COMPETITIVE ENTERPRISE INSTITUTE

APPROPRIATIONS RIDERS AND ENVIRONMENTAL REFORM: HOW APPROPRIATE?

Scott H. Segal
and
Jonathan H. Adler

CEI Environmental Discussion Paper 95-3

September 15, 1995

1001 Connecticut Avenue, NW • Suite 1250 • Washington, D.C. 20036 • Telephone: (202) 331-1010 • Fax: (202) 331-0640

APPROPRIATIONS RIDERS AND ENVIRONMENTAL REFORM: HOW APPROPRIATE?

Scott H. Segal*
and
Jonathan H. Adler**

Introduction

The reform and restriction of federal regulatory programs is a key element of the conservative Congressional agenda. Many victorious candidates for the House of Representatives campaigned against government bureaucrats and the seemingly serpentine maze of federal regulatory edicts. Regulatory reform was also a significant component of the House Republicans "Contract With America." Any serious regulatory reform effort must address current environmental laws. There are extensive federal statutes covering air, water, waste, species diversity and land use that all have significant, though largely unmonitored, economic impacts.

Reforming the dozen or so major federal environmental statutes is a task far beyond the scope of any one Congressional session. Even were the 104th Congress to devote the lion's share of its efforts to environmental programs, it is unlikely that more than a few major environmental laws would be reformed in any one year.

To address the perceived excesses of federal environmental regulation prior to the enactment of new or amended environmental statutes, the House of Representatives attached appropriations limitations or "riders" to spending bills that prevent the Environmental Protection Agency and other federal entities from using taxpayer dollars in specified ways. In this sense, the riders are designed to limit the federal government's most extreme regulatory excesses until such time when Congress can reform the underlying statutes.

The use of appropriations riders by the 104th Congress has been extremely controversial, particularly in the area of environmental protection. Environmental Protection Agency Administrator Carol Browner alleges that the appropriations riders placed on the EPA by the House are part of "an organized, concerted effort to undermine health protections."[1] Citizens for Sensible Safeguards (CSS), a pro-regulatory coalition of labor, environmental and

---

* Scott Segal is a legislative attorney with the Washington Office of Houston-based Bracewell & Patterson, L.L.P. Mr. Segal is an adjunct professor of environmental management at University of Maryland University College.

** Jonathan H. Adler is Director of Environmental Studies at the Competitive Enterprise Institute in Washington, D.C. He is the author of *Environmentalists at the Crossroads: Green Activism in America* (Capital Research Center, forthcoming), and contributed the chapter "Clean Fuels, Dirty Air" to *Environmental Politics: Public Costs, Private Rewards* (Praeger, 1992).

The authors note that research appearing in this document will also appear in the *Texas Environmental Law Journal*, a publication of the State Bar of Texas.

consumerist groups, issued a report, *Back Door Extremism: Misusing the Appropriations Process to Gut public Protections*, that decried the appropriations limitations "designed to amend, and even eliminate, important public protections."[2] CSS charged that "This unprecedented attack is a grotesque misuse of the budget process." Yet the use of appropriations riders is not new. Democratically-controlled Congresses have enacted such provisions into law for years, sometimes for environmental purposes.

A larger issue is whether appropriations limitations are ever appropriate in the U.S. constitutional system. The Founding Fathers noted that a constitutional process can best be relied upon to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . ."[3] This constitutional process requires an appropriate balance between executive and legislative prerogatives. This discussion paper will focus upon the exercise of one legislative prerogative -- the appropriations power -- as a mechanism to ensure that balance and perspective is maintained in the execution of environmental laws in the United States.

This paper provides a brief overview of the origin, extent and limitations of the appropriations authority and the recent use of this appropriations authority by the House of Representatives to proscribe certain actions by the Environmental Protection Agency.

Congress' Appropriations Power: Its Origin, Extent and Limitations

The notion of separation of powers is not explicitly recognized in the U.S. Constitution. However, it can be implicitly inferred from the division of labor in cooperative and yet competitive allocation of responsibility between the three coordinate branches of government.[4] One mainstay of the effective distribution of power between the branches of government is the location of "power of the purse" within the U.S. Congress.[5] The Constitution specifically states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."[6]

Calling upon antecedents in English history, the authors of the Constitution viewed the exercise of Congressional authority over appropriations as a key mechanism for ensuring strong but workable separation of powers.[7] During the Philadelphia Convention of 1787, George Mason remarked that the "purse & the sword ought never to get into the same hands, whether legislative or executive."[8] As the young nation developed, it became clear the power of the purse would be a foundational principle establishing the power of the new legislature.[9]

In modern times, the relationship between the legislature and the executive has become much more complicated, particularly in view of the delegation of substantial authority to administrative agencies. As legislation has focused on increasingly "novel or changing fields of activity," the temptation has existed for broader delegation of authority.[10] In the decade of the 1970s, a "flood of regulatory legislation poured out of Congress."[11] In seven years, Congress passed over 40 statutes covering environmental protection, employment, civil rights, energy conservation, consumer protection, and industrial health and safety.

The "flood" of environmental legislation was particularly powerful. The National Environmental Policy Act was signed into law on January 1, 1970. Congress quickly followed that bill with the Clean Air Act (1970), the Clean Water Act (1972), the Federal Insecticide, Fungicide, and Rodenticide Act (1972), the Endangered Species Act (1973), the Resource Conservation and Recovery Act (1976), the Clean Air Act Amendments (1977), and many others. Still, the demand for more laws was unsatiated. By the end of the following decade, environmental bills accounted for nearly one-fifth of all bills presented to Congress and almost one-quarter of those enacted into law.[12] These statutes charged regulatory agencies with designing and administering vast regulatory programs.

With this delegation comes the risk of decreased accountability -- and a concomitant need for greater political scrutiny of agency actions. Professors Ernest Gellhorn and Barry Boyer note:

> In a constitutional democracy, government institutions which set and enforce public policy must be politically accountable to the electorate. When the legislature delegates broad lawmaking powers to an administrative agency, the popular control provided by direct election of decisionmakers is absent. However, this does not mean that administrative agencies are free from political accountability. In many areas, policy oversight by elected officials in the legislature or the executive branch is a more important check on agency power than judicial review.[13]

Among these political, nonjudicial constraints upon unfettered administrative discretion are appropriations control, investigative oversight, appointments powers, so-called legislative "casework," studies by Congressional support agencies, and "sunset" laws that terminate agencies or regulations upon a predetermined schedule.[14]

While each mechanism for political oversight of the administrative state has an important role in ensuring adequate accountability, the use of the appropriations power has come to take on special significance. One commentator has noted the Constitutional significance of the appropriations power by stating that, "The Constitution presupposes a distinction between the public sphere and the private sphere and permits the expansion of the public sphere only with legislative approval. The appropriations requirement both reflects and implements these fundamental constitutional choices. In specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government."[15]

A more satisfactory approach to concerns about agency excess would be to limit the delegation of legislative functions to executive agencies. New York Law School professor David Schoenbrod, a former attorney with the Natural Resources Defense Council, argues that from a Constitutional perspective Congress should not be allowed to delegate broad powers to agencies and unelected officials.[16] One reform that would achieved this end would be to require explicit Congressional approval of significant rulemaking proposals. Under such a system, Congress would rarely have cause to enact appropriations riders. Another possibility

under discussion is to devolve much regulatory authority from the federal government into the hands of state, regional, and local entitities.

So long as environmental policy decision making rests in the hands of the federal government, and more substantive procedural reforms remain on the drawing board, we would argue that the Congress not only has the right but has the duty to make sure that the executive branch is limited to those activities duly authorized by Congress or otherwise commanded by the Constitution. It is essential to the concept of limited government that the President or other executive branch officials not expend monies from the "public fisc" without the approval of Congress.[17] Indeed, it would be hard to imagine a limited federal government if the Congress did not possess the power to forbid expenditures of public money on particular Administration initiatives. In such a world, the President or his delegatee would simply withdraw money from the Treasury to avoid even statutory prohibitions of governmental actions. [18] Recent examples of such "executive appropriation" demonstrate the institutional dangers of the approach only too well.[19]

Moreover, appropriations riders are a legitimate means of clarifying Congressional intent when agencies exercise their statutorily-authorized discretion in ways with which Congress disagrees. Similarly, due to the length of time that modifying authorizing legislation often requires, appropriations riders, because they are only in effect for one fiscal year, are reasonable stop-gap measures that allow time for Congressional reconsideration of controversial laws.

As already noted, the use of appropriations limitations language, also known as "riders," is not new.[20] In the 1980s, a Democratic Congress repeatedly passed limitations on appropriations as a means of restraining a Republican executive. For instance, after the Reagan administration enhanced the role the Office of Information and Regulatory Affairs (OIRA) in order to ensure that agency regulations comported with the administration's ideological priorities, Congress enacted riders to limit OIRA's reach. One such rider prohibited the administration from conducting regulatory review of citrus marketing orders promulgated by the Department of Agriculture.[21]

The use of riders possesses several distinct advantages over other forms of political oversight. Professor Kate Stith of Yale University, who authored an exhaustive review of the appropriations power, described the benefits of the approach as follows:

> The genius of regulating executive branch activities by limitations on appropriations is that these limitations can be bureaucratically and contemporaneously enforced without the need for litigation or after-the-fact congressional investigations in every case. Appropriations limitations . . . constitute a low-cost vehicle for effective legislative control over executive authority.[22]

From 1880 up to the present day, Congress has appropriated money for almost every government activity through one of the thirteen appropriations bills that it considers each year.[23] Therefore, the appropriations process provides an opportunity for a regularized review

process of executive branch initiatives, particularly when the statutory reauthorization process may be less than effective.[24]

Despite the broad potential reach of appropriations limitations, such devices are themselves limited by the constraints imposed under the Constitution and the rules of Congress. Constitutionally, appropriations limitations may not be used to compel the Executive to engage in acts contrary to the Constitution nor can they be used to forbid another branch from performing a duty otherwise required by the Constitution.[25] These constraints should look familiar: They are the same imposed upon any Congressional action, and the courts are fully capable of engaging in judicial review to determine the constitutionality of law.[26]

Further, Congress has adopted rules against "legislation" on appropriations to guard against changes in existing laws or program statutes to be enacted in appropriations measures.[27] Technically, limitations do not change underlying statutory enactments, but merely limit the expenditure of funds in furtherance of the particular administration initiative.[28] It is perhaps useful to think of an appropriations limitation as temporarily[29] freezing current conditions until such time as the Committees of substantive jurisdiction have time to pass judgment upon more permanent reforms to the underlying program statute. Thus appropriations riders are also used as a temporary measure prior to the enactment of more sweeping legislative actions. More colloquially, appropriators may "call time out," but only authorizers can "decide the match."

It is most fitting that the ultimate restraint on the appropriations limitation is at the option of the President: the veto. If the President believes the appropriations limitation is either unconstitutional or simply wrong-headed, he may elect to veto the bill.[30] Even though the appropriations limitation may be buried within a spending bill otherwise difficult to veto, history proves that it can be done.[31] If the veto proves too dear, and the appropriations limitation is unconstitutional, he may also seek judicial redress.[32]

In short, limitations on appropriations serve a useful but circumscribed role in the dynamic allocation of responsibilities between Congress and the Executive Branch. It is precisely because appropriations limitations are only infrequently adopted that we can conclude that limitations are more than statements of fiscal responsibility; for the length of the funds limitation, they are findings that the prohibited activity is "no longer within the realm of authorized government actions."[33]

The Need for Value Judgements in Environmental Policy

Environmental regulations inherently necessitate value judgments. An agency may be capable of arriving at an objective economic or scientific judgement, but the determination of what ought to be done on the basis of such a determination is not nearly so clear. In the context of current environmental policy, such judgements are inherently political, and Congress is the particular institution possessing the competence and accountability to make such judgments. The limitations on appropriations found within the EPA budget are reflections of these judgments, limited in scope and duration, but important in establishing governmental priorities.

If it is conceded that government has an important, if not vital, role to play in protecting the environment, the remaining judgment is how much environmental protection is enough. This judgment is political because it requires a careful balancing of competing conceptions of which values, environmental or otherwise, should be advanced. The weighing of costs and benefits -- many of which are subjective, such as the value of a swimmable stream or pristine air -- is an important part of this process. The growth of current environmental laws has proceeded as if unencumbered by these inherent political constraints. As EPA Administrator Carol Browner has herself remarked, "The average length of [an] environmental law has grown from 50 pages to 400 pages."[34]

The expansion of environmental regulation has not come without substantial cost, however. By one estimate, current expenditures on environmental controls are annually about $140 billion in the United States, or about 2.3 percent of our gross national product.[35] Even if the U.S. can afford to divert this much of the GNP toward environmental protection, it is also clear that "we're not rich enough to spend it in the wrong places."[36] This sentiment reflects the reality that despite the great amount of resources expended on environmental protection, such resources are limited and important choices must be made. The Supreme Court has found that "available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.[37]

The failure to make the important choices regarding environmental protection is simply not an option. One observer has noted that environmentalist influences may be "perhaps 10 percent constructive, 90 percent destructive" because "their emphasis on largely imaginary hazards has diverted attention from the real ones, and their pressures on regulatory agencies...has caused the heavy expenditure of scarce scientific resources on non-problems, thereby reducing the resources available for work on the real ones."[38]

The example of remediation at Superfund sites provides a classic example of the role values must inexorably play in the formulation and execution of environmental policy. It will not do to embrace a policy that more should always be spent on the environment regardless of the potential gain. A recent review of Superfund argued that:

> In addition to the onerous liability standards, the problems of Superfund are compounded by the demand for excessive cleanup -- the 'how clean is clean?' issue. Intuitively, it might seem that 'cleaner is better.' Insistence on purity, though, raises the costs of cleanups and thereby further induces recalcitrance by potentially responsible parties. Excessive cleanup efforts also divert resources from other sites and reduce the number of sites that can be addressed.[39]

The bottom line is that the demand for strong environmental protection must be balanced with limited resources available for environmental protection. The establishment of this balance is a process which of necessity combines economic, scientific and moral considerations. The answer to "How Clean is Clean?" cannot be arrived at in any other manner. These factors must be weighed in an atmosphere of accountability, and it falls to "Congress to act as a kind of

conscience for EPA and other agencies -- asserting public concern and holding EPA accountable for responding to it."[40]

Why Congress?

If a branch of government is to be entrusted with making decisions about how economic resources are to be allocated in the environmental context, it is appropriate to ask which branch of government should be empowered to make such judgements. The U.S. Congress is the only answer. Whereas the importance of a quick and decisive unitary executive is relevant in areas such as foreign policy where fragmentation is undesirable and sometimes dangerous, environmental policy is largely domestic and inherently fragmented. More importantly, while there are concerns about the accountability of the current government, it is clear that Congress is at least somewhat more accountable to the desires of the American people than either the executive or judicial branch.[41]

The fact that Congressional debate is responsible for the development of the major environmental program statutes is not the sole reasoning for deferring to the judgment of the legislature in oversight. It should be noted that whether the American people desire strong environmental protections, and whether they view centralized federal regulations as the means of achieving such protections, given the enormous scope of current environmental policies Congress has a fundamental role to play. For example, at times of conservative Executive Branch leadership, it has been the watchful eye of environmental advocates within the Congress that has kept the pendulum from shifting too far against existing policy. Similarly, should the American people make clear that they desire decentralized, free market approaches to environmental concerns, such changes can not occur without active Congressional leadership.[42]

There is no doubt that Congress possesses "enormous authority" with respect to enactment and supervision of environmental statutes.[43] If the process appears chaotic, such chaos is fairly descriptive of any representative democracy in action.[44] In the case of the environment, Congress' collective trial and error have produced an institution generally sympathetic to environmental concerns, although some would argue that Congress has mistaken broad public support in favor of environmental protection with support for extensive federal environmental regulation.[45]

Daniel J. Fiorino, in his recent review of environmental policy-making, described Congress' role as follows:

> Asked to pick the one institution that has been the most important initiator of national environmental policy over the last few decades, most observers would select Congress. Unlike some policy areas, where there is a pattern of executive leadership and legislative response, the source of change in environmental policy has usually been Capitol Hill.[46]

Beginning with the adoption of the National Environmental Policy Act,[47] Congress enacted an incredible series of statutes and continues to revise them to this day. With each statute, Congress has become more learned -- and specific -- in the requests it makes of the administrative agencies to whom it has delegated authority. [Although it can be argued whether Congress' increasing specificity has always been to the environment's benefit[48]] As a result, Congressional oversight has become more necessary and significant.[49] Among the techniques utilized for oversight, the appropriations process -- both as a mechanism to fund projects and to disfavor projects -- has become an important tool in effecting change.[50]

Appropriations Riders Placed on the EPA

On July 28, 1995, the U.S. House of Representatives began its consideration of Title III of H.R. 2099, the appropriations bill that covers the Veterans Administration, the Department of Housing and Urban Development, and various independent agencies. Among the independent agencies under consideration was the U.S. Environmental Protection Agency, and Title III set forth both the fiscal year 1996 funding levels for EPA and the appropriations limitations applicable for fiscal year 1996.[51] Depending upon how the provisions are counted, H.R. 2099 contained some seventeen appropriations limitations restraining EPA activities. After vigorous debate on July 28, an amendment introduced by Congressmen Louis Stokes (D-OH) and Sherwood Boehlert (R-NY) was adopted by a six-vote margin, and the seventeen riders were stripped from the bill.[52]

The defeat of the House appropriations limitations was controversial, heated, and ultimately short-lived. After a furious bout of leadership discussions and vote counting, the Stokes-Boehlert Amendment was re-voted on July 31, 1995. Following a successful motion to recommit to the Committee of the Whole (a procedure that allowed the House to repeat the vote), the Stokes-Boehlert Amendment was narrowly defeated.

It is not our intention to review each and every appropriations limitation within H.R. 2099. Rather, we will group the appropriations limitations into related categories, as did Congressman Collin Peterson (D-MN) in a recent presentation on the subject before President Clinton.[53] The Peterson Memo, presented on August 4, observes that the limitations "do not prevent EPA from enforcing environmental regulations. The riders are a temporary moratorium against *specific* regulations that are of concern to both parties."[54] The appropriations limits are then divided by the purposes for which they were introduced:

- to force the Senate to take action on regulatory reform legislation passed by the House of Representatives. In this category is included the measures that delay enforcement or implementation of certain Clean Water Act programs until such time as Clean Water Act reauthorization legislation is adopted.[55] Because Clean Water Act amendments already passed by the House would substantially revise many of these programs in any event, Congressman Collin Peterson reasoned that the riders would prompt Senate action -- an action necessary to make sure that

water infrastructure projects are not placed "in jeopardy." It should also be noted that the previous authorization of the Clean Water Act expired in 1992;

- to provide authorizing committees with time to act on legislation that reforms underlying environmental laws. In this category are included appropriations limitations affecting the employee trip reduction program under the Clean Air Act and the arsenic, radon and radionuclei standards under the Safe Drinking Water Act;[56]

- to block enforcement of regulations that go beyond Congressional intent in the law and to give Congress sufficient time to review these regulations. In this category fall limitations covering implementation of inspection and maintenance requirements under the Clean Air Act, implementation of risk management plan requirements for certain facilities (i.e., oil and gas production and natural gas processing) located in remote/low population areas, expanded requirements for Toxic Release Inventory reporting, and impermissible use of permitting authority and air standards to implement EPA's so-called "Combustion Strategy;"[57]

- to give states more time to comply with regulations. In this category falls the appropriations limitation regarding the Title V operating permit program. Litigation and negotiations regarding this controversial program has made several states miss key deadlines and the rider pushes back implementation of the program one year to avoid penalization;[58]

- to require regulatory agencies to consider additional information. In this category falls the appropriations limitation delaying the maximum achievable control technology program for petroleum refineries, a proposed rule that would impose a cost of more than $800 million while reducing cancer incidence by less than 0.33 persons per year. Data from the "early 1980's instead of available data from 1993" was used to generate the proposal;[59] and

- to block regulations that are duplicative or which actually conflict with other policies. In this category would fall riders dealing with redundant agricultural regulations, Delaney clause enforcement against pesticides previously approved, and protection of state laws establishing environmental audit privileges.[60]

The Current Controversy

The appropriations limitations discussed above must be viewed through the lens of the appropriations process. First, each limitation only applies for one fiscal year. Therefore, limitations are better characterized as temporary moratoria or fixes then permanent solutions. Second, the appropriations process begins with its own hearings, but often relies upon the findings of committees of substantive jurisdiction. And third, and most important, appropriations limitations are like any other legislation: they must be passed by both Houses

of Congress either signed by the President or subject to an override of a Presidential veto. With these points in mind, some objections to appropriations limitations are at best meritless and at worst distortion.

Do the appropriations limitations "roll back" environmental protection?

One member of Congress termed the riders "the biggest step backward in environmental protection that this body has considered since the original Earth Day, 25 years ago."[61] While it is not our intention to defend each appropriations limitation in seriatim, it is clear that the preceding characterization is mere hyperbole. As discussed above, one can firmly defend protection of the environment and not endorse the contemporary reliance upon centralized, federal environmental regulation. Indeed, given cost considerations, regulation for regulations' sake is hardly a recipe for environmental protection. When resources are misplaced in the regulatory context, EPA "consequently may divert regulatory concern from other more serious concerns."[62] Moreover, most of the riders in question are minor, affecting a few small portions in a handful of gargantuan laws. The exception, as noted above, are those designed to induce prompt reauthorization of the Clean Water Act.[63] Another point worth mentioning is that some of the riders are actually similar to ones included in bills signed into law by President Clinton last year.[64] Suffice it to say that reports of the EPA's death are an exaggeration.

In particular, we would reference the two limitations regarding combustion of hazardous waste. In that case, EPA was utilizing authority allegedly under the Resource Conservation and Recovery Act to condition combustion unit permits with requirements that went beyond RCRA. Further, EPA was in the process of developing a hazardous air pollutant standard designed to unfairly disadvantage the recovery of energy from hazardous wastes combusted in boiler or industrial furnaces, such as cement kilns.[65]

In this instance, if EPA's policy moves forward despite the constraints imposed under both RCRA and the Clean Air Act, EPA could succeed in discouraging or eliminating recycling hazardous wastes for energy recovery. We agree with the Chairman of the Subcommittee on Regulatory Affairs of the House Committee on Government Reform, Congressman David McIntosh (R-IN), who wrote to Administrator Browner that:

> In my opinion, if EPA is allowed to discourage or eliminate recycling of hazardous waste as fuel for boilers and industrial furnaces, the result will be greater emissions and more adverse impact on human health and the environment. If cement kilns and other devices do not supplement their fuel with waste, such devices will return to the combustion of 100 percent fossil fuels with consequent air emissions and extractive wastes. Meanwhile, the waste-fuels will be transferred to commercial incinerators, which therefore will also have greater total emissions. The result? Children, the elderly, and other susceptible groups in our society will be exposed to greater emissions of all harmful constituents, including mercury and dioxin.[66]

In another provision, the EPA would be forced to delay the implementation of a MACT emission standard for refiners for one year, in order to give the EPA time to utilize more accurate and up-to-date data. In the EPA's own rulemaking proposal, the health benefits of the rule were described as "small" and emissions reductions were termed "modest."[67] One flaw in the EPA's costly approach, according to the Senate Appropriations Committee report, is that "key emissions data are based on 1980 data that do not reflect controls which facilities have adopted in the past 15 years. The Committee understands that while the EPA was aware that this methodology overstates emissions, the Agency made no attempt to adjust or modify their estimates." The appropriations provision forces the EPA to modify their conclusions to reflect reality.

It should be noted that in these instances, when faced with a choice between maximizing environmental protection and extending regulatory power, the EPA seems to be opting for the latter. In such instances, how could one not applaud Congressional efforts to reorient the Agency's priorities?

Each rider must be evaluated upon its own merits. After all, there could be riders that are completely inappropriate. However, forcing the EPA to reconsider suspect priorities or instances in which the Agency has gone beyond the authorization of Congress remains a laudable objective.

Are appropriations limitations an abuse of Congressional process?

Several members of Congress have argued that the limitations attached to H.R. 2099 constitute a "sneak attack"[68] principally because the provisions were considered "without the opportunity for authorizing committees to consider the issues."[69] To avoid such outcomes, the ranking minority member of the House Committee on Commerce, Congressman John Dingell (D-MI) reminded members that, "One of the ancient rules of this body is that we should legislate in the legislative committees and appropriate in the appropriation committees."[70]

If the "ancient rule" established a high wall of separation between appropriations and authorizations, the debate concerning development of H.R. 2099 may reflect an important turning point in the relationship between the two Congressional functions. Here, as the statements of the Chairmen of the House Commerce Committee,[71] the House Resources Committee,[72] the House Infrastructure Committee,[73] and other Committees and Subcommittees indicate, authorizing committees had worked hand in glove in cooperation to review the appropriations limitations. Chairman Bliley (R-VA) of the House Commerce Committee (the Committee of substantive jurisdiction for most environmental issues) described a process in which "many, many other proposed riders...did not make it into this bill" because the Commerce Committee had reviewed them and decided further debate was necessary.[74]

It would further appear that a formalistic separation between authorization and appropriation is called upon not necessarily to vindicate high principle, but often simply to achieve political advantage. Where you stand, it seems, does depend upon where you sit. Consider that the

Endangered Species Act authorization ended in 1992, but "legislation" on appropriations bills keeps the statute alive to date.[75] Further, wastewater treatment grants and other infrastructure programs apparently had appropriations held in abeyance until such time as authorization was complete -- and in motions supported by sponsors of the Stokes-Boehlert Amendment.[76] Even Congressman Dingell supported an appropriations rider regarding corporate average fuel economy standards faced by the automobile industry.[77] Inconsistencies regarding this venerated separation of authorization and appropriation were so much in evidence that one member offered the following prayer, "Dear Lord, may our words today be sweet, for tomorrow we may have to eat them."[78]

The necessity for hearings in the case of the limitations language within H.R. 2099 was a chimera. The Chairmen of each authorizing Committee of substantive jurisdiction over the environment spoke in favor of the provisions. Hearings were held on the issues present in individual riders in both the Appropriations Committee and in the authorizing Committees.[79]

The most important factor militating in favor of appropriations limitations are those cases in which the EPA itself has exceeded its legislative authorization. It is a peculiar convention indeed that would restrain appropriators from limiting funds and would thereby force appropriators to fund agency actions that were not previously authorized by law. As the Peterson Memo cited above indicated, several riders were proposed merely to limit EPA to existing law.[80] In describing one rider, Chairman Joe Barton (R-TX) noted that hearings before his Commerce Oversight Subcommittee led him to the conclusion that "the language requires that EPA do only what it is already required to do."[81] It is a troubling conclusion indeed if rule or convention regarding appropriations forced members of Congress to assist EPA in violating the intent of Congress by providing the money to do so. Chairman McIntosh summarized the difficulty:

> The bottom line from my perspective is that current EPA policy is as incorrect as is EPA's interpretation of H.R. 2099. The limitations provisions of the EPA appropriations bill do not eliminate the Agency's ability to require permit conditions or to set protective [standards]...In both cases, EPA may regulate consistent with statute and process. If EPA is uncomfortable with being limited by law, it makes Congressional resolve to do so all the more essential in a democracy.[82]

Conclusion

In years past, appropriations limitation provisions have been sharply criticized for failure to meet substantive and procedural criteria. And yet, probably the most eloquent support for use of appropriations limits to constrain environmental regulation came from the sharpest critic of the recent use of such limits. In an attempt to dissuade his fellow members from voting in favor of the riders, the ranking minority member on the VA, HUD Appropriations Subcommittee, Congressman Louis Stokes, observed, "And when our constituents find out how radical . . . these riders are, they will certainly hold us accountable."[83] While Rep. Stokes' estimation of

the riders' likely impact is clearly one that we do not share, his point about accountability is one we accept.

Accountability should be embraced and not avoided. Technocratic administrative agencies manned by unelected, career civil servants are largely beyond public scrutiny once authority has been delegated. Therefore, absent broader institutional reforms, such as explicit limitations on the delegation power, strong sunsetting requirements, or the like, the appropriations power must be exercised as a means of holding unresponsive agencies in check. If members of Congress discover that an administrative agency requests funds when it is arguably "out of control,"[84] then it is not merely the right of those members, it is their duty to limits funds. That is the meaning and importance of accountability.[85]

Notes:

1. "EPA, Browner Says House Budget Proposal, S. 343 'Concerted Effort' Against EPA," *Daily Report for Executives*, July 12, 1995.

2. Citizens for Sensible Safeguards, *Back Door Extremism: Misusing the Appropriations Process to Gut Public Protections* (September 1, 1995), p. 5.

3. U.S. Constitution, preamble.

4. Martin H. Redish, "Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta," 39 *De Paul Law Review* 299 (1989) p. 300 n.7 ("The text of the United States Constitution does not explicitly refer to the principle of separation of powers. Instead, separation of powers may be inferred because the legislative, executive, and judicial powers are described and authorized by three separate and distinct articles of the Constitution. *Springer v. Philippine Islands*, 277 U.S. 189, 201 (1928).").

5. For a general discussion, see Kate Stith, Congress' Power of the Purse, 97 *Yale Law Journal* 1343 (1988); for a lively discussion of the topic, see discussion of Panel IV, The Appropriations Power and the Necessary and Proper Clause, 68 *Washington University Law Quarterly* 623 (1990). For a discussion of the importance of the appropriations power in a historical context, see Charles Tiefer, *Congressional Practice and Procedure: A Reference, Research, and Legislative Guide* (1989) (Chapter 13).

6. U.S. Constitution article I, § 9, clause 7.

7. The mechanism by which Parliament "cemented democratic rule" was to vest appropriations authority exclusively within its powers and distinct from the powers of the Monarch. The Act of Settlement of 1701 confirmed this judgment. Tiefer, p. 922, n.4 and accompanying text.

8. *The Records of the Federal Convention of 1787*, at 139-40 (M. Farrand ed. 1937). For a discussion of George Mason's statement, compare Louis Fisher, Panel IV, p. 634; Greg Sidak, Panel IV, p. 652; and Fisher p. 653.

9. Representative Randolph remarked in 1809, "Among the duties -- and among the rights, too -- of this House, there is perhaps none so important as the control which it constitutionally possesses over the public purse." 19 *Annals of Congress* 1330 (1809)(remarks of Rep. J. Randolph) as quoted in Stith, p. 1344.

10. Ernest Gellhorn and Barry B. Boyer, *Administrative Law and Process* (1981) pp. 8-10. See also Jack Davies, *Legislative Law and Process* 284 (1986)("As society grew increasingly complex, it became necessary to delegate a good deal of legislative work in order to keep the essential legislative task manageable.")

11. Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development* 678 (1983).

12. Don Coursey, "The Demand for Environmental Quality," unpublished draft, December 1992, p. 7.

13. Gellhorn and Boyer, 11 p. 30.

14. Gellhorn and Boyer, pp. 34-39. In addition to these, Gellhorn and Boyer also list legislative vetoes, although subsequently these mechanisms were rule unconstitutional. *INS v. Chadha*, 462 U.S. 919 (1983).

15. Stith, p. 1345.

16. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

17. Stith, pp. 1345-46 (describes the appropriations power as a duty incumbent upon Congress and as a "foundational value choice that permeates our constitutional structure.").

18. Stith, p. 1349 ("If the Constitution thus strictly forbids 'executive appropriation' of public funds, the exercise by Congress of its power of the purse is a structural imperative.").

19. The most notable example of recent times is likely the violation of the Boland Amendment by certain members of the Reagan Administration. The Boland Amendment restricted the expenditure of funds on support for the so-called "contras" in Nicaragua. The provision was evaded in a scheme in which funds were solicited from private sources and foreign governments. Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition & House Select Committee to Investigate Covert Arms Transactions with Iran, Report, Senate Report No. 100-216, H.R. Report No. 100-433, 100th Cong., 1st Sess. 18 (1987)("The covert program of support for the Contras evaded the Constitution's most significant check on Executive power: the President can spend funds on a program only if he can convince Congress to appropriate the money."); Fisher, Panel IV, pp. 635-36 (wherein author terms the Iran-Contra affairs as "what might be a low point in government.").

20. The term "rider" has historically referred to nongermane amendments, and therefore has a negative connotation. Stith, p. 1352, n.40; see, e.g., *Bengzon v. Secretary of Justice*, 299 U.S. 410, 415 (1937). Of course, in the modern context, riders often are germane to the overarching principle expressed in appropriations bills: namely, that agency jurisdiction is limited and that agencies must establish priorities accordingly.

21. This is recounted in Douglas H. Ginsburg, "Delegation Running Riot," *Regulation*, 1995 No. 1, p. 84.

22. Stith, p. 1360.

23. Tiefer, pp. 925-26.

24. Edward F. Willett, *How Our Laws Are Made*, H.R. Report No. 101-139, 101st Congress, 2d Session 17 (1989)("Each standing committee...is required to review and study, on a continuing basis, the application, administration, execution, and effectiveness of the laws dealing with the subject matter over which the committee has jurisdiction..."). It is the very frustration with the slow pace of reauthorization that frequently underlies the support for appropriations limitations. See, e.g., 141 *Congressional Record* H7945 (daily ed. July 28, 1995)(statement of Rep. Tauzin)(citing support for riders because environmentalists "have seen to it that for years we could not bring reforms to ESA [Endangered Species Act], reforms to clean water, wetlands regulation, cost-benefit analysis, property rights control.").

25. For a discussion of these constitutional limitations, see Geoffrey Miller, Panel IV, p. 643.

26. For a discussion of the constitutional basis of judicial power, see Charles Alan Wright, *Law of Federal Courts* 19-21 (1976).

27. Tiefer, p. 928.

28. Tiefer, p. 933, n.29 ("Congress does not seem to regard them [limitations on appropriations] legislation when drafted to technical standards regarding their restricting spending on the particular bills rather than changing the permanent law.").

29. An appropriations limitation generally is applicable only for the fiscal year for which the underlying appropriations bill is in effect.

30. Stith, in Panel IV, p. 649 ("The President's *first* weapon...in his constitutional arsenal [is] his veto.").

31. Fisher, at Panel IV, p. 634 ("You might say: 'Well, he cannot veto the bill because the Amendment is only a small part of a massive continuing resolution.' Well, he can. Reagan vetoed omnibus bills, including appropriations bills, supplemental bills, and continuing resolutions.").

32. Stith, Panel IV, p. 649 (President should seek quick judicial resolution).

33. Stith, p. 1361.

34. Carol Browner in National Environmental Policy Institute, *Common Ground: Roundtable for Reinvention, Environmental Leadership in the 104th Congress* 40 (June 1995), p. 40.

35. Walter A. Rosenbaum, *Environmental Politics and Policy* 12 (1995)(citing Department of Commerce statistics).

36. William Stevens, "What Really Threatens the Environment?," New York Times, January 29, 1991, p. C4.

37. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

38. Virgil Wodicka, "Public Interest Groups and Food Safety," 12 *Regulatory Toxicology & Pharmacology* 263, 269 (1990).

39. Frank Cross and Scott Segal, "And the Meek Shall Inherit Cleaner Earth," 9 *Journal Natural Resources & Environmental Law* 269, 275 (1993-94).

40. Daniel J. Fiorino, *Making Environmental Policy* 69 (1995).

41. The need to make Congress even more accountable, through measures such as an end to delegation of policymaking to executive agencies is outlined in Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale University Press, 1993).

42. Democratic pollster Stanley Greenberg has explained the growing popularity of increasing the role of state and local governments in the formulation of environmental policy, noting that "For ordinary citizens, devolution is a way of making the environmental regime more responsive, more flexible and sensible." Stanley B. Greenberg, "Against the Tide: In Defense of Environmental Quality, Greenberg Research, May 11, 1995, p. 6.

43. Rosenbaum, p. 129 (citing Constitutional prerogatives and observing simply, "Congress may enact, rescind, or amend an environmental law.").

44. Rosenbaum, pp. 130-31 (describing Congressional process has highly reactive to perceived crises as "Ready, Fire, Aim").

45. This argument is based on the observation that polls repeatedly show high public support for stronger environmental protection, while failing to show majority support for described regulatory programs. For instance, in one recent poll, 75 percent of Americans believe that current endangered species regulations "strike the right balance" or have "not gone far enough." Yet fully two-thirds of the respondents in the same poll believe in compensation when for landowners when such regulations reduce the value of private lands, even though landowners

do not now receive such compensation. Roper-Starch, *The Environmental Two-Step: Looking Back, Moving Forward*, The Times Mirror Magazines National Environmental Forum, May 1995.

46. Fiorino, p. 63.

47. 42 U.S.C. §§ 4321-4370c.

48. See, generally, *Environmental Politics: Public Costs, Private Rewards*, M. Greve and F. Smith, ed. (1992).

49. Fiorino, pp. 63-64.

50. Fiorino, pp. 67-68 ("The appropriations process is another effective tool. Money talks, here [in environmental protection] as elsewhere," and appropriations riders are used to "direct EPA to conduct a study, change policy, or take some other action.").

51. While the debate on Title III of the bill sporadically occurred for two days prior to July 28, the debate concerning appropriations limitations occurred at 141 *Congressional Record* H7933-961 (daily ed. July 28, 1995)(hereinafter "July 28 Floor Debate").

52. The Stokes-Boehlert Amendment was introduced as Amendment No. 66 to the bill by Mr. Stokes at July 28 Floor Debate at H7933 and was adopted by a vote of 212-206 at id. at H7954-55. For a discussion of the adoption of the Stokes-Boehlert Amendment, see Dan Morgan, "Republicans Defect to Kill Curbs on EPA," *Washington Post*, July 29, 1995, pp. A1, A9; John H. Cushman, Jr., House Coalition Sets GOP Back on Environment, *New York Times*, July 29, 1995, pp. A1, A7; Patrice Hill, EPA Cuts Defeated in House, *Washington Times*, July 29, 1995, pp. A1, A5; Karen Hosler, "Rebel Vote Preserves EPA's Bite," *Baltimore Sun*, July 29, 1995, pp. A1, A7; Bill Mintz, "House Defeats GOP Leadership's Attack on Environmental Laws," *Houston Chronicle*, July 29, 1995, pp. 1A, 16A.

53. Congressman Peterson presented the President a document entitled Fact Sheet Regarding Legislative Riders on EPA Appropriations Bill (hereinafter "Peterson Memo"). For a description of the meeting, see Budget: WH Strategy Depends on Dem-Moderate GOP Coalition, Greenwire, August 7, 1995 (LEXIS, Envirn library, Curnws file)("The Coalition, a group of conservative House Democrats, on 8/4 met with Pres. Clinton to discuss budget strategy and regulatory reform. They argued that some 30 to 70 Democrats support regulatory changes and that Dems 'cannot continue to vote for the status quo on environmental regulation.' Rep. Collin Peterson (D-MN) presented Clinton with a paper explaining support for each of the 17 riders attached to a US EPA spending bill....He warned that if the admin. does not move toward more substantial reg reform, Coalition members will 'vote against you on these issues and vote to override your vetoes.'").

54. Peterson Memo, p. 1.

55. Peterson Memo, p. 1 (Specifically, the measure would delay enforcement of regulations "regarding wetlands, effluent limitation guidelines, pretreatment standards, programs under the Great Lakes Program, permit requirements for municipal and industrial stormwater discharges, or compliance schedules for sewer overflows until re-authorization legislation is enact.").

56. Peterson Memo, pp. 2-3 (Congressman Peterson further notes that, "The Commerce Committee has begun to consider legislation revising both the Clean Air and Safe Drinking Water Acts. These riders will hasten consideration of these bills and relieve undue burdens while Congress considers reauthorizing legislation which will address these problems.").

57. Peterson Memo, pp. 2-3. See further discussion of some of these issues below and at July 28 Floor Debate at H7950-53 (statement of Rep. Barton).

58. Peterson Memo, p. 3.

59. Peterson Memo, p. 3.

60. Peterson Memo, p. 4 (Regarding environment audits, the Peterson Memo states, "Fourteen states already use this voluntary cooperative approach to maximize environmental protection. Subjecting companies to penalties for violations they voluntarily uncover and report to state agencies will undermine these cooperative ventures.").

61. July 28 Floor Debate H7934 (statement of Rep. Stokes); see also H7937 (statement of Rep. Mineta).

62. Frank B. Cross, *Environmentally Induced Cancer and the Law* 139 (1989); see Daniel Byrd & Lester Lave, "Narrowing the Range: A Framework for Risk Regulators," *Issues in Science and Technology* (Summer 1987) p. 95 (a "carcinogen of the month" policy may cause significant risks to be "neglected in favor of transient public concerns.").

63. Of course, should the Senate act on Clean Water Act reauthorization, these limits disappear. Moreover, should the Senate fail to go along with the House's riders, either by including them in the Senate appropriations bills or accepting them in a House-Senate conference, they will have no effect whatsoever.

64. In 1994, the appropriations for the Environmental Protection Agency included a rider prohibiting the promulgation of drinking water regulations covering radon and arsenic. Public Law 103-327.

65. July 28 Floor Debate at H7952 (statement of Rep. Barton); and id. at H7957-61 (statements of Reps. Barton and Chapman).

66. Letter from the Hon. David McIntosh, Chairman, Subcommittee on Regulatory Affairs, to the Hon. Carol M. Browner, Administrator, U.S. EPA 5 (Aug. 14, 1995).

67. 59 *Federal Register* 36, 130-157.

68. July 28 Floor Debate, H7934 (statement of Rep. Stokes).

69. July 28 Floor Debate, H7937 (statement of Rep. Mineta).

70. July 28 Floor Debate, H7935 (statement of Rep. Dingell).

71. July 28 Floor Debate, H7936 (statement of Rep. Bliley).

72. July 28 Floor Debate, H7936 (statement of Rep. Young).

73. July 28 Floor Debate, H7935 (statement of Rep. Shuster).

74. July 28 Floor Debate, H7936.

75. July 28 Floor Debate, H7949 (statement of Rep. Pombo)(also notes that Coastal Zone Management Act has expired but "is being kept alive by the appropriations process.").

76. July 28 Floor Debate, H7941 (statement of Rep. Hayes).

77. July 28 Floor Debate, H7936 (statement of Rep. Bliley).

78. July 28 Floor Debate, H7941 (statement of Rep. Hayes).

79. July 28 Floor Debate, H7943 (statement of Rep. Chapman); see id. at H7941 (statement of Rep. DeLay, House Majority Whip)("And let's be clear -- including this language here is backdoor maneuver -- the authorizing committee has held extensive hearings on the issue."). For a discussion of deliberations before the House Committee on Appropriations, see Jerry Gray, "In House, Spending Bills Open Way to Make Policy," *New York Times*, July 19, 1995, p. A16; and before the Appropriations Subcommittee on VA, HUD, and Independent Agencies, see Gary Lee, "House Panel Signals Assault on EPA Initiatives," *Washington Post*, July 14, 1995, p. A19.

80. Peterson Memo, pp. 2-3.

81. July 28 Floor Debate H7952 (statement of Rep. Barton).

82. McIntosh, p. 6.

83. July 28 Floor Debate H7934 (statement of Rep. Stokes).

84. July 28 Floor Debate, H7943 (statement of Rep. Chapman)("I really do agree with one of the proponents of this amendment [Stokes-Boehlert] that this is about process. The problem is that the processes over at EPA are out of control....EPA in many instances has gone...far beyond...their legal authorization..."); July 28 Floor Debate, H7945 (statement of Rep. Tauzin)("The gentleman from Texas said it. Bureaucrats at EPA are out of control. We have not been in control, either, for many years.").

85. Stith, p. 1363 ("Where Congress prohibits use of any appropriated funds for an activity, the Executive simply has no authority to finance the prohibited activity...By placing the power of the purse in Congress, the Constitution makes Congress accountable for the actions of the operating branch of the federal government.").