ENFORCEMENT DISCRETION AND THE US ENVIRONMENTAL PROTECTION AGENCY: USE, ABUSE AND CONTROL

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Introduction

For four years - from 1979 until 1983 - I served as a lawyer, a defensive litigator, with the US Environmental Protection Agency (EPA). During that period, a new president took office, a president who as a candidate for that office had favoured the easing of stringent environmental legislation, had repeatedly attacked the Clean Air Act, and had blamed environmental regulation for slowing the rate of industrial expansion. Given the antipathy of Ronald Reagan and his administration toward environmental protection, one might have expected the White House and EPA to mount a frontal assault upon the statutory culprits, including the Clean Air Act which was, fortuitously for the administration, slated for reauthorisation and amendment. For a while, in fact, the attack seemed imminent as the political leadership at EPA began to work on a weaker version of the Clean Air Act. That strategy, however, was soon abandoned apparently for want of political support.

Despite his electoral success, Ronald Reagan simply never possessed a popular mandate to reverse the environmental progress of the previous decade. Public support for strong environmental protection had not wavered, and Congress, perhaps as a consequence, could not be relied upon as an ally in the fight against existing environmental legislation. It seems clear that a radically revised Clean Air Act would have been 'dead on arrival' in the Democratic House of Representatives and that it would have had a most difficult time in the Republican controlled Senate - where I suspect a number of independently-minded Republicans would have opposed the president.

Unable to muster public support for legislative reform and seemingly unlikely to obtain congressional approval, the Reagan administration adopted a different strategy for weakening EPA - a strategy that avoided the necessity of seeking congressional support for basic statutory change. This alternative strategy involved the use of unilateral, low visibility actions to reshape and dilute environmental regulation - a long series of crippling reorganisations, personnel cuts, the appointment of loyal ideologues unfamiliar with environmental affairs, and a clear, but unstated, policy against vigorous federal enforcement of environmental standards and limitations.

Such a low-profile administrative approach succeeded in reducing environmental enforcement efforts for a considerable period of time. During 1981-1983, the number of administrative and civil enforcement actions plunged dramatically from previous levels. Enforcement lawyers at EPA seemed to have little to do but solve crossword puzzles and speculate about their rather uncertain future.

This neglect of the Agency's obligation to execute faithfully its statutory mission has prompted me to reconsider the wisdom of

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the traditional view that government agencies should possess unfettered enforcement discretion. After considerable reflection, I submit that the discretion to enforce or not to enforce the law is a form of governmental power that should be structured and controlled to the extent possible. Such control would lessen the likelihood that future administrations could engage in administrative sabotage of statutory law. Such control, moreover, would also discourage enforcement personnel from being influenced by any other sort of illegitimate political or personal bias.

The task of creating a system which effectively limits and controls enforcement discretion, without destroying the kind of administrative flexibility that good enforcement programs need, is no easy matter. The field of US environmental law, however, is a logical place to examine the question since Congress has attempted for two decades to check and guide the discretion that it gives EPA.

The advent of modern environmental law

Many commentators have described American federal legislation of the late 20th century as predominantly intransitive in nature - legislation which gives administrative agencies broad discretion to implement congressional goals. This observation is linked to the fact that Congress lacks the time and requisite technical ability to draft detailed legislation in areas of great complexity. Not all modern legislation, however, is intransitive. The environmental legislation of the 70s, 80s had 90s has bucked that trend.

If perceived as necessary, Congress certainly has had the staff capability, the committee structure, and the political desire to craft enormously detailed statutes. And Congress certainly felt the need to do so when it came to modern environmental legislation.

Federal efforts to regulate water and air pollution date back to the 1940s and 1950s. The original legislation, even though repeatedly amended during the 1960s, proved completely ineffective. All of that early legislation suffered from the fact that Congress relied too heavily upon state governments to establish and then enforce air and water quality standards. The states simply were not up to the challenge.

Many states never adopted the necessary standards because they lacked the scientific expertise or the political will. Even when standards were adopted, they tended toward the lowest common denominator since our states are in perpetual competition for new industry and development. Enforcement of those standards, not surprisingly, was almost non-existent - even at the federal level because state governments possessed a de facto veto power over most federal enforcement actions. A strong federal presence was clearly required if the United States was ever going to successfully tackle the continued degradation of its air and water resources.

That strong federal presence was provided by the innovative environmental legislation of the 1970s - the first environmental decade. In both the 1970 Clean Air Act and the 1972 Clean Water Act, Congress placed the primary responsibility for the establishment and implementation of the new regulatory schemes in the hands of the recently created US EPA.

Both statutes, however, did more than transfer most basic decision making to the federal level. Both Acts were extremely detailed pieces of legislation that limited the exercise of administrative discretion by imposing, *inter alia*, a long series of regulatory duties, mandatory schedules, and deadlines on EPA. The statutes, furthermore, created judicial mechanisms that could compel EPA to meet those duties and deadlines.

Why did this legislation evince such a preoccupation with executive discretion? It resulted, in part, from the conjunction of Democratic Congresses and Republican presidents - a situation which prompted Congress to reassert its power as it has from time to time during the course of American history. Congress, moreover, was extremely leery about the ability or even the willingness of the federal bureaucracy to fulfil its statutory mandates. After all, the faith of the American Progressive movement and the New Deal in neutral, scientific administration had tarnished badly over the years. The perception had grown that tired old agencies were likely candidates for regulatory 'capture'. And the experts themselves had fallen from grace - after bringing the country to the brink of nuclear annihilation and ecological devastation.

Congress was more cautious, however, about imposing mandatory enforcement duties to remedy the lack of enforcement under the prior legislation. Consequently, it utilised a broad-gauged strategy to facilitate and encourage vigorous government enforcement action. At times, Congress included the use of mandatory enforcement provisions, but not always. What then were the common ingredients of this approach?

First, Congress eliminated the pre-existing procedural impediments to federal enforcement and also created a wide array of sanctions. Under the Clean Water Act, for example, EPA was authorised (1) to issue administrative orders compelling compliance, (2) to go directly to court to obtain injunctive relief and civil penalties, and (3) to seek criminal penalties. Today - by the way - EPA has the additional option of seeking to impose substantial administrative penalties.

Second, in order to supplement as well as induce government enforcement, Congress empowered private citizens to obtain injunctive relief against violations of the Clean Air and Clean Water Acts. Congress, moreover, gave citizens the right to seek civil penalties under the Clean Water Act.

These citizen suit provisions - as they are commonly known also authorised citizens to sue EPA for any failure to perform a non-discretionary duty under the respective statute. A major issue, therefore, was whether or not to mandate EPA enforcement action and thereby subject enforcement inaction to judicial scrutiny.

Please note that Congress does not encounter a constitutional - separation of powers - problem by mandating civil or administrative enforcement. Although some may contend that the decision to seek a criminal indictment, involving traditional prosecutorial discretion, implicates a core executive function, American courts have clearly recognised that Congress may compel administrative or civil enforcement of the regulatory programs it has created.

The federal courts, however, labour under a presumption that such enforcement decisions are normally committed to the absolute discretion of the executive branch and hence are unreviewable. In order to rebut the presumption, Congress must indicate an intention to limit agency enforcement discretion and provide standards for defining the limits of that discretion - in other words, Congress must provide some law to apply.

So, although Congress possessed the power, it still had to decide whether to limit EPA's discretion and authorise judicial review for enforcement inaction. The question was not easy to resolve. On the one hand, the courts certainly are not the most desirable forum in which to review decisions about enforcement priorities, agency resources, and so on. On the other hand, Congress was angry about the prior lack of enforcement and quite sceptical about the Agency's ability

to maintain a strong enforcement program.

The Clean Air Act experience

The Senate, accordingly, tried to mandate EPA enforcement in the 1970 Clean Air Act. Its bill provided that upon a finding of violation EPA had to issue an administrative order. If a polluter did not comply with the order, EPA was directed to seek its enforcement in a federal court. The Senate bill also provided that a citizen suit against EPA would lie wherever EPA failed to execute these enforcement duties.

The House version of the bill, by contrast, contained none of these innovations - not even a citizen suit provision. Thus a showdown came during the deliberations of the conference committee. There Senator Muskie, the primary author of the Senate bill, succeeded in obtaining agreement to permit citizen suits against polluters and against EPA in order to enforce its mandatory duties. EPA's enforcement duties, however, were made discretionary. The contours of this compromise may have been shaped by an unusual step taken by the Nixon administration.

It had sent a letter to the conference praising the citizen suit provision in general, but criticising the provision that allowed citizens to challenge enforcement inaction. The administration argued that such suits would reduce the overall effectiveness of the air pollution program by distorting the agency's enforcement priorities. And the administration carried the day.

The Clean Water Act experience

Senator Muskie apparently did not want to experience such a defeat again for his version of the Clean Water Act, introduced in 1971, contained discretionary language relating to federal enforcement. Both Muskie's bill and the bill introduced for the Nixon administration, however, were attacked during the public hearings for that precise reason. The Sierra Club, for example, stated that:

> [T]he time has long passed . . . when the Federal Government should have the choice of acting or not acting in the courts or through other means to curb [water] pollution. These enforcement sections need to be tightened up by substituting the word 'shall', whenever the word 'may' now occurs.

This onslaught did not go unheeded. When the Senate subcommittee released its marked-up bill, it was replete with mandatory enforcement directives. Essentially, EPA was required to institute administrative or civil enforcement proceedings in the case of any violation where a state had not already acted.

The full Senate committee accepted this language, but added a twist in its report. After indicating that enforcement was mandatory, thus subjecting inaction to judicial review, the report stated that EPA, nevertheless, should husband its resources for the most serious cases. While that may seem like a contradiction, I don't think it is. In my opinion, the Senate bill gave EPA some discretion to determine the seriousness of a violation and to set priorities, but also gave district courts jurisdiction to determine whether EPA had, in specific cases, abused that limited discretion.

After the Senate version was merged with the House version, however, the situation became even more confused. The resulting law provides that, upon finding a violation, EPA must issue an administrative order or file a civil suit. Nevertheless, it later states that the filing of a civil action is merely authorised - in other words, discretionary. What in the world was the intent of Congress? The Senate conferees told the Senate that the differences between the two chambers had been resolved in the

following fashion: while the issuance of administrative enforcement orders remained mandatory, the filing of civil actions was made discretionary.

The federal courts have really struggled with this language. At least five district courts have held that the issuance of administrative orders is mandatory, while four have found it discretionary. But the matter has been largely settled by two courts of appeal which have held that EPA enforcement is completely discretionary. I believe that those two decisions were mistaken - neither court read the legislative history completely or sympathetically, both were too keen to conclude that the legislative history was ambiguous, and both seemed too hostile to the notion that Congress can validly and appropriately limit the exercise of enforcement discretion.

Congress, nevertheless, had left the statutory language and its legislative history in a bit of a muddle. Perhaps this problem was caused by the fact that Congress and the courts tend to speak and think in terms of absolute mandatory enforcement, on the one hand, or complete discretion, on the other. One extreme or the other. I believe, rather, that they ought to think in terms of limited enforcement discretion - giving an agency enough discretion to order its priorities while providing safeguards against the abuse of that discretion.

The contemporary situation

Since 1972, Congress - when it has tried to limit enforcement discretion - has done so in exceedingly simplistic fashion. The Safe Drinking Water Act amendments of 1986 provide a good example. Upset by the general fall in enforcement during the early 1980s and dismayed about the nearly total lack of drinking water enforcement, Congress enacted a rather harsh remedy. In the absence of state action, each and every violation of drinking water standards will trigger a mandatory federal duty to issue a compliance order or to commence a civil action.

The problem with such an approach quickly becomes obvious. In 1987, 37,000 public drinking water systems committed over 100,000 violations. Neither EPA nor the states, of course, possess the resources to act against such a large number of violations. And not all such violations really merit formal action since many are relatively minor infractions.

Has this approach - this overbroad approach - encouraged EPA to be more vigorous? Well, the Act is so clear and the anger so palpable that Congress did catch EPA's attention. Federal enforcement efforts under the Safe Drinking Water Act have expanded fivefold since 1987. The National Wildlife Federation, however, has not been satisfied. It wants more and has filed suit to get it.

Such lawsuits, while exposing some possible problems at EPA, may create new ones. Attempts to push the agency toward full enforcement in one program area could well siphon enforcement personnel from other programs where their work is more valuable. And even if one stops short of demanding full enforcement, private litigants could conceivably force the agency to act against minor violations while leaving more serious ones unattended. The possibility that judicial action could cause such distortions at EPA might even prompt a reviewing court to nullify the mandatory nature of this provision by holding that the finding of violation is a discretionary condition precedent to the mandatory duty. That is a lot of rubbish, but the courts have used such devices in the past to avoid distasteful results.

So what should Congress do? Should it abandon the search for a legislative solution and simply increase its oversight of EPA's enforcement program, using

public criticism to encourage vigorous action?

Well, more congressional oversight certainly would be a fine thing, but I seriously doubt whether Congress could consistently summon enough interest in the tedious details of EPA enforcement to be a really effective monitor. And the experience with congressional oversight during the early 1980s appears to support my point.

During 1981 and 1982, it was fairly clear that the EPA enforcement program was being destroyed. The enforcement division had been abolished, its personnel were being shunted continually from one office to another, the number of enforcement actions had fallen precipitously, and thousands of young dedicated civil servants were leaving the Agency. While individual members of Congress decried these developments, the subject apparently was not 'chic' enough to warrant a major congressional inquiry.

Although the administrator of EPA, Anne Gorsuch, and 20 of her top aides were fired or resigned in 1983, it was not due to their attempts to subvert law enforcement at EPA. Rather it was because a really spicy political scandal had emerged. In late 1982, a congressional inquiry uncovered the possibility that the administration had manipulated the superfund program for political ends, that agency officials may have lied under oath about it, and that relevant documents may have been shredded. It was the kind of scandal that Congress seems to relish, and I doubt whether diminishing enforcement efforts alone would have led to such a speedy departure of Reagan's first appointee as EPA administrator.

In order to recover from the public relations debacle emanating from the scandal, the administration eventually appointed Bill Ruckelshaus as administrator of EPA. Soon, EPA's enforcement program returned to an even keel. Today, under the leadership of Bill Riley, the former president of the Conservation Foundation, EPA enforcement is at or near record levels. In 1989, for example, EPA issued over 4,000 administrative orders, referred over 350 civil cases, obtained 72 criminal convictions, and received over $36 million in civil and criminal penalties.

I am afraid, however, that not all political appointees are as well-intentioned or as devoted to the rule of law as Bill Ruckelshaus and Bill Riley. I am also not confident that major political scandals will always coincide with periods of depressed agency enforcement. Private enforcement efforts, moreover, are not an adequate substitute for a concerted and consistent government program.

Most importantly, EPA simply cannot afford to endure another serious hiatus in enforcement. The success of its regulatory schemes and its credibility as an agency depend upon vigorous enforcement. The fiasco of the early 1980s so damaged EPA's reputation, in fact, that the Agency still suffers today from a lingering sense of public distrust.

A possible approach to the structuring of enforcement discretion

Perhaps Congress should take some legislative action that would help ensure that EPA maintains the motivation necessary for a credible and vigorous enforcement program. Such action would involve the creation of enforcement duties the breach of which could be challenged in court. Such duties need not mandate enforcement against every single technical violation. In fact, the duty to act may be tied to cases that satisfy a set of predetermined criteria.

Congress could, for instance, authorise enforcement against all violations of the Clean Water Act, but mandate it for any 'significant violation'. Congress could then order EPA to promulgate an

informal rule to implement that scheme. I suggest, furthermore, that Congress guide that rulemaking by setting forth a number of statutory criteria to be considered when EPA defines 'significant violation'. Such criteria might well include the extent and magnitude of the violation, whether toxic substances were involved, the strength of the evidence, and so on. The Agency, in turn, could turn to its accumulated enforcement experience and existing staff guidance to fashion specific regulations along the lines established by Congress.

I suggest that this be done by administrative rulemaking for three reasons. First, informal notice-and-comment rulemaking would enhance the rationality of the decision making process by providing EPA with a broader range of information and opinion. Second, the utilisation of rulemaking procedures would create a barrier against hasty, ill-informed, or politically motivated changes in enforcement policy. The process would give citizens the time and knowledge they need to seek help from Congress should another administration decide to repeal legislation by simply failing to enforce it. And third, the existence of regulatory criteria would give career civil servants a tool to use against their political superiors - cases satisfying the criteria must proceed as a matter of law, at least until a new rulemaking alters the criteria.

There is at least one major problem with this approach. Industry and environmental groups could drag each rulemaking through an exhaustive judicial challenge. And there could be many such challenges since enforcement priorities are bound to change in response to newly perceived problems, redefined priorities, and budgetary expansions or contractions. Since these rulemakings need to proceed fairly expeditiously to keep enforcement policy current, Congress should preclude judicial review for these particular rulemakings. I personally don't care for preclusion as a general matter, but in this instance it seems absolutely necessary for the maintenance of an effective enforcement program. Furthermore, public notice, public scrutiny, and possible congressional oversight should serve to dissuade the Agency, in most instances, from the promulgation of substantively poor criteria.

Under this scheme, a citizen could judicially challenge EPA inaction in the face of an alleged 'significant violation'. In such a case, a federal district court would have to determine, after examining the decision document and any other relevant portions of the administrative record, whether the agency had applied its regulatory criteria in an arbitrary or capricious manner. Such decisions implicate agency expertise and are entitled to some deference. But no deference should shield an irrational refusal to enforce because inaction in that instance would clearly breach EPA's statutory duty to act. Hopefully, such cases will be few in number - since the existence of transparent, publicly available, and legally binding enforcement guidance should encourage the prudent exercise of enforcement discretion.

Conclusion

In the absence of a scandal or serious difficulties with EPA enforcement, I am afraid that Congress is unlikely to turn to such remedial measures. When enforcement problems arise, however, it will be too late. Perhaps, therefore, Congress should consider some new agency-forcing approaches that seek to ensure that EPA will continue faithfully to enforce the law.