning up America* 201-11 (Houghton Mifflin, 1976). Ironically, it is sometimes those in Congress who sponsored the strict environmental laws who, fearing the possibility of a legislative backlash, subsequently fault EPA for threatening to apply them according to their strict terms. See R. Shep Melnick, *Deadlines, Common Sense, and Cynicism*, The Brookings Review 21, 22 (Fall 1983); see also Congress, *Worried About Shutdowns, Pressures EPA to Push Back UST Deadlines*, 11 Inside EPA 2 (March 9, 1990) (Congress pressuring EPA to push back certain requirements because of concern with financial impact; EPA reluctant without assurances that it will not subsequently be criticized by Congress for easing enforcement).

55. See Mercury Pollution and Enforcement of the Refuse Act of 1899, Hearings before the Subcommittee on Conservation and Natural Resources of the House Committee on Govt Operations, 92d Cong, 1st & 2d Sess 1134-1228, 1281-1363 (1971 & 1972) (oversight hearings on White House interference with pending Department of Justice enforcement action against alleged polluter).

56. See, for example, Hearings before the Subcommittee on Air and Water Pollution, 92d Cong, 2d Sess 3-177, 224-328 (1972) (accusations that OMB was undermining EPA authority); EPA's Asbestos Regulations: Report on a Case Study on OMB Interference in Agency Rulemaking (Committee Print, 1985); EPA: Investigation of Superfund and Agency Abuses, Part 3: Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 98th Cong, 1st Sess 5-8, 79-83 (1983) (testimony of John Daniel, administrator's chief of staff); see also Quarles, *Cleaning up America* at 117-19 (cited in note 54) (Administrator William Ruckelshaus reportedly threatened to quit unless President Nixon agreed that EPA and not OMB or the White House would have final say on the content of EPA rules); *Special Report: Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 Envir Rptr Curr Dev (BNA) 693 (1976); Marc Landy, Marc Roberts & Stephen Thomas, *The Environmental Protection Agency: Asking the Wrong Questions* 66-75 (Oxford U Press, 1990) ("Asking the Wrong Questions") (conflict between OMB and White House) and EPA (Administrator Costle) concerning promulgation of ozone standard); Anne Burford, *Are You Tough Enough?* 83 (McGraw Hill, 1986) (Gorsuch confrontation with OMB over promulgation of EPA rule). Ruckelshaus said he faced "exactly the same" problems with OMB review as EPA administrator in the early 1970s, as he did in 1983 and

Congress has also frequently accused the agency of neglect and of overreaching. Congressional oversight of EPA's handling of the pesticides program in the mid-1970s illustrates both. Partly in response to congressional claims of excessive agency regulation, Administrator Russell Train reduced the role of lawyers in the general counsel's office, which had been a strong advocate of stringent pesticide regulation. Soon EPA was buffeted by allegations of agency neglect; agency lawyers, some of whom resigned in protest, were upset by the administrator's action and brought evidence to Congress' attention that EPA had relied on industry data in registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act.⁵⁷ To agency officials, their reliance on industry data was the necessary result of unrealistic statutory deadlines and reduced agency budgets. To Senate overseers, however, such reliance showed the agency's capture by industry and its subversion of congressional will at the expense of increased public health hazards.⁵⁸

An example of supposed agency overreaching involved EPA's aborted effort to require states to develop transportation control plans under the Clean Air Act to improve air quality. Almost as soon as EPA announced that states would be required to formulate such plans to meet federally mandated air quality standards, members of Congress held oversight hearings and made statements on the floors of their respective chambers in which they uniformly denounced EPA's intrusion into matters of traditionally state and local concern.⁵⁹

Without a doubt, EPA's most contentious time with Congress occurred during the tenure of Anne Gorsuch as EPA's administrator from 1981 to 1983.⁶⁰ Intense congressional scrutiny of Gorsuch's management began soon after her confirmation.⁶¹ There were pervasive congressional concerns that

1984. See Rochelle Stanfield, *EPA Administrator Lee Thomas Is More a Manager Than a Policymaker*, 18 Natl J 391, 392 (Feb 15, 1986).

57. Christopher J. Bosso, *Pesticides and Politics* 197-200 (U Pittsburgh Press, 1987).

58. *Id.* at 199-200.

59. See John Quarles, *The Transportation Control Plans—Federal Regulation's Collision with Reality*, 2 Harv Envir L Rev 241, 243-48 (1977).

60. Anne Gorsuch changed her last name to Burford following her marriage in February 1983, which was shortly before she resigned as EPA administrator.

61. In 1981, the chairs of six different committees and subcommittees began to investigate EPA, including Senator Stafford of the Senate Committee on the Environment and Public Works, Representative Dingell of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Representative Florio of the Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, Representative Levitas of the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation, Representative Synar of the Subcommittee on Environment, Energy, and Natural Resources of the House Government Operations Committee, and Representative Scheuer of the Subcommittee on Natural Resources, Agricultural Research, and Environment of the House Science and Technology Committee. See Reauthorizations, Hearing before the Subcommittee on Toxic Substances and Environmental Oversight of the Committee on Environment and Public Works, 97th Cong, 1st Sess 1 (1981) (research and development program of EPA); EPA Oversight: One-Year Review Joint Hearings before the Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations, Subcommittees on Health and the Environment and on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, and Subcommittees on Natural Resources, Agricultural Research, and Environment

Gorsuch and other political appointees at the agency were entering into "sweetheart deals" with industry,⁶² manipulating programs for partisan political ends,⁶³ and crippling the agency through requests for budget reductions.⁶⁴ The confrontation with Congress, fueled by Congress' massive oversight efforts, was the decisive factor in causing Gorsuch, as well as most of the other political appointees at the agency, to resign.⁶⁵

The appropriations committees were not especially active in the events that precipitated Gorsuch's departure, but they have been extremely effective in overseeing the agency's programs during the last twenty years.⁶⁶ From the outset, these committees (particularly the House committees) have closely scrutinized EPA's programs through the budgetary process. Unlike members of the committees that drafted the environmental protection laws, many members of the appropriations committees were not advocates of the programs. They were instead often quite skeptical of the wisdom of those laws⁶⁷ and sought to undermine their statutory mandates through the appropriation process.⁶⁸

As a result of internal compromise, the leadership in Congress initially placed EPA's budget within the jurisdiction of the House appropriations subcommittee on the Department of Housing and Urban Development ("HUD") chaired by Representative Jamie Whitten, an outspoken critic of

and on Investigation and Oversight of the House Committee on Science and Technology, 97th Cong, 2d Sess 1 (1982).

62. Note, *The Conflict between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 Duke L J 1333, 1341 n59 (authored by Ronald L. Claveloux).

63. See EPA Enforcement and Administration of Superfund, Hearings before the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce, 97th Cong, 2d Sess 287-89 (1981 & 1982); Donald V. Feliciano, *The U.S. Environmental Protection Agency: An Analysis of Its Controversies* 32 (Cong Res Serv, June 1, 1983) ("EPA: An Analysis of Its Controversies"); see also Howard Kurtz, *Political Races Discussed with Superfund Chief*, Wash Post A1 (March 22, 1983).

64. See Lawrence Mosher, *Move Over Jim Watt, Anne Gorsuch Is the Latest Target of Environmentalists*, 13 Natl J 1899 (1981).

65. Her assertion of executive privilege in declining to provide agency enforcement files requested by congressional oversight committees was the event that triggered her departure. Somewhat ironically, career staff at the Department of Justice, not Gorsuch, instigated the refusal to turn over enforcement files because of concern with congressional access. See HR Rep No 99-435, 99th Cong, 1st Sess 10 (1985) (report on Department of Justice role in withholding of EPA documents from Congress); Milan Savarous Yancy, *An Evaluation of the Initial Implementation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: The Effect of Withholding of Documents by the Environmental Protection Agency from Congress in 1982-83*, 76 (unpublished PhD dissertation, U Texas at Dallas, May 1988) ("Withholding of Documents"); see generally Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 Minn L Rev 461, 508-16 (1987); Note, 1983 Duke L J 1333 (cited in note 62).

66. Oversight conducted by appropriations committees has been characterized as the most potent form of oversight. *Senate Study on Federal Regulation* at 42 (cited in note 8); see Morris P. Fiorina, *Congress, Keystone of the Washington Establishment* 42-43 (Yale U Press, 1977).

67. See, for example, Agriculture—Environmental and Consumer Protection Appropriations for 1974, Hearings before the Subcommittee on HUD—Independent Agencies of the House Committee on Appropriations, 93d Cong, 1st Sess Pt 5, 789-90 (1973) (testimony of EPA Administrator William Ruckelshaus).

68. James L. Regens & Robert W. Rycroft, *Funding for Environmental Protection: Comparing Congressional and Executive Influences*, 26 Soc Sci J 289, 299 (1989); Steven A. Cohen, *EPA: A Qualified Success*, in Sheldon Kamieniecki & Michael Clarke, eds, *Controversies in Environmental Policy* 181 (State U NY Press, 1986).

many of the environmental laws.⁶⁹ Whitten used the appropriations process to conduct lengthy inquiries into the agency's implementation of those laws. He lobbied the administrator on pesticide matters of concern to agricultural interests,⁷⁰ and he subsequently denounced EPA when it failed to heed his advice.⁷¹ He also openly stated his view that Congress may not have intended full implementation of the environmental laws that it had passed.⁷² According to Whitten, the appropriations process provided a way to "limit use of money" in order to cut back on those laws.⁷³

III

REASONS FOR QUANTITY AND QUALITY OF CONGRESSIONAL OVERSIGHT OF EPA

Several explanations exist for the intensity and the highly adversarial quality of Congress's oversight of EPA over the past twenty years. Some of these explanations are historical, wholly coincidental to the development of federal environmental protection law. Much of the oversight, however, reflects the depth of conflict embedded in the substance of environmental policy and the ways in which that conflict challenges our governmental institutions.

A. Historical Factors

One reason for intense congressional scrutiny of EPA is that the agency's creation coincided with a general increase in congressional oversight of executive branch activities. There was enhanced congressional concern at the time about the dangers of "agency capture." The "agency capture" thesis, launched in the early works of Professor Marver Bernstein,⁷⁴ describes the tendency of regulatory agencies to become too closely affiliated with those

69. Bosso, *Pesticides* at 154 (cited in note 57); see also Douglas Murray, *The Politics of Pesticides: Corporate Power and Popular Struggle over the Regulatory Process* 77 (unpublished PhD dissertation, U California, Santa Cruz, 1983) (describing political compromise resulting in assignment of EPA budget to agriculture appropriations subcommittee).

70. Agriculture—Environmental and Consumer Protection Appropriations for 1972, Hearings before a Subcommittee of the House Committee on Appropriations, 92d Cong, 1st Sess 382 (1971) (hearings concerning DDT).

71. See Agriculture—Environmental and Consumer Protection Appropriations for 1974, Hearings before a Subcommittee of the House Committee on Appropriations, 93d Cong, 1st Sess 475-76 (1973).

72. Department of Housing and Urban Development—Independent Agencies Appropriations for 1973, Hearings before the Subcommittee on HUD-Independent Agencies of the House Committee on Appropriations, 92d Cong, 2d Sess 350 (1972) (statement of Rep. Whitten).

73. Id. Representative Whitten surrendered subcommittee jurisdiction over EPA in 1974 to avoid a confrontation and possible liberal challenge to his eventual succession as chair of the House Appropriations Committee. Foreman, *Signals from the Hill* at 195 (cited in note 51); see Bosso, *Pesticides* at 187-89 (cited in note 57). Whitten is presently chair of the House Appropriations Committee. Pursuant to a 1975 reform, however, the subcommittee chairs of the House Appropriations Committee are quite independent of the full committee chair because they are elected by the full Democratic caucus. Fred Barnes, *Congressional Despots, Then and Now*, 100 Pub Interest 45, 49 (Summer 1990).

74. Marver H. Bernstein, *Regulating Business by Independent Commission* 79-94 (Princeton U Press, 1955); James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 73-74 (Basic

they regulate. At roughly the same time that EPA was created, Ralph Nader's organization published a series of books that, relying on Bernstein's thesis, accused various federal agencies of having been "captured" by the regulated community.⁷⁵

Also in the early 1970s, congressional distrust of the Nixon Administration grew. While this distrust was fueled initially by the President's handling of the Vietnam war, the administration's lack of credibility on Capitol Hill did not remain confined to the war. It spread to the administration's dealings with Congress in a wide range of areas, including the environment.⁷⁶

Another factor precipitating increased congressional oversight was President Nixon's effort to exert greater control over the work product of the federal bureaucracy, by, for example, creating OMB.⁷⁷ Congress naturally became concerned about maintaining its ability to influence federal agencies. Many representatives became convinced that Congress needed to develop its own resources in order to serve as an objective, knowledgeable, and independent overseer of the bureaucracy. These concerns with presidential control have not dissipated over the last twenty years, perhaps partly because different political parties have controlled the White House and at least one chamber of Congress for all but the four years from 1977 through 1980.

Increased congressional oversight also results from the growth of the federal administrative bureaucracy during the last two decades. During this period, the number and reach of federal regulations grew several-fold. The number of pages in the Federal Register provides a rough, but illustrative, measure of that phenomenon. In 1970, the Federal Register contained 20,032 pages; by 1980, it totalled 87,012 pages.⁷⁸

This increase in bureaucratic activity caused a correspondingly dramatic increase in the number of congressional staff during the early 1970s and greater congressional reliance on subcommittee government to provide oversight. Between 1960 and 1984, congressional staff grew from 7,091 to 17,963; the number of subcommittee staff during that same period grew from 910 to 3,183.⁷⁹ In addition, congressional reforms in the 1970s gave

Books, 1990); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1667, 1685-86 (1975).

75. Robert C. Fellmeth, John E. Schultz & Edward F. Cox, *The Nader Report on the Federal Trade Commission* (R.W. Barron, 1969); James S. Turner, *The Chemical Feast* (Grossman, 1970); Robert C. Fellmeth, *The Interstate Commerce Commission: The Public Interest and the ICC* (Grossman, 1970); John C. Esposito, *Vanishing Air* (Grossman, 1970); David Zwick & Marcy Benstock, *Water Wasteland* (Grossman, 1971).

76. See S Doc No 100-45 at 19 (cited in note 48); see also Melnick, *Regulation and the Courts* at 33 (cited in note 1).

77. See generally Richard P. Nathan, *The Plot that Failed: Nixon and the Administrative Presidency* (J. Wiley, 1975).

78. NAPA, *Oversight Study* at 2 (cited in note 9). By 1986, during the heyday of President Reagan's deregulatory efforts, the number of pages decreased to 47,418, which was still significantly higher than in 1970. See also Aberbach, *Watchful Eye* at 43-46 (cited in note 7).

79. See Shane, 71 Minn L Rev at 464 (cited in note 65); Aberbach, *Watchful Eye* at 46 (cited in note 7); Foreman, *Signals from the Hill* at 16 (cited in note 51) (personal staffs grew from 1,150 in 1930 to 10,679 by end of 1970s; committee staffs grew from 275 to over 3,000 in the same period). The staffs of the Senate and House committees and subcommittees with jurisdiction over environmental

additional powers to subcommittees and their chairs. For example, in the 1950s, full committees held most hearings and debates; subcommittees held only 20 to 30 percent of the hearings. By the late 1970s and the 95th Congress, subcommittees held over 90 percent of all hearings; their decisions were more authoritative; full committee chairs could chair only one subcommittee; and subcommittee chairs increasingly served as the floor managers for bills.⁸⁰ To assist the subcommittees' efforts, Congress created or substantially expanded the GAO,⁸¹ Office of Technology Assessment,⁸² Congressional Budget Office,⁸³ and Library of Congress's Congressional Research Service.⁸⁴ These additional resources were devoted substantially to oversight.⁸⁵

The last twenty years have also witnessed the emergence of the political phenomenon known as "interest group politics." During this period, individual legislators have become increasingly responsive to the lobbying efforts of single issue organizations.⁸⁶ One expression of interest group politics has been enhanced congressional oversight of federal agencies of concern to particular groups.⁸⁷ In order to influence agency behavior, an interest group may try to persuade a subcommittee chair to hold an oversight hearing at which the group could air its concerns.

Finally, the growth of the national news media, especially the broadcast media, undoubtedly has been a significant catalyst for congressional oversight. Indeed, a symbiotic relationship has developed between the two. Television, in particular, provides public exposure to elected representatives;

issues have significantly increased during the last several decades. *History of the Senate Committee* at 19 (cited in note 48) (staff of the Senate Committee on the Environment and Public Works increased in the late 1960s and early 1970s in response to hostility between Congress and the administration). According to one survey, 11 Senate and 45 House committee staff members were concerned with environmental problems in 1960; 34 Senate and 42 House in 1970; 70 Senate and 112 House in 1975; 74 Senate and 160 House in 1979; and 56 Senate and 151 House in 1981. See John Pitney, *Hazardous Politics: Toxic Waste and American Government* 39 (unpublished PhD dissertation, Yale U, 1985).

80. See Lawrence Dodd & Bruce Oppenheimer, *The House in Transition: Change and Consolidation*, in Lawrence Dodd & Bruce Oppenheimer, eds, *Congress Reconsidered* 40-48 (Cong Q Press, 2d ed 1981).

81. Legislative Reorganization Act of 1970, Pub L No 91-510, § 204, 84 Stat 1168 (1970); Congressional Budget and Impoundment Act of 1974, Pub L No 93-344, § 702, 88 Stat 326 (1974).

82. Technology Assessment Act of 1972, Pub L No 92-484, § 3, 86 Stat 797-803 (1972).

83. Congressional Budget and Impoundment Control Act of 1974, Pub L No 93-344, §§ 201-203, 88 Stat 302-05 (1974).

84. Legislative Reorganization Act of 1970, Pub L No 91-510, § 321, 84 Stat 1181-85 (1970).

85. See text accompanying notes 12, 18.

86. See generally Kay Lehman Schlozman & John T. Tierny, *Organized Interests and American Democracy* 1-13, 289-317 (Harper & Row, 1983). For an entertaining and informative description of the ways in which special interest groups seek to influence the legislative process, see Jeffrey H. Birnbaum & Alan S. Murray, *Showdown at Gucci Gulch* (Random House, 1988) (congressional passage of the 1986 Tax Reform Act).

87. Conversely, the dispersion of power into subcommittees may have been a precipitating cause of the growth in influence of interest groups. Interest groups seek influence over numerous subcommittees; however, subcommittees, because of their limited policy domain, depend upon only one or two interest groups for electoral support. Subcommittees are uniquely effective loci for interest groups to bring their power to bear. See Dodd & Schott, *Administrative State* at 181-83 (cited in note 18).

oversight provides a media event conducive to television news. C-Span's comprehensive coverage of congressional activities reflects and perpetuates this phenomenon.

One immediate effect of the national news media has been the promotion of "fire alarm" oversight. Such oversight occurs in response to allegations of controversy, scandal, or corruption, often occurring within the government itself.⁸⁸ Fire alarm oversight thus alerts the public to a major problem and, not incidentally, publicizes Congress's effort to respond.

Because environmental issues bear a particularly close relationship to public health—the initial handle for much early environmental legislation—many in the national media have been ready to pay special heed to claims of agency dereliction.⁸⁹ No doubt Senator Muskie was aware of this phenomenon; he used environmental issues and oversight of EPA's work quite effectively to bolster his own presidential aspirations.⁹⁰ Others have followed his lead, particularly Representative John Dingell, who similarly has used congressional oversight of environmental issues and EPA to expand his political power base and increase his national prestige.⁹¹

Fire alarm oversight, by its nature, is also disproportionately negative. Consequently, most formal oversight of EPA through public hearings has been of that quality. Because, moreover, many in Congress base the success of fire alarm oversight on its ability to attract media attention, committee staff in arranging such hearings favor witnesses less likely to qualify their views (that is, more ready to exaggerate) and therefore more likely to produce newspaper headlines and effective sound bites.

B. Inherent Factors

Certain factors inherent in fashioning federal environmental protection policy virtually have guaranteed both the intensity and highly adversarial

88. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am J Pol Sci 165 (1984); NAPA, *Oversight Study* at 12 (cited in note 9). In his recent book on congressional oversight, Professor Aberbach posits that "police-patrol" oversight—in which the committee staff regularly oversees the agency's work looking out for possible problems—is likewise on the rise. According to Aberbach, one reason why committees are increasingly relying on police patrol oversight is that they now possess the staff required to undertake such a resource-intensive endeavor. Aberbach, *Watchful Eye* at 98-101 (cited in note 7).

89. Foreman, *Signals from the Hill* at 38-45 (cited in note 51).

90. J. Clarence Davies & Barbara S. Davies, *The Politics of Pollution* 78 (Bobbs Merrill, 2d ed 1975) ("Pollution"); Melnick, *Regulation and the Courts* at 32 (cited in note 1); compare Elliott, Ackerman & Millian, 1 J L Econ & Org at 334-35 (cited in note 2).

91. Representative Dingell from Michigan is likely the most aggressive of current congressional overseers. See David Rosenbaum, *Washington at Work; Michigan Democrat Presides as Capital's Grand Inquisitor*, NY Times A1 col 5 (Sept 30, 1991); Barnes, 100 Pub Interest at 51-53 (cited in note 73). Of course, those in Congress who sought to exploit the advantages of "fire alarm" oversight in the environmental context have not been limited to those faulting the agency for insufficient environmental protection. There have been plenty in Congress equally quick to criticize the agency for the tremendous costs imposed on society by the federal environmental laws. See text accompanying note 59. For instance, because of his natural interest in protecting the auto industry, Representative Dingell frequently plays both sides of the fence. See Norman J. Vig & Michael E. Kraft, eds, *Environmental Policy in the 1980s: Reagan's New Agenda* 84, 90 (Cong Q Press, 1984).

quality of congressional oversight of EPA. These factors include (1) the moralistic, indeed, spiritual quality of many of the arguments in favor of environmental protection; (2) the tremendous complexity of ecosystems and, consequently, the great scientific uncertainty associated with our understanding of the degradation process, its reversal, and the relationship of environmental factors to human health; (3) the temporal gap between the costs of environmental controls, which are immediate, and the resulting benefits, which are not, as well as the resistance of those benefits to market valuation techniques; and (4) the depth of change in existing industrial practices and current American lifestyle necessary to realize significant improvements in environmental quality.

The Earth Day celebration of April 1970 marked this nation's spiritual awakening to environmental problems. The strongly moralistic overtones of the cries for reduced pollution allowed little room for pragmatic debate about the issues. As a result, the development of public expectations for environmental protection was not accompanied by any threshold understanding of what would actually be necessary to change past practices in order to improve environmental quality.

Consistent with the widespread sentiment in favor of environmental protection, Congress passed a series of dramatic and uncompromising environmental statutes. Congress instructed EPA, in effect, "to eliminate water pollution, end all risk from air pollution, prevent hazardous waste from reaching ground water, establish standards for all toxic drinking water contaminants, and register all pesticides."⁹² Congress did not make any meaningful effort in those laws to bridge the gap between the nation's aspirations for environmental protection and its technological, economic, and cultural capacity for change.

Congress also mandated that EPA perform those tasks within extremely short deadlines. Reflecting congressional distrust of the executive branch, 86 percent of the deadlines applied to EPA in the first instance, rather than to the regulated community;⁹³ one-third were for six months or less;⁹⁴ and 60 percent were for one year or less.⁹⁵ The deadlines left little time for EPA to develop the scientific and technological expertise necessary to defend its implementation of the laws from attack either from those concerned about inadequate protection of public health or those concerned about the imposition of possibly needless, yet costly, environmental regulation.

Nor did the legislation anticipate the scientific complexity of environmental problems. The relationships within ecosystems are wonderfully intricate. Indeed, perhaps the greatest insight yielded from

92. Council on Environmental Quality, *Sixteenth Annual Report* 14 (U.S. Govt Printing Office, 1985).

93. *Statutory Deadlines in Environmental Legislation: Necessary But Need Improvement* 11 (Envir & Energy Study Inst, Sept 1985) ("EESI, *Statutory Deadlines in Environmental Legislation*"). The remaining 14% applied to the regulated community and the states.

94. *Id.* at 13-14.

95. *Id.*

environmental research during the last twenty years is how little we understand. EPA's programs, therefore, generally face major gaps in scientific knowledge. Agency officials can either delay action pending further scientific investigation or act on the basis of limited scientific knowledge. Either response, however, is likely to trigger congressional criticism.⁹⁶

In addition, the cost of environmental regulation contrasted sharply with its benefits in ways that made EPA's job especially susceptible to second-guessing and that gave strong economic incentives to criticize the agency. The cost of pollution control and cleanup has been immediate, concrete, and massive. As the National Academy of Sciences concluded, "the regulatory reach of the EPA program is probably unparalleled."⁹⁷ Indeed, virtually no significant economic activity has been unaffected. GAO estimates that the societal cost of EPA programs since 1970 has been \$700 billion and now totals about \$86 billion each year.⁹⁸ The United States currently devotes approximately 2 percent of GNP to pollution control, and that amount is expected to rise to approximately 2.8 percent by the end of the decade.⁹⁹

In contrast, environmental benefits are amorphous, difficult to measure, and tend to be realized only in the long term. Great scientific uncertainty surrounds the relationship between pollution levels and environmental quality, let alone environmental quality and public health and welfare. Environmental values also defy ready economic measurement, prompting many environmentalists to resist comparing the economic costs and benefits of environmental protection programs.¹⁰⁰ Lacking a common denominator, a polarization of views has persisted in the debate over environmental policy, and EPA has constantly been attacked by all sides.

The benefits of environmental protection policies also challenge the tendency of elected officials and the electorate to demand immediate return on their investment. Just as the harm caused by environmental pollution may not be immediately discernible, reductions in environmental pollution frequently do not lead to immediate, discernible improvements in environmental quality. The safeguards mandated by EPA benefit future generations at great economic cost to those in the present. Although differently motivated, neither the regulated community nor the environmentalists historically have exhibited much patience in waiting for the positive return. The former claims that the benefits are illusory; the latter argue that EPA is too slow in their delivery.

96. See Joel Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decision Making*, 92 Yale L J 1300 (1983); see also Note, *The EPA and Biotechnology Regulation: Coping with Scientific Uncertainty*, 95 Yale L J 553 (1986) (authored by Ruth E. Harlow).

97. 2 *Decision Making in the Environmental Protection Agency—Selected Working Papers* 2 (Nat'l Acad Sciences, 1977).

98. Dept of the Environment Act of 1990, S Rep No 101-262, 101st Cong, 2d Sess 15 (1990).

99. William K. Stevens, *2% Of G.N.P. Spent by U.S. On Cleanup*, NY Times A13 col 1 (Dec 23, 1990).

100. Mark Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* (Cambridge U Press, 1988).

Thus, much of the contentiousness evident in EPA's relationship with Congress over the last twenty years results from 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.¹⁰¹ Historically, EPA has served as the focal point of criticism from interest groups on every side of this conflict, ranging from those who charge EPA with undermining the federal environmental laws to those who charge the agency with regulatory excesses in their implementation. The vehicle for much of this criticism has been congressional oversight. Each interest group has found at least one sympathetic ear within Congress, which typically suffices to trigger a formal or informal congressional inquiry.

Not surprisingly, Congress has spoken with many different voices in its oversight of EPA. Some members express concern about EPA's possible capture by the regulated community. These members also often voice concern about the bureaucratic tendency to capitulate to the executive branch because of the influence exerted upon it by powerful economic interests generally opposed to expensive pollution control measures.¹⁰² Many of these representatives drafted the environmental statutes in a manner designed to minimize the possibility of agency capture or of bureaucratic neglect and compromise. Other members of Congress, some of whom served on the appropriations committees, have been more concerned about the potential dangers of a bureaucracy run amok, such as the imposition of excessive costs on the nation's economy.¹⁰³

Finally, controversies endemic to the fashioning of federal environmental protection policy contributed to intense congressional oversight of EPA and to the growing schism between the executive and legislative branches during the last twenty years. A marked lack of consensus concerning the proper direction of federal environmental protection policy exists between the two branches. Regardless of party affiliation, each president since 1970 has been more concerned about the impact of environmental laws on national economic indicators than have been the drafters of those laws.¹⁰⁴

President Nixon's veto of 1972 federal water pollution control legislation,¹⁰⁵ which was overridden, and his subsequent impoundment of congressional appropriations earmarked for the water pollution control

101. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L & Contemp Probs 311, 342 (Autumn 1991).

102. Landy, Roberts & Thomas, *Asking the Wrong Questions* at 33-34 (cited in note 56).

103. Davies & Davies, *Pollution* at 73-44 (cited in note 90).

104. Melnick, *Regulation and the Courts* at 34-5 (cited in note 1). Generally, oversight is reduced when the president and a majority of a particular chamber of Congress are affiliated with the same national political party. Aberbach, *Watchful Eye* at 59-60 (cited in note 7); Dodd & Schott, *The Administrative State* at 226 (cited in note 18). For 10 of EPA's 20 years of existence, the president and the majority of at least one of the congressional chambers have been affiliated with the same party (1976-80; 1981-86). When the Republicans were the majority party in the Senate, however, a wide gulf in philosophy on environmental issues persisted between the White House and those in relevant Senate leadership positions. Melnick, *Regulation and the Courts* at 32 (cited in note 1).

105. Federal Water Pollution Control Act Amendments of 1972, 8 Wkly Comp Pres Docs 1531 (Oct 17, 1972).

program appear to be the first shots in an ongoing battle between Congress and the White House over environmental policy.¹⁰⁶ The Supreme Court held the presidential impoundment unlawful,¹⁰⁷ but presidents have continued to veto pollution control legislation.¹⁰⁸ All presidents have argued for more fiscal responsibility within those laws.

Each president has also assigned OMB increasing authority to review EPA rulemaking to ensure greater consideration of economic concerns. Under President Nixon, OMB Director George Schultz instructed OMB to undertake this oversight function just a few months after EPA's creation.¹⁰⁹ OMB review has remained a point of contention between EPA and OMB under all subsequent presidents,¹¹⁰ although President Reagan gave OMB the greatest leverage over the agency.¹¹¹

During President Reagan's first term, White House staff engaged in a determined effort to appoint individuals to EPA who possessed a heightened sensitivity to the cost of pollution control generally and to industry concerns in particular.¹¹² OMB officials played a major role in the interview and selection process.¹¹³ Hence, all presidential appointees, ranging from the administrator herself to each of the assistant and associate administrators and the general counsel, shared a political philosophy and a sense of mission at odds with that reflected in the federal statutes and embraced by the agency's bureaucracy. No president previously had sought to invade the agency from within.

Congress responded to OMB's enhanced review authority by steadily increasing its own oversight resources in an effort to serve as a counterweight. Congress also responded by holding hearings in which members repeatedly questioned the propriety of OMB oversight of EPA's work. Indeed, OMB's

106. In fiscal years 1973 and 1974, President Nixon withheld six billion dollars from funds authorized by Congress for the Federal Water Pollution Control Act's construction grants program. *Train v City of New York*, 420 US 35, 38-40 (1975). In fiscal year 1975, he impounded three billion dollars of authorized funds. *Id.* at 40 n4. It is no coincidence that it was the Congressional Budget and Impoundment Control Act of 1974 that enhanced congressional oversight potential through the Congressional Budget Office and the GAO. See text accompanying notes 81, 83.

107. See *Train*, 420 US at 48.

108. See Veto of Surface Mining Control and Reclamation Bill, 11 Wkly Comp Pres Docs 4, 5 (Dec 30, 1974); Veto of the Water Quality Act of 1987, 23 Wkly Comp Pres Docs 97 (Jan 30, 1987).

109. Shultz advised EPA's first administrator, William Ruckelshaus, on May 21, 1971, that EPA would have to clear its regulations with OMB and the Department of Commerce prior to their promulgation. Alfred Allen Marcus, *Promise and Performance: Choosing and Implementing An Environmental Policy* 125 (Greenwood, 1980); Stanley Bach, *Governmental Constraints in Environmental Regulation*, in 2b *Decisionmaking in the Environmental Protection Agency—Selected Working Papers* 163, 168-71, 173-74, 178-81 (Nat'l Acad Sciences, 1977).

110. See NAPA, *Presidential Management* at 25 (cited in note 5).

111. See generally Olson, 4 Va J Nat Res L 1 (cited in note 5).

112. Feliciano, *EPA: An Analysis of Its Controversies* at 8 (cited in note 63); Susan J. Tolchin & Martin Tolchin, *Dismantling America: The Rush to Deregulate* 100-01 (Houghton Mifflin, 1983).

113. See Burford, *Are You Tough Enough?* at 84 (cited in note 56) (describing how an OMB official asked an applicant for position of EPA administrator whether he "would be willing to bring EPA to its knees").

oversight has been a constant source of friction between the legislative and executive branches, with EPA at the fulcrum.¹¹⁴

Moreover, presidential appointments of persons such as Anne Gorsuch ignited the pre-existing embers of congressional concern with agency capture. With officials like Gorsuch in control of EPA, the worst fears of many in Congress seemed finally to have been realized. As a result, the congressional oversight arsenal was directed with full force at EPA. Ultimately, the entire agency was engulfed in controversy.¹¹⁵

The Gorsuch era ended almost eight years ago, but there has been surprisingly little change since in the amount and character of congressional oversight of EPA. Oversight remains intense and is predominantly negative. There is a simple, yet important, explanation for this phenomenon. The Gorsuch era was a prominent expression of the tensions underlying Congress's relationship with EPA. It was not, however, the cause of these tensions, which have deeper roots than mere partisan politics or one administrator's personality.¹¹⁶

IV

THE ADVANTAGES AND DISADVANTAGES OF CONGRESSIONAL OVERSIGHT OF EPA

The advantages of congressional oversight of EPA are undeniably substantial. Congressional overseers have exposed instances of agency neglect and even corruption. Certainly they played a critical role in ridding EPA of destructive forces within the agency during President Reagan's first term. Oversight has also served as an important counterweight to OMB, which has often appeared to wield influence antithetical to the policies and purposes of the environmental laws enacted by Congress.¹¹⁷ Finally, oversight can be commended for providing an opportunity to educate elected representatives about the intricacies of environmental law and policy, thereby enabling legislators to make more considered judgments in their subsequent amendment of the federal laws.¹¹⁸

Congressional oversight of EPA has, however, also had adverse effects. These effects are not unique to EPA. They are the potential problems generally associated with the rise of subcommittee government in Congress: how fragmentation of authority impedes effective congressional and agency decisionmaking, and how the empowerment of subcommittee chairs to conduct oversight grants them great power but little accountability for their

114. See generally Robert V. Percival, *Checks without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & Contemp. Probs 127 (Autumn 1991).

115. See Jonathan Lash, Katherine Gillman & David Sheridan, *A Season of Spoils: The Story of the Reagan Administration's Attack on the Environment* (Pantheon, 1984); see text accompanying notes 60-65.

116. See text accompanying notes 48-59; Lazarus, 54 L. & Contemp. Probs at 336-40 (cited in note 101).

117. NAPA, *Oversight Study* at 29 (cited in note 9).

118. Dwyer, 17 Ecol. L. Q. at 291-98 (cited in note 3).

actions.¹¹⁹ In the case of EPA, many of those concerns have apparently been realized, possibly to an unprecedented degree.¹²⁰ Moreover, because “the benefits [of oversight] are highly celebrated and the possible costs understated,”¹²¹ the disadvantages of oversight are discussed here in greater detail.

First, the intensity and negative quality of congressional oversight of EPA has done much to create and perpetuate the view that EPA is incompetent, negligent, and even corrupt. In isolated instances, such a public image may well have been justified. In many cases, however, it plainly was not. Frequently, the agency's failures, controversies, and scandals highlighted during congressional oversight resulted from clashes of institutional forces outside EPA's control; they were not usually the result of program mishandling by the agency.¹²²

One significant adverse effect of EPA's poor reputation has been the undermining of the agency's ability to implement the federal environmental protection statutes by eroding judicial and public confidence. Because so much scientific uncertainty surrounds agency decisions, EPA actions often cannot be sustained in court unless the agency is given the benefit of the doubt. In addition, public confidence in EPA decisions regarding public health is essential. In its absence, EPA must expend considerable resources to overcome the resistance of the very public whose support is an important measure of the agency's success.¹²³

Second, the oversight process may also have contributed to retarding the evolution of federal environmental law. Much of the myth of EPA's “regulatory failure” has been perpetuated by the oversight process as those in

119. See Aberbach, *Watchful Eye* at 12 (cited in note 7) (oversight may be “counterproductive from the standpoint of the balance of power between elected and nonelected officials and of coordinated control of policy and administration”); Dodd & Schott, *Congress and the Administrative State* at 173 (cited in note 18) (oversight characterized as “dispersed and haphazard”); id at 182 (increased congressional dependence on interest groups); id at 214 (oversight's effects on agencies); id at 397 (subcommittee chairs described as “power entrepreneurs”); NAPA, *Oversight Study* at 43-50 (cited in note 9) (setting forth recommendations to redress problems presented by current congressional oversight practices); *Senate Study on Federal Regulation* (cited in note 8) (emphasizing the need for greater coordination between oversight committees).

120. NAPA's 1989 report on congressional oversight appears to reach a similar conclusion. See NAPA, *Oversight Study* at 19-30 (cited in note 9). That study includes a specific discussion on congressional oversight of EPA. Id.

121. Aberbach, *Watchful Eye* at 10 (cited in note 7).

122. See Lazarus, 54 L & Contemp Probs at 313-14 (cited in note 101).

123. For instance, in his initial report to Congress on the Superfund program, EPA's current administrator, William Reilly, concluded that the “legacy of public distrust” surrounding EPA's management and “the barrage of criticism leveled at the program nationally” had caused the agency to lose its “most valuable asset, the benefit of the doubt.” William Reilly, A Management Review of the Superfund Program ch 5 at 4 (EPA, 1989). According to Reilly, the public consequently did not trust EPA to represent its interests in Superfund negotiations, and the ultimate effect was to slow clean up efforts. Id at 5-1 to 5-4; see William D. Ruckelshaus, *Not In My Backyard: Institutional Problems in Environmental Protection*, reprinted in 130 Cong Rec 9803, 9804 (April 1984) (address before the Economic Club of Detroit) (“[F]rom the standpoint of an American governmental agency charged with protecting human health and the environment, trust is the oil in the gearbox. . . . [W]hen [the public] ceases to believe that the agency is trying to act in the public interest, that agency cannot function at all.”).

Congress have derided agency officials for failing to meet statutory mandates that were unattainable anyway. In response to these perceived instances of agency failure, Congress usually has returned to the manner in which it historically oversaw the federal bureaucracy prior to its explosive growth this century: detailed prescription of the terms of the agency's implementation of the law.¹²⁴

While legislative prescription had some advantages (for example, it increased congressional accountability),¹²⁵ they came at the expense of the kind of flexibility EPA needed to respond to the uncertain contours of environmental problems. Congress and EPA have rarely known the best way to respond to an environmental pollution problem at the time a statute was passed. The implementation of environmental standards has necessarily required substantial groping in the dark because policymakers have chosen not to risk environmental quality and human health by waiting for the elusive notion of scientific certainty. Statutory prescription therefore is an especially risky endeavor. It can lead to wasteful expenditures for pollution control and,

124. See text accompanying notes 6-7. The agency's failure to meet the initial deadlines undermined the credibility of the agency to resist these increasingly restrictive legislative initiatives. See Ogul, *Congress Oversees the Bureaucracy* at 49, 181-82 (cited in note 10); Gary C. Bryner, *Bureaucratic Discretion: Law and Policy in Federal Regulatory Agencies* 2 (Pergamon Press, 1987); William D. Ruckelshaus, *Environmental Protection: A Brief History*, 15 *Envir L* 455, 463 (1985); Schoenbrod, 30 *UCLA L Rev* at 793 (cited in note 2).

Amendments to various environmental statutes from the 1970s through the 1990s all exhibit the same trend toward increased statutory prescription. See Clean Air Act Amendments of 1977, Pub L No 95-95, 91 Stat 685 (1977), codified at 42 USC § 7401 (1988); Clean Air Act Amendments of 1990, Pub L No 101-549, 104 Stat 2399 (1990); Clean Water Act of 1977, Pub L No 95-217, 91 Stat 1566 (1977), codified at 33 USC § 1251 (1988); Water Quality Act of 1987, Pub L No 100-4, 101 Stat 7 (1987), codified at 33 USC § 1251 (1988); Superfund Amendments and Reauthorization Act of 1986, Pub L No 99-499, 100 Stat 1613 (1986), codified at 42 USC § 9601 (1988); Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub L No 100-532, 102 Stat 2654 (1988), codified at 42 USC § 6901 (1988); Hazardous and Solid Waste Amendments of 1984, Pub L No 98-616, 98 Stat 3221 (1984), codified at 42 USC § 6901 (1988); Safe Drinking Water Act, Pub L No 99-339, 100 Stat 642 (1986), codified at 42 USC § 201 (1988); Toxic Substances Control Act, Pub L No 99-519, 100 Stat 2970 (1986), codified at 15 USC § 2601 (1988). Each eliminated substantial EPA discretion, imposed more deadlines, and included more detail concerning the methods and standards to be employed by the agency. Shapiro & Glicksman, 1988 *Duke L J* at 1829-30 (cited in note 4).

The administrative tasks included in those laws are also no less enormous (and indeed greater) than those contained in earlier laws. The likelihood of a series of new EPA "failures" therefore seems great. If that occurs, the scenario that EPA officials fear will result is another round of oversight hearings and even more prescriptive legislation. Paul R. Portney, ed., *Public Policies for Environmental Protection* 284-86 (Resources for the Future, 1990); Shapiro & Glicksman, 1988 *Duke L J* at 1828 (cited in note 4); Ruckelshaus, 16 *EPA J* at 15 (cited in note 47).

125. Of course, one possible advantage of legislative prescription is that it may decrease the need for subsequent congressional oversight. Ironically, for that reason, some in Congress argue that an advantage of congressional oversight is that it provides Congress with an option other than legislative prescription to ensure that the agency is not abdicating its statutory responsibilities. See, for example, HR Rep No 99-253, 99th Cong, 1st Sess 55-56 (1985) ("If the new law was overly detailed and restricted in its prescription of how the agency should operate Superfund, it would almost surely doom the program to future failures. Congressional oversight is the way to ensure diligent and good faith behavior from an Agency.").

by way of missed opportunity, to more, rather than less, environmental degradation.¹²⁶

The threat of congressional scrutiny and accusations of agency misconduct have also chilled decisionmaking and innovation within EPA. Agency officials fear overseers' reactions to agency decisions and to any changes in agency programs; they worry, in particular, about how some in Congress might use an agency decision as a basis for launching an attack on the agency. The mere anticipation of congressional criticism is often enough to dissuade agency decisionmaking, including experimentation with new approaches to environmental problems.¹²⁷ Agency efforts to promote cross-media regulation are one significant example. (A cross-media regulatory scheme considers a polluting activity's impact on the natural environment as a whole, in contrast to the existing legal regime, under which an activity's impact on various environmental media (air, water, land) are separately regulated.) Administrator William Ruckelshaus shied away from its implementation during his first term in office because of potential congressional criticism, and subsequent efforts have stalled for related reasons.¹²⁸ Similar jurisdictional clashes are evident as the agency seeks to implement pollution prevention programs.¹²⁹

Another disadvantage of congressional oversight is that it can require considerable expenditure of limited agency resources. Agency testimony must be prepared, which often requires substantial staff work. The EPA must also coordinate its testimony with OMB. After the hearing is completed, EPA must respond to requests for additional information that committee members and their staff make at the hearing.

While the resources necessary to respond to any one oversight inquiry are unlikely to pose an undue burden, the cumulative effect of the hundreds of oversight hearings to which EPA is called has, in the past, reduced significantly EPA's ability to devote sufficient resources to program implementation. For this reason, EPA officials have complained that congressional oversight is sometimes the cause of the agency's inability to

126. See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 *Stan L Rev* 1267 (1985); see also Bruce A. Ackerman & William Hassler, *Clean Coal/Dirty Air* 42-58 (Yale U Press, 1981).

127. Former EPA Administrator Lee Thomas reportedly commented that oversight often "has a chilling effect on decision making in the agency. You need to be able to make reasonable decisions with the understanding that you're accountable for them, you may well hear about them, but that it's not going to end up as some kind of posturing, personal attack." NAPA, *Oversight Study* at 27 (cited in note 9).

128. See Davies & Davies, *Pollution* at 105-06 (cited in note 90); Lakshman Guruswamy, *Integrating Thoughtways: Reopening of the Environmental Mind?*, 1989 *Wis L Rev* 463, 487-89.

129. See *Congressmen to Push Mandatory High-Level EPA Pollution Prevention Office*, 10 *Inside EPA* 5 (Nov 3, 1989).

meet congressional goals.¹³⁰ In extreme circumstances, it has virtually paralyzed the agency.¹³¹

In addition, congressional oversight has tended to skew EPA's priorities. With limited resources, EPA constantly faces the difficult question of how to prioritize the various issues on its statutory agenda. Political realities, however, often require the agency to adjust its priorities in response to the requests and complaints of individual subcommittee chairs with oversight leverage.¹³² The resulting agenda is unlikely to bear any close relationship to that which would be dictated by an objective assessment of competing priorities. Indeed, EPA priorities appear to have been poorly allocated partly as a result of fragmented and uncoordinated legislative oversight.¹³³

Another victim of oversight has been agency morale, since the barrage of criticism has inevitably affected employee self-esteem. The EPA employees have been deprived of that which prompted many to join the agency in the first instance—a sharing of the agency's social mission.¹³⁴ This has made it more difficult for EPA to recruit the most qualified agency personnel and may also be a cause of high agency turnover.¹³⁵ The latter is especially problematic for an agency like EPA. Long term strategic planning is an essential component of an effective environmental protection program, but it depends on continuity among those responsible for its development.

Finally, fragmentation of congressional oversight authority over EPA has exacerbated Congress's problems in seeking to speak with a coherent and consistent voice on environmental matters. The appropriations committees have often resisted the efforts of the authorization committees by declining (with OMB support) to provide EPA with the level of funding necessary for even a good faith effort to achieve the statutory mandates. As a result, increases in EPA's budget have lagged far behind increases in the agency's statutory responsibilities.¹³⁶ The appropriations committees have also placed

130. Landy, Roberts & Thomas, *Asking the Wrong Questions* at 112 (cited in note 56) (congressional oversight diverted Agency resources from developing RCRA regulations).

131. Feliciano, *EPA: An Analysis of Its Controversies* at 276 (cited in note 63); Yancy, *Withholding of Documents* at 110-13 (cited in note 65).

132. Aberbach, *Watchful Eye* at 7 (cited in note 7).

133. U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, *The Nation's Hazardous Waste Management Program at a Crossroads* 8-9 (EPA, 1990); see generally EPA Science Advisory Board, *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* 1 (EPA, Sept 1990) (blaming "fragmentary nature of US environmental policy," as evidenced by the absence of consistent and coordinated pollution control laws, as a cause of misplaced priorities).

134. Irene B. Devine, *Organizational Crisis and Individual Response: The Case of the Environmental Protection Agency* 71 (unpublished PhD dissertation, Case Western Reserve U, 1983); *Steps Toward a Stable Future* 3 (Nat'l Acad Pub Admin, 1984); see also Wilson, *Bureaucracy* at 95 (cited in note 74); Steve Kelman, *Making Public Policy—A Hopeful View of American Government* 247, 261-62 (Basic Books, 1987).

135. Lazarus, 54 L. & Contemp Probs at 353 (cited in note 101).

136. The congressional appropriations were less under President Carter than under Presidents Ford or Nixon, and EPA's budget has decreased 12% since 1981. See Regens & Rycroft, 26 Soc Sci J at 293-94 (cited in note 68); S Rep No 101-262, 101st Cong, 2d Sess 16 (1990); see also Robert V. Bartless, *The Budgetary Process and Environmental Policy*, in Norman J. Vig & Michael E. Kraft, eds, *Environmental Policy in the 1980s: Reagan's New Agenda* 138-39 (Cong Q Press, 1984).

“riders” on appropriations bills that have effectively prevented EPA from taking action otherwise required by the agency’s statutory mandate.¹³⁷

Excessive fragmentation of committee oversight jurisdiction also causes laws to be poorly drafted and designed. Quite often no single committee is in an effective position to take a comprehensive, holistic look at a particular environmental problem. Instead, each committee tends to examine the problem through its own narrow jurisdictional lens and worries primarily about the impact of statutory amendment on its own jurisdiction.¹³⁸ The result can be different laws, and even different provisions within the same law, working at cross purposes.

Indeed, the absence of coordination between all the various committees with jurisdiction to oversee EPA has often stymied efforts to amend existing laws. Needed amendments to CERCLA were stalled for this reason;¹³⁹ amendments to the Clean Air Act took over thirteen years for congressional passage because of similar problems of congressional coordination.¹⁴⁰ Promising ideas such as pollution prevention and cross-media regulation have been tirelessly promoted, but Congress has enacted relatively little legislation to further either initiative.¹⁴¹ Even passage of legislation as seemingly uncontroversial as that designed to elevate EPA to cabinet status has been delayed, partly because some committees were concerned about its possible impact on their jurisdiction over the agency’s programs.¹⁴²

137. See Foreman, *Signals from the Hill* at 105-07 (cited in note 51) (describing examples of appropriation riders limiting EPA authority); HR Rep 101-490, 101st Cong, 2d Sess 145-46 (1990) (describing how Congress barred EPA from using appropriated funds to impose sanctions under the Clean Air Act on certain violators); see also Neal E. Devins, *Regulation of Government Agencies through Limitation Riders*, 1987 Duke L J 456.

138. Aberbach, *Watchful Eye* at 33, 198-201 (cited in note 7).

139. Former EPA Administrator Lee Thomas described his “disgust” with the process of reauthorizing CERCLA in 1986, focusing on the sheer number of committees involved and how much time was spent “looking for a room big enough to hold everybody.” Department of Housing and Urban Development—Independent Agencies Appropriations for 1987, Hearings before the Subcommittee on HUD-Independent Agencies of the House Committee on Appropriations, 99th Cong, 2d Sess 160 (1986).

140. For instance, 132 members of the House were responsible for the negotiations on different aspects of the Conference Committee’s consideration of the 1990 Clean Air Act bill. See *Lengthy List of House Conferees Promises an Unwieldy CAA Conference Most Say*, 11 Inside EPA 13 (July 6, 1990). Some credit (or blame) Representative John Dingell, who was responsible for the appointment of 132 members to the Conference Committee, for having “singlehandedly blocked revision or reauthorization of the Clean Air Act [from 1979 to 1990], acting to protect the biggest special interest in his home town (Detroit), the auto industry.” Barnes, 100 Pub Interest at 53 (cited in note 73).

141. Congress did, however, enact a limited pollution prevention bill in the final days of the 101st Congress as part of the budget reconciliation package. See Pub L No 101-508, § 6601, 104 Stat 1388 (1990); 136 Cong Rec H12517 (Oct 26, 1990). Congress, however, apparently failed to appropriate adequate funding for implementation of the bill’s provisions. See *Budget Limits Affecting EPA’s Ability to Implement New Pollution Prevention Law*, 21 Envir Rptr (BNA) 2039 (March 1991).

142. See *Majority Leader Intervenes to Break Senate Deadlock over EPA Elevation Bill*, 11 Inside EPA 3 (June 8, 1990); *EPA Cabinet Bill Dead for this Year, Some Fault Administration Inaction*, 11 Inside EPA 3 (Nov 2, 1990). Every time the legislation conferring cabinet status upon EPA freed itself of one problem, another emerged, prompting speculation that EPA’s cabinet status was itself sufficiently threatening to vested interests to ensure the legislation’s defeat. By the end of 1991, however, just before this symposium issue went to press, Congress finally passed a version of EPA cabinet legislation that appeared to be stripped of past controversies, and the House seemed interested in its

V

POSSIBLE REFORMS FOR IMPROVING CONGRESSIONAL
OVERSIGHT OF EPA

Congress could address in a variety of ways the problems to which its oversight of EPA has contributed. First, Congress, especially the House, could reduce fragmentation in oversight authority over EPA by reducing the number of standing committees and subcommittees with jurisdiction over the agency. Much of the intensity of present congressional oversight of EPA appears to be due to the current system, under which closely related (and sometimes duplicative) hearings are held by different committees and subcommittees. A second, related reform would be for Congress to establish mechanisms for improving coordination of congressional oversight among existing committees. For instance, Congress could establish a formal oversight agenda that set out a systematic, comprehensive, and long-term program for the examination of the various environmental laws and their implementation by EPA.¹⁴³ Interested committees could join together in a hearing, but the topic, not a particular committee or subcommittee, would trigger the hearing pursuant to the pre-established oversight agenda. Ad hoc hearings that were not part of the formal oversight agenda would be discouraged.

A related way to improve coordination and weed out unnecessary hearings would be to require committees and subcommittees to establish their own oversight agendas and to discuss their plans with other potentially interested committees.¹⁴⁴ To that same end, each committee or subcommittee could be required to prepare a formal written justification for an oversight hearing prior to arranging the hearing itself. Such reports could require descriptions of the hearing's purpose; its relationship to the committee's jurisdiction and to the oversight agendas of Congress and the relevant committee or subcommittee; the committee's efforts to coordinate the hearing with any other committee with related jurisdiction; the committee's discussion with the agency about the need for an oversight hearing; and the anticipated cost of the hearing. The reporting requirement could extend to written statements following the hearing concerning the steps taken by the committee, if any, to address the problems identified. Requiring such justifications, without more,

adoption. See 137 Cong Rec S14012-32; *Senate Passes EPA Cabinet-Level Bill, Adds Amendment on Statistics and Confidentiality*, 22 Envir Rptr Curr Dev (BNA) 1407 (Oct 4, 1991).

143. NAPA, *Oversight Study* at 44-46 (cited in note 9).

144. The Senate Committee on Government Operations made two related recommendations in 1977:

To improve coordination of oversight activities the Congress should require that all committees with responsibility for oversight of regulatory agencies report on their oversight plans each session. Such reports would be submitted to the Senate Rules Committee or the House Administration Committee along with each committee's annual budget. . . .

The Senate and House should require standing committees to include in their legislative reports a summary of any oversight findings and recommendations made by other committees, providing that they are made on a timely basis.

Senate Study on Federal Regulation at 98 (cited in note 8).

might chill some of the more impulsive, mostly self-aggrandizing, and less valuable, oversight hearings.

A more ambitious (and therefore controversial) reform would supplement the procedural reporting requirement with measures intended to make the standing committee and subcommittee chairs more accountable for their decisions to convene full oversight hearings. Presently, a standing chair's authority to convene a hearing is subject only to committee budgetary and timing limitations,¹⁴⁵ and the possibility that another committee might complain to the rules committee that the hearing lies outside the first committee's assigned jurisdiction.¹⁴⁶

One possible method to promote accountability would be to tie the committee's future budget requests more closely to the merits of its past oversight justifications.¹⁴⁷ If a standing committee or subcommittee chair became persuaded that its oversight budget would be adversely affected by the appearance of impulsive, unnecessary hearings, or the absence of meaningful follow-through subsequent to a hearing, the chair might exercise more care when considering the merits of a particular oversight proposal.

A related reform would allocate most oversight funding to systematic evaluation of agency statutes as prescribed by a formal congressional oversight agenda, and leave budgetary requests for ad hoc oversight to applications from a limited amount of remaining funds. The National Academy of Public Administration recently recommended just such a

145. Examination of the rules of the relevant Senate and House committees did not reveal any general limitations on a subcommittee chair's authority to convene an oversight hearing, except for those pertaining to space, timing, and budget. See generally Senate Committee on Rules and Administration, 101st Cong, 1st Sess, *Authority and Rules of the Senate Committees* (Comm Print, 1990); House Committee on Rules, 101st Cong, 1st Sess, *Rules Adopted by the Committees of the House of Representatives* (Comm Print, 1990). In those circumstances when the subcommittee chair must seek the standing committee chair's prior permission, those requests are likely granted on a pro forma basis, particularly if the hearing will occur in Washington, D.C. (and therefore not require significant expenditures from the standing committee's budget). In isolated instances, of course, the standing committee chair may advise against the subcommittee hearing—perhaps because the full committee itself would like to take up the issue—because another congressperson with a constituent who wishes to avoid the hearing has successfully bent the full committee chair's ear, or simply as a sanction for an unrelated transgression by the subcommittee chair. Because, however, the current rules do not appear to limit significantly a subcommittee's ability to convene an oversight hearing, one possible reform would be to impose some limitations. For instance, a subcommittee might be required to seek the standing committee chair's approval of an oversight hearing outside the pre-established oversight agenda. Given such authority, the standing committee chair, for instance, might determine that the hearing was too broad in scope and could be justified only if joined by other committees with related jurisdiction, or was simply excessive in light of the committee's other oversight endeavors during the session.

146. Of course, others on the committee may likewise request a committee meeting or hearing on a particular topic. For instance, the rules for both the Senate Committee on Governmental Affairs (Rule 1(b)) and the House Committee on Energy and Commerce (Rule 2(c)), like rules for other committees, provide that if three members of the committee (or subcommittee) request the chair to convene a meeting and the chair does not do so within seven days, then the meeting will be held if a majority of those on the committee support the request.

147. A 1977 Senate Committee recommendation sought to tie in oversight to budget requests by requiring that each committee include a report on its oversight plans in its budget request. See note 144.

reform.¹⁴⁸ Under its proposal, certain funds would be set aside for special oversight projects, and the House and Senate leadership would work with the committees to establish guidelines for awarding those funds.

Another area for reform would involve somehow bridging the philosophical gap that has persisted between the authorization committees responsible for drafting the laws implemented by EPA and the appropriations committees responsible for determining EPA's budget. The whipsawing of EPA between these two types of committees might be diminished, or at least the conflict redirected, by increasing coordination and channels of communication between them. For instance, those who draft the statutes within EPA's charge presently appear to make little effort to ensure that the agency receives the level of funding necessary to do its work. If representatives on the relevant standing authorization committees testified more routinely before the appropriations committees concerning the need for specified levels of agency funding, they might provide an authoritative voice in favor of funding that is otherwise currently lacking from the budget process.¹⁴⁹ Congress also should reduce its use of appropriations riders that seek, in effect, to amend the existing law.¹⁵⁰ At the very least, such riders should, as a matter of congressional rule, require referral to the authorization committee(s) with jurisdiction over the underlying federal statutory program.¹⁵¹

Finally, some thoughtful suggestions have been made concerning how to discourage Congress from imposing unrealistic statutory mandates on EPA. Mere exhortation for Congress to do better and to be fairer is, unfortunately, likely to fall on deaf ears. A better approach might be to institutionalize some procedures that would make those results more likely. One proposal would require the committee to consider the views of OTA or GAO concerning the reasonableness of a particular mandate (including the deadline) prior to its imposition.¹⁵² Finally, the National Academy of Sciences once suggested the possibility of allowing EPA to extend deadlines for prescribed time periods in certain circumstances.¹⁵³

148. NAPA, *Oversight Study* at 46 (cited in note 9).

149. EESI, *Statutory Deadlines in Environmental Legislation* at xii-xiii (cited in note 93).

150. Many have criticized the use of appropriations riders as a matter of policy, and some have argued that they are unconstitutional. See, for example, Victor M. Sher & Carol Sue Hunting, *Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 Harv Envir L Rev 435 (1991); Rabkin, 100 Pub Interest at 126 (cited in note 7). The Ninth Circuit, in fact, recently held unconstitutional (under separation of powers doctrine) an appropriations rider that limited the court's jurisdiction to review a particular environmental management decision of the Department of Agriculture's Forest Service. The Supreme Court has decided to review that decision. See *Seattle Audubon Society v Robertson*, 914 F2d 1311 (9th Cir 1990), cert granted, No 90-1596, 59 USLW 3865 (1991).

151. Another possible alternative is for reviewing courts to pay greater heed to appropriations language when discerning congressional intent.

152. The Congressional Budget Office, however, does currently include an estimate of the cost of proposed legislation in House and Senate reports on bills that committees report out. See, for example, S Rep No 101-262, 101st Cong, 2d Sess 58-60 (1990) (report on the Department of the Environment Act of 1990).

153. *Decisionmaking in the EPA* at 66-71 (cited in note 97).

VI

QUESTIONS CONCERNING THE WISDOM, EFFECTIVENESS, AND
POLITICAL FEASIBILITY OF OVERSIGHT REFORM

Serious questions remain concerning whether any of these reforms would be wise, especially effective, or politically feasible. With regard to the wisdom of reform, the danger always exists that the cure could be worse than the disease. Reforms that reduce poor oversight practices might simultaneously decrease those that have proven most valuable.

It is also exceedingly difficult to distinguish "good" from "bad" oversight. There are few obvious objective criteria for oversight's evaluation. The beauty or ugliness of oversight lies largely in the eye of the beholder, with the answer to an inquiry concerning a particular oversight activity's worth likely turning on whether the evaluator shares values and preferences similar to those of the overseer. For this reason, even if we were able to determine what kind of oversight would be reduced by a particular reform of current congressional oversight practices, little consensus concerning whether that reform would constitute a net improvement is likely.

Another potential problem with discouraging congressional oversight is that it might encourage an increase in detailed legislative prescription. Authorization committees, in other words, would seek to control the agency through precise legislation if they were unable to use the leverage of oversight to influence agency behavior. For the reasons already described,¹⁵⁴ an increase in detailed legislative prescription would probably be a step in the wrong direction in the evolution of federal environmental law.

It is also unclear how effective these reforms would be in redressing the adverse effects of oversight previously identified.¹⁵⁵ The reforms principally concern the kind of formal oversight conducted in agency hearings. Less formal oversight, however, may also contribute to EPA's problems. In addition, congressional oversight is hardly the sole cause of many of these problems; EPA's predicament is a product of a continuing clash of institutional forces. For this reason, restricting one factor in the equation may be a necessary but not a sufficient remedial measure. Indeed, the disequilibrium created by such a unilateral decrease of one factor could create new problems. For instance, Congress's current oversight excesses are partly in response to the excesses displayed by OMB;¹⁵⁶ restricting the former without limiting the latter would enhance OMB's power considerably.

Finally, there is even greater reason to question the political feasibility of any of these reforms. It seems virtually impossible to prompt Congress to adopt even the more modest proposals, let alone to persuade legislators to cease assigning impossible tasks to EPA. The EPA administrators have long complained about the phenomena of congressional oversight and sought to

154. See text accompanying notes 125-126.

155. See text accompanying notes 122-142.

156. See text accompanying notes 56, 114.

reduce the number of committee overseers.¹⁵⁷ In addition, the National Academy of Sciences reported twenty years ago that congressional reorganization was a prerequisite to effective federal governmental management of the environment.¹⁵⁸ The Academy has likewise recommended that Congress take measures to avoid imposing unreasonable deadlines on the agency.¹⁵⁹ The Administrative Conference echoes these sentiments.¹⁶⁰

At most, however, Congress has made only minimal efforts to improve the situation by restructuring committee jurisdiction, reforming oversight practices, or taking more care in imposing deadlines. In the early 1970s, Congress failed to follow through on a fairly modest proposal to create a joint committee on the environment.¹⁶¹ Efforts in the mid-1970s to restructure committee jurisdiction were only somewhat successful in diminishing the fragmentation of authority over environmental matters. The Senate achieved substantial consolidation with its creation of the Senate Committee on the Environment and Public Works in the mid-1970s,¹⁶² but the House defeated a parallel effort.¹⁶³ Probably for this reason, although fragmentation in terms of the sheer number of committees and subcommittees persists in both chambers (and likely cannot be entirely avoided),¹⁶⁴ the problems presented by fragmentation in the House have proven substantially greater than those in the Senate.

Whatever its disadvantages, however, members of Congress do not appear to have sufficient incentives to change the existing system.¹⁶⁵ The aspects of legislative oversight that are problematic are the same ones that make reform less likely. Decentralization, fragmentation of committee authority, and the

157. See Congress and the Nation's Environment, Environmental and Natural Resources Affairs of the 92nd Congress, Senate Committee on Interior and Insular Affairs, 93d Cong, 1st Sess 845 (1973); Peggy Wiehl, *Ruckelshaus and EPA: Case Program—John F. Kennedy School of Government, Harvard University* 13 (Harvard U Press, 1974); Douglas Costle, *A Regulator's Path Isn't a Rose Garden*, NY Times E21 (April 24, 1983); Reilly, *The Turning Point* at 9 (cited in note 34).

158. See Institutions for Effective Management of the Environment, Report of the Environmental Study Group to the Environmental Studies Board of the National Academy of Sciences and National Academy of Engineering Pt 1, 52 (Nat'l Acad Sciences, 1970).

159. See text accompanying note 153.

160. See Edward Tomlinson, *Report on the Experience of Various Agencies with Statutory Limits Applicable to Licensing or Clearance Functions and to Rulemaking*, in Administrative Conference of the United States, Recommendations and Reports 122 (1978).

161. See Environmental Policy Division, Congressional Research Service of the Library of Congress, Congress and the Nation's Environment, Environmental and Natural Resources Affairs of the 93rd Congress, Senate Committee on Interior and Insular Affairs, 98th Cong, 1st Sess 833-36 (1983); see also Report of the Council on Environmental Quality, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 91st Cong, 2d Sess 2 (1970) (statement of Sen. Muskie).

162. Dodd & Schott, *Congress and the Administrative State* at 186-88 (cited in note 18); History of the Senate Committee at 14-18 (cited in note 48).

163. See Henry C. Kenski & Margaret Corgan Kenski, *Congress against the President: The Struggle Over the Environment*, in Vig & Kraft, eds, *Reagan's New Agenda* at 110 (cited in note 91); see also NAPA, *Oversight Study* at 15-16 (cited in note 9).

164. Because the impact of environmental laws is so sweeping, some fragmentation is unavoidable.

165. Dodd & Schott, *Congress and the Administrative State* at 273, 326 (cited in note 18).

absence of checks on oversight all empower individual legislators by providing them with leverage over an agency that can enhance their reelection prospects and national prestige.¹⁶⁶ Elected representatives naturally prefer high visibility committees with jurisdiction over pressing national issues like environmental protection.¹⁶⁷ They are therefore likely to resist, as they have in the past,¹⁶⁸ any reforms that rely on reduced subcommittee jurisdiction and the centralization of authority.

Congress has never displayed a predilection to regulate itself.¹⁶⁹ Very little effective oversight of legislative appropriations exists, which is one reason why the number of congressional staff has grown exponentially in recent years. No effective authority is positioned to second-guess the wisdom of such an expansion. Likewise, there is relatively little effort to circumscribe the authority of the subcommittee chairs. The absence of restrictions on congressional oversight simply reflects Congress's general reluctance to regulate itself.

VII

CONCLUSION

The adverse effects of congressional oversight appear to be substantial. But do they mean that congressional oversight should be eliminated? Absolutely not. The practical advantages of oversight are too numerous, and its importance to our system of government is too central. Congressional oversight is, after all, Congress's most effective way to curb abuses by another branch of government and is also necessary for Congress's development of

166. NAPA, *Oversight Study* at 12 (cited in note 9); Dodd & Schott, *Congress and the Administrative State* at 273, 326 (cited in note 18). For instance, representatives and senators routinely threaten to affect an agency's programs adversely (for example, cutting appropriations or delaying confirmation of its appointees) unless the agency agrees to respond to a problem within the member's district (or state). EPA, like other agencies, frequently has little practical choice. It must choose the path of least resistance and attempt to placate the legislator's parochial concerns. Aberbach, *Watchful Eye* at 7 (cited in note 7). Even an agency's failure to consult with an interested subcommittee prior to making a decision may trigger severe congressional retribution. See Thomas Watson, *Panel Cuts Budget in Showdown with Justice Department*, 8:5 Legal Times of Washington 17 (June 25, 1990) (recommending 10% budget cut in Office of Legal Counsel because it issued an opinion without prior opportunity for review by House subcommittee). See, for example, *EPA Nominees Break Free from Hold by Senator Concerned about Superfund Site*, 10 Inside EPA 4-5 (Nov 24, 1989) (Senator Metzenbaum placed "hold" on two nominees to assistant administrator positions at EPA until Administrator Reilly satisfied him that EPA would rectify specific problem at a Superfund site in Ohio, the senator's home state).

167. See Barbara Sinclair, *The Distribution of Committee Positions in the United States Senate: Explaining Institutional Change*, 32 Am J Pol Sci 276, 297 (1988); see also Charles S. Bullock, III, *United States Senate Committee Assignments: Preference, Motivation, and Success*, 29 Am J Pol Sci 789 (1985).

168. Aberbach notes that the more a reform opens the possibility of centralized control of the oversight agenda and the more comprehensive the reviews it encourages—reviews cutting across committee jurisdictions and increasing the vulnerability of programs to actions by those outside the committees—the more resistance it is likely to meet in Congress. Aberbach, *Watchful Eye* at 207 (cited in note 7).

169. Congress' longstanding refusal to extend fully the protection of the nondiscrimination provisions of the Civil Rights Act to its own staff is a stark example.

legislation.¹⁷⁰ The adverse effects on EPA and on the fashioning and implementation of federal environmental law also do not support singling out environmental law for drastic reductions in congressional oversight. Though the adverse effects are substantial, they do not appear to be greater than the associated benefits. The federal environmental statutes and EPA have made significant achievements during the last twenty years. Substantial improvements in environmental quality have been made in some areas and at least a resistance to more environmental degradation has emerged in many other areas, despite a growing level of industrial activity.¹⁷¹ Congressional oversight has played an instrumental role in many of those accomplishments.

The substantial adverse effects on EPA of congressional oversight nonetheless strongly suggest that reformation of the oversight process is warranted. The problems are not unique to EPA, but they appear there to have been realized to an unprecedented extent. Even more importantly, EPA can ill afford such problems.

There is a growing consensus that future environmental protection efforts will need to do more than merely continue past regulatory regimes.¹⁷² Priorities need to be shifted, and new approaches to environmental control will be required. Whatever their precise identity, the tasks will require a strong and invigorated EPA. An important lesson of the last twenty years, however, is that the existing fragmented, uncoordinated, and undisciplined regime of congressional oversight has been a substantial impediment to the kind of paradigmatic shifts in approach and institutional structures that appear now to be necessary.

To be sure, there is reason to be concerned that oversight reform might unintentionally eliminate some oversight that would have proven valuable. Some loss is unavoidable. However, it seems unlikely that the costs in terms of lost oversight would be greater than the benefits of reform. Under the current system, there is virtually no meaningful check on congressional oversight. The question of how much accountability is warranted can be debated. But it seems fairly certain that significantly more accountability than is presently provided could be added with little risk of it being so excessive as to chill the good along with the bad. In the long run, fundamental change will no doubt occur only upon bridging the current gap that persists between public aspirations for environmental protection and public willingness to make the changes necessary for those aspirations to be realized. In the

170. See *Watkins v United States*, 354 US 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process.").

171. See Council on Environmental Quality, *Environmental Quality—Twentieth Annual Report* 7-11 (U.S. Govt Printing Office, 1990).

172. See, for example, the statement by the EPA advisory board:

[T]his kind of fragmented approach to protecting the environment will not be as successful in the future as it has been in the past. . . . Given the diversity, complexity, and scope of the environmental problems of concern today, it is critically important that U.S. environmental policy evolves in several fundamental ways.

EPA Science Advisory Board, *Reducing Risk* at 1 (cited in note 133); see also Arnold W. Reitze, Jr., *Environmental Policy—It Is Time for a New Beginning*, 15 Colum J Envir L 111 (1989).

meantime, however, Congress, like the other branches of government, could facilitate that result by improving its own decisionmaking through the use of procedures designed to reduce impulsiveness and promote reasoned contemplation. That should hardly seem a controversial proposition.

Nonetheless, it is probably foolhardy to believe that Congress will soon reform its oversight practices. Indeed, such a call for congressional reform may be as unrealistic as many of the mandates included by Congress in some of its early environmental statutes. The thesis of this paper is not, however, that Congress will, in fact, initiate reform any time soon. It is rather that an appreciation of the effects of congressional oversight on EPA and on the development of federal environmental law over the last two decades suggests that Congress should.

