

## Separation of Powers, the Presidency and the Environment

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The structure of American government is designed to avoid concentration of power by separating executive, legislative and judicial functions and by creating a system of shared sovereignty between federal and state authorities. Despite inefficiencies fostered by this diffusion of power, this system of government has proven remarkably successful at adapting to vast economic and social changes while preserving democratic values. Profound changes have occurred in government and politics since the Constitutional Convention. These include the rise of political parties, the enormous expansion of the federal bureaucracy, and the creation of the regulatory state. Yet the constitutional structure that the framers erected has endured even as the doctrine of separation of powers has spawned spirited inter-branch competition to influence policy.

Competition between executive, legislative and judicial actors has been particularly intense in the environmental policy area. This article provides a historical perspective on this competition by focusing on the role of the president. Beginning with President Theodore Roosevelt, the presidency has played a major role in shaping federal environmental policy. While most early environmental conflicts focused on federal management of public lands and natural resources, the rise of the regulatory state in the 1970s created new avenues for inter-branch competition. Conflicts over regulatory policy between the president, Congress, and the judiciary have become routine staples of political life. These conflicts have generated new techniques used by each branch to influence regulatory policy. This article examines these evolving mechanisms of regulatory oversight and their effect on the balance of power between the branches of government.

This article begins by briefly reviewing how the Constitution allocates power between the three branches of the federal government and the checks and balances it establishes to ensure that no single branch acquires excessive influence. The article then illustrates how the powers of the presidency have come into play in the environmental policy arena. It sketches a history of federal environmental policy from the early days of the Republic through the regulatory legislation of the 1970s. Finally, the article examines how the implementation and

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refinement of regulatory programs has generated conflicts between the branches, focusing on presidential oversight of rulemaking by environmental agencies.

### I. THE CONSTITUTIONAL POWERS OF THE PRESIDENT

The Constitution vests the executive power in the president and instructs him to "take Care that the Laws be faithfully executed."<sup>1</sup> The president is also given the power to appoint "Officers of the United States" as established by law,<sup>2</sup> although Congress may vest the appointment power for inferior officers in the "President alone, in the Courts of Law, or in the Heads of Departments."<sup>3</sup> Furthermore, the president is given supervisory power over the executive branch as reflected in Article II's directive that "he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."<sup>4</sup>

Among the most significant of presidential powers for influencing regulatory policy is the president's power to veto legislation. Article I grants Congress all legislative power,<sup>5</sup> but article I, section 7 requires that every bill passed by the House and Senate be presented to the president for approval.<sup>6</sup> If the president vetoes legislation, it can be enacted into law only if subsequently approved by a two-thirds vote of each house.<sup>7</sup> The Constitution allows the president to play an active role in the legislative process. It requires him to give Congress information on the state of the union and it directs him to recommend to Congress "such Measures as he shall judge necessary and expedient."<sup>8</sup> Other constitutional powers of the president that are occasionally relevant to environmental policy include his powers to make treaties, to appoint judges and ambassadors, his role as commander-in-chief of the armed forces, and his authority to grant pardons for offenses against the United States.<sup>9</sup>

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<sup>1</sup> U.S. Const. art. II, §§ 1, 3.

<sup>2</sup> U.S. Const. art. II, § 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> U.S. Const. art. I, § 1.

<sup>6</sup> U.S. Const. art. I, § 7.

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Const. art. II, § 3.

<sup>9</sup> U.S. Const. art. II, § 2.

## II. PRESIDENTIAL INVOLVEMENT IN ENVIRONMENTAL POLICY: A HISTORY

Government policies have affected the environment long before government officials understood what it meant to have an environmental policy. As Richard Andrews notes: "[T]he 'real' environmental policy of a government is not necessarily what its officials say their policy is, nor what the statutes and regulations say, but the cumulative effect of what government actions actually *do* to the natural environment."<sup>10</sup> Although early administrations paid little attention to the environment, their policies for acquiring western land and promoting its development had significant environmental consequences. The vast size of the nation's natural resources kept these consequences from becoming a significant public concern until the late nineteenth century.

### *A. The Republic's Early Days*

In the early days of the Republic, environmental issues were rarely part of the president's agenda. President Thomas Jefferson had read Thomas Malthus's warnings about the impact of population growth, but dismissed them as inapplicable to the United States because of the nation's vast untapped resources.<sup>11</sup> Following the Louisiana Purchase, the United States was viewed as possessing limitless resources and public policy was designed to foster exploitation of these resources.<sup>12</sup> In 1806, President Jefferson eschewed a tax reduction in favor of investing the government's surplus in "roads, rivers, canals, and other objects of public improvement . . ."<sup>13</sup>

Early presidential involvement in the legislative process focused generally on measures to assist in the development of the nation's infrastructure. Conflict over creation of a national bank overshadowed other disputes concerning the distribution of federal funding for projects to improve roads, rivers, and harbors.<sup>14</sup> While the veto power was rarely exercised in the early years of the Republic,<sup>15</sup> President James Monroe vetoed H.R. 50, legislation for the

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<sup>10</sup> Richard N.L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* 4 (Yale U. Press 1999).

<sup>11</sup> *Id.* at 397 n. 3.

<sup>12</sup> *Id.* at 76.

<sup>13</sup> *Id.* at 88 (citation omitted).

<sup>14</sup> Roy M. Robbins, *Our Landed Heritage: The Public Domain, 1776-1936*, at 57-58 (U. Neb. Press 1962).

<sup>15</sup> Louis Fisher, *Constitutional Conflicts Between Congress and the President* 123 (Princeton U. Press 1985) (during the first twenty-eight years of Congress, only seven bills were vetoed by the president). *See*

"[p]reservation and repair of roads" that had been passed in the 17th Congress.<sup>16</sup> Legislation to improve water-borne commerce became a subject of some dispute in subsequent administrations. President Andrew Jackson opposed federal public works programs out of concern that they infringed on state's rights. He vetoed three bills to improve rivers and harbors.<sup>17</sup> President John Tyler vetoed two such bills and President James K. Polk vetoed another. The development of the political party system in Congress was one of the most significant developments affecting federal policymaking during the first half of the nineteenth century.<sup>18</sup>

An unusual piece of legislation that won the approval of President Martin Van Buren in 1838 created a federal commission to impose safety regulations to prevent explosions of steamship boilers.<sup>19</sup> This was highly exceptional for nineteenth century America because regulatory legislation was left largely to state and local governments. State laws and local ordinances to protect public health and to require the abatement or segregation of public nuisances were common, although they were poorly coordinated and rarely enforced in the absence of a professional civil service.<sup>20</sup> Federal policy focused largely on management of the vast public lands. In 1849, Congress created the Department of Interior to manage the public lands.<sup>21</sup>

### *B. The Post-Civil War Era*

During the late nineteenth century, most of what are now thought of as environmental issues—such as air pollution and hazardous waste disposal—were not the subject of presidential concern. They were viewed primarily as local responsibilities. Prior to the adoption of federal regulatory legislation in the 1970s, the common law was the legal system's primary vehicle for responding to environmental disputes.<sup>22</sup> When post-Civil War industrial growth spawned numerous conflicts over environmental harm caused by large, uncontrolled sources of pollution, such as smelters,<sup>23</sup> the disputes were resolved not by legislation, but by the common law.

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appendix.

<sup>16</sup> James Monroe, *Veto Message*, 1789–1897 Pub. Papers, 142–43.

<sup>17</sup> Robbins, *supra* n. 14, at 57–58.

<sup>18</sup> Fisher, *supra* n. 15, at 143.

<sup>19</sup> See Robert V. Percival, et al. *Environmental Regulation: Law, Science and Policy* 103 (3d. ed., Aspen L. & Bus. 2000).

<sup>20</sup> *Id.* at 103.

<sup>21</sup> Act of March 13, 1849, ch. 108, § 1, 9 Stat. 395 (1849) (codified at 43 U.S.C. § 1451).

<sup>22</sup> Andrews, *supra* n. 10, at 127.

<sup>23</sup> *Id.* at 111.

Most early federal legislation that affected the environment did so by promoting the development of natural resources. During the Lincoln administration, Congress enacted the Homestead Act.<sup>24</sup> This legislation, as well as the Mining Act,<sup>25</sup> enacted during President Ulysses S. Grant's administration, encouraged rapid development of public resources by authorizing private parties to lay claim to public land and the mineral resources on it. Land grants, used to encourage railroad construction, turned more than 180 million acres of public lands over to private developers.<sup>26</sup> Even the establishment of the first national park in 1872 was supported not only by conservationists but also by the railroads, which were seeking to promote tourism and further development of western lands.<sup>27</sup>

After presidential power reached its peak during the Civil War under Abraham Lincoln's administration, the pendulum swung back to Congress, which became the dominant force in federal policymaking. By 1879, President Rutherford B. Hayes complained that Congress had essentially "strip[ped] him of his veto power" by including measures that he disfavored in appropriations riders that he had to sign.<sup>28</sup> Conversely, Congresses, in the mid-nineteenth century, had complained that the veto power of the president was nearly impossible to override,<sup>29</sup> although President Chester Arthur saw his veto of an appropriations bill for river and harbor improvements overridden in the 47th Congress.<sup>30</sup>

Until the late nineteenth century, federal environmental policy, to the extent that it could be called a "policy," reflected pressures to develop natural resources coupled with the reliance on common law remedies for localized pollution problems. The limited federal regulatory power was used to promote commerce rather than environmental protection.<sup>31</sup> Significantly, the rise of the conservation movement in the late nineteenth century followed intensive efforts to promote private development of public resources.

The close of the frontier and the rise of the conservation movement in the late nineteenth century helped produce additional legislation to conserve public resources. In 1891, during President Benjamin Harrison's administration, Congress enacted legislation establishing a national forest system. This

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<sup>24</sup> *The Homestead Act of 1862*, ch. 75 § 1, 12 Stat. 392 (1862) (codified at 43 U.S.C. §§ 161-302) (repealed 1976).

<sup>25</sup> *The Mining Act of 1872*, ch. 152, 17 Stat. 91 (1872) (codified at 30 U.S.C. §§ 21-39).

<sup>26</sup> Robbins, *supra* n. 14, at 163-64.

<sup>27</sup> Percival, *supra* n. 19, at 103.

<sup>28</sup> Fisher, *supra* n. 15, at 143.

<sup>29</sup> *Id.* at 145.

<sup>30</sup> Act of August 2, 1882, ch. 375, 22 Stat. 191-213 (1882).

<sup>31</sup> Percival, *supra* n. 19, at 102-03.

authorized the president to withdraw forest lands from development under the Homestead Act.<sup>32</sup> By the time President Harrison left office, 13 million acres of land had been withdrawn, including 1.2 million acres of forests near Yellowstone National Park.<sup>33</sup> His successor, President Grover Cleveland, doubled the size of the forest reserve ten days before he left office in 1897.<sup>34</sup>

While natural resource issues continued to command more federal attention than pollution control, Congress adopted the Rivers and Harbors Act of 1899, signed into law by President William McKinley.<sup>35</sup> This legislation banned discharges of refuse to navigable waters unless the discharger had a permit.<sup>36</sup> The act's *qui tam* provisions later became a vehicle for citizen suits, which helped spur amendments to the Federal Water Pollution Control Act in 1972 (later renamed the Clean Water Act).<sup>37</sup> However, the principal purpose of the legislation was to promote water-borne commerce by preventing obstructions to navigation.<sup>38</sup>

### *C. The Early Twentieth Century*

President Theodore Roosevelt, who assumed office in 1901, was the quintessential champion of environmental interests long before they were popular. A passionate outdoorsman, Roosevelt put the conservation movement at the forefront of the nation's agenda. He used the powers of the presidency to aggressively promote environmental interests. Opposition from Congress did not deter Roosevelt, who used his influence to mobilize public support for conservation measures. When Congress barred the expenditure of federal funds on a conservation commission that Roosevelt wished to create, he succeeded in raising private funds so that the commission could carry on its work. When Congress balked at measures to preserve natural areas, Roosevelt acted to protect them by executive order.<sup>39</sup> In 1903, he created the first National Wildlife Refuge on Pelican Island by Executive Order 1014.<sup>40</sup> His act was significant because it represented the first use of executive power to set aside federal lands for conservation purposes without the express approval of Congress.

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<sup>32</sup> Robbins, *supra* n. 14, at 303-04.

<sup>33</sup> A.L. Riesch Owen, *Conservation Under F.D.R.* 43 (Praeger 1983).

<sup>34</sup> Robbins, *supra* n. 14, at 314.

<sup>35</sup> Act of March 3, 1899, ch. 425, 30 Stat. 1121-61 (1899).

<sup>36</sup> *Id.*

<sup>37</sup> 33 U.S.C. §§ 1251-1387 (1994).

<sup>38</sup> Ch. 425 §§ 19-20, 30 Stat. at 1154-55.

<sup>39</sup> Andrews, *supra* n. 10, at 150-51.

<sup>40</sup> Paul Russell Cutright, *Theodore Roosevelt: The Making of a Conservationist* 224 (U. of Ill. Press 1985).

One of the most abiding legacies of President Roosevelt's administration was the enactment of the Antiquities Act.<sup>41</sup> This legislation, which remains in force today, gives the president the authority to designate federal lands as national monuments if they are of "historic or scientific interest."<sup>42</sup> Roosevelt promptly used the act to create the Devils Tower National Monument in September 1906.<sup>43</sup> In 1908, he established the Grand Canyon National Monument, an 800,000-acre site, a portion of which eventually became the national park.<sup>44</sup> Today, the Antiquities Act remains one of the most powerful vehicles the president can use to protect federal lands.

President Roosevelt was also concerned about pollution generated by expanding industrial activity. His Fifth Annual Message to Congress in 1905 decried the failure of municipalities to control the smoke nuisances generated by expanding industrial activity.<sup>45</sup> In 1908, President Roosevelt convened the first National Governor's Conference on Conservation at the White House. This conference completed a national inventory of natural areas and cemented the cause of conservation in the national consciousness.<sup>46</sup> Roosevelt's actions demonstrated how the powers of the presidency could be used to elevate the environment to the forefront of the nation's agenda, despite opposition from Congress.

Roosevelt's successor, William Howard Taft, was not as active in championing environmental interests. However, he used the Antiquities Act on eight occasions to set aside federal lands.<sup>47</sup> He also won enactment of an unusual federal tax designed to protect workers' health. The legislation, endorsed by Taft in his 1910 State of the Union Message, was known as the Esch-Hughes Act.<sup>48</sup> By imposing a stiff federal excise tax on the use of white phosphorous, the act forced match manufacturers to discontinue use of a substance linked to a horribly disfiguring disease called "phossy-jaw" affecting workers at match factories.<sup>49</sup> Congress' tax powers were used because Congress was not thought to have the constitutional authority to regulate white phosphorous directly under the commerce clause.<sup>50</sup>

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<sup>41</sup> *Antiquities Act of 1906*, Pub. L. No. 209, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431-33).

<sup>42</sup> 16 U.S.C. § 431 (1994).

<sup>43</sup> Exec. Procl. 658, 34 Stat. 3236 (1906).

<sup>44</sup> Exec. Procl. 794, 35 Stat. 2175 (1908).

<sup>45</sup> 40 Cong. Rec. 91, 102 (1905).

<sup>46</sup> Owen, *supra* n. 33, at 45.

<sup>47</sup> Andrew, *supra* n. 10, at 150.

<sup>48</sup> Pub. L. No. 118, 62 Stat. 81-84 (1912).

<sup>49</sup> Percival, *supra* n. 19, at 104.

<sup>50</sup> *Id.*

During his first year in office, President Woodrow Wilson was confronted with the climactic stage of a major environmental controversy that had produced a bitter split between preservationist John Muir and Theodore Roosevelt.<sup>51</sup> The project involved damming the Tuolumne River to flood the scenic Hetch Hetchy Valley, a wilderness preserve near Yosemite, so that hydropower could be provided to San Francisco.<sup>52</sup> Roosevelt had approved the project which had the enthusiastic support of Gifford Pinchot.<sup>53</sup> Wilson took the position that it was up to Congress to make the final decision and he refused to veto the legislation that sealed the Valley's fate, despite fierce lobbying from environmentalists.<sup>54</sup>

Presidents continued to use the Antiquities Act to set aside federal lands. President Woodrow Wilson used it thirteen times, President Warren Harding eight, and President Calvin Coolidge thirteen.<sup>55</sup> Specifically, Coolidge created the Glacier Bay National Monument in Alaska, which covered 2.3 million acres, now part of Glacier Bay National Park.<sup>56</sup>

President Franklin D. Roosevelt had a long history of championing the cause of conservation many years before being elected president. As a New York state senator, he chaired the commission that helped create the State Department of Conservation.<sup>57</sup> As governor of New York he played an active role in promoting pollution control and resource conservation.<sup>58</sup> As president, his New Deal programs included the creation of the Civilian Conservation Corps, which helped restore public lands and promote outdoor recreation.<sup>59</sup> The Duck Stamp Act of 1934<sup>60</sup> established a new funding mechanism for wildlife refuge acquisition by imposing a federal licensing fee on hunters.

After initial resistance to the regulatory legislation that accompanied the programs of the New Deal, the Supreme Court ultimately acquiesced in a broad expansion of federal regulatory power based on an expanded interpretation of Congress's powers under the commerce clause.<sup>61</sup> The New Deal programs set the stage for the environmental and consumer protection programs of the 1970s. The

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<sup>51</sup> Roderick Nash, *Wilderness and the American Mind* 163-64, 170 (Yale U. Press 1982).

<sup>52</sup> *Id.* at 161.

<sup>53</sup> *Id.* at 163.

<sup>54</sup> *Id.* at 179.

<sup>55</sup> Dennis Drabelle, *Want A Legacy? Here's 1.5 Million Acres' Worth*, Wash. Post B2 (Sept. 17, 2000).

<sup>56</sup> Exec. Procl. 1733, 43 Stat. 1988 (1925).

<sup>57</sup> Owen, *supra* n. 33, at 8-9.

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Id.* at 93, 128-45.

<sup>60</sup> *The Migratory Bird Hunting Stamp Act*, ch. 71, 48 Stat. 451 (1934) (codified at U.S.C. §§ 718-718j).

<sup>61</sup> *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).



result has been the development of a federal regulatory bureaucracy, that some argue has transformed the "system of shared powers created by the Constitution . . . [into] a system of shared influence over bureaucratic decision making."<sup>62</sup>

#### *D. The Post-World War II Era*

After World War II, the federal government began encouraging the states to adopt pollution control measures of their own. During the administration of Harry Truman, the Water Pollution Control Act<sup>63</sup> provided grants to states for water pollution control. In 1956, Congress took a bold step by providing federal grants to municipalities for the construction of sewage treatment plants. This funding quickly overcame municipal reluctance to invest in pollution control projects that would primarily benefit downstream cities.<sup>64</sup> Concerned that this was not an appropriate role for the federal government, President Dwight Eisenhower vetoed the legislation, but his veto was overridden by Congress.<sup>65</sup>

Interstate pollution was becoming increasingly apparent as a consequence of the expanding economic activity in the post-World War II era. Similarly, scientists' warning that the entire planet was being dangerously poisoned by radiation from nuclear tests in the atmosphere brought the notion home that pollutants do not respect state or even national boundaries. "The premise that the federal role in pollution control should be non-regulatory became increasingly tenuous" particularly after the rise of the modern environmental movement in the 1960s.<sup>66</sup> The political popularity of environmental concerns during this period often is traced to Rachel Carson's *Silent Spring*, which alerted the public to the possibility that pesticides could be accumulating in the food chain and could cause severe and long term environmental damage.<sup>67</sup> New national environmental organizations were formed and promptly went to court to require government agencies to be more responsive to environmental concerns.

#### *E. The Rise of the Federal Regulatory State*

As a result of the enormous popularity of the environmental cause in the late 1960s, President Richard Nixon and the Democratic leadership in Congress

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<sup>62</sup> Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 Colum. L. Rev. 427, 428 n. 1 (1989).

<sup>63</sup> *The Water Pollution Control Act of 1948*, Pub. L. No. 845, 62 Stat. 1155 (1948) (codified at 33 U.S.C. §§ 1251-1387).

<sup>64</sup> Percival, *supra* n. 19, at 104.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Rachel Carson, *Silent Spring* (The Riverside Press Cambridge 1962).

engaged in an unusual competition to promote environmental concerns.<sup>68</sup> The landmark National Environmental Policy Act of 1969 (NEPA)<sup>69</sup> was signed by President Nixon on national television on New Years Day, 1970. NEPA requires federal agencies to prepare an environmental impact statement when taking any action with a potential impact on the environment.<sup>70</sup> After the first Earth Day in April 1970, Congress adopted in rapid succession legislation that established the modern federal regulatory infrastructure for environmental protection. This legislation included the Clean Air Act in 1970;<sup>71</sup> the Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act in 1972;<sup>72</sup> the Endangered Species Act in 1973;<sup>73</sup> the Safe Drinking Water Act in 1974;<sup>74</sup> and the Toxic Substances Control Act<sup>75</sup> and the Resource Conservation and Recovery Act in 1976.<sup>76</sup> These statutes established comprehensive national controls on air and water pollution. They also require licensing and regulation of pesticides, limits on contaminants in drinking water, regulation of toxic substances, and "cradle-to-grave" regulation of hazardous waste management.

National regulatory legislation transformed American environmental law in response to public concern for environmental protection. Virtually all of these laws were adopted by overwhelming, bipartisan majorities in Congress. Federal agencies were directed to establish and implement national regulatory programs to prevent harm to human health and the environment and to guarantee a uniform, minimum level of environmental quality in all areas of the country.

### III. PRESIDENTIAL OVERSIGHT OF REGULATORY POLICY

In response to the rise of the regulatory state, every president since President Nixon has established some systematic program for exercising oversight of the regulatory activities of federal agencies. Eight months before issuing Reorganization Plan No. 3 that created the Environmental Protection Agency (EPA),<sup>77</sup> President Nixon reassured business interests that their concerns would be reflected in federal regulatory policy by creating the National Industrial

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<sup>68</sup> E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. Econ. & Org. 313, 327-28 (1985).

<sup>69</sup> 42 U.S.C. §§ 4321-4334 (1994).

<sup>70</sup> 42 U.S.C. § 4332.

<sup>71</sup> 42 U.S.C. §§ 7401-7671 (1994).

<sup>72</sup> 7 U.S.C. §§ 136-136y (1994).

<sup>73</sup> 16 U.S.C. §§ 1510-1544 (1994).

<sup>74</sup> 42 U.S.C. §§ 300f-300j-26 (1994).

<sup>75</sup> 15 U.S.C. §§ 2601-2692 (1994).

<sup>76</sup> 42 U.S.C. §§ 6901-6992k (1994).

<sup>77</sup> Reorganization of Agencies of the Executive Branch (Feb. 9, 1970) (reprinted in 1970 U.S.C.C.A.N. 6309, 6322).

Pollution Control Council.<sup>78</sup> This group was composed of sixty-three top corporate executives appointed by the secretary of commerce who met in secret to express the views of the business community on the federal regulatory programs that were being developed.<sup>79</sup>

Following EPA's creation, President Nixon established a "Quality of Life" (QOL) inter-agency review process. It was centered in the Office of Management and Budget (OMB) to review regulations before EPA proposed them. Because of legal concerns, the QOL program did not shift explicit decision-making authority to OMB, though it could serve as a vehicle for blocking regulations pending resolution of concerns raised by other agencies.<sup>80</sup>

President Gerald Ford continued the QOL program, though President Jimmy Carter replaced it with his own Regulatory Analysis Review Group (RARG).<sup>81</sup> RARG considered the economic impact of significant regulatory initiatives. President Carter allowed himself to become deeply involved in major regulatory decisions when he asked the Occupational Safety and Health Administration to delay issuing standards to protect workers from exposure to cotton dust. He also conducted a White House meeting with EPA Administrator Costle on the eve of issuance of regulations establishing new source performance standards for coal-fired power plants.<sup>82</sup> Despite these interventions, and his ill-fated synfuels initiative, President Carter became a champion of environmental interests by preserving over 50 million acres in Alaska by proclamation prior to his White House departure.<sup>83</sup> Congress ratified the proclamation with the Alaska National Interest Lands Conservation Act of 1980 which almost doubled the land area of the national park system.<sup>84</sup>

The election of President Ronald Reagan represented an entirely new era during which the powers of the presidency were used to reduce and restrain environmental protections at every turn.<sup>85</sup> To accomplish this end, the Reagan administration established a program of presidential oversight of rulemaking that centralized enormous power in OMB, allowing OMB to become involved in the

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<sup>78</sup> Exec. Or. 11523, 35 Fed. Reg. 5993 (Apr. 11, 1970).

<sup>79</sup> W.H. Rogers, Jr., *The National Industrial Pollution Control Council: Advise or Collude?*, 13 B.C. Indus. & Com. L. Rev. 719, 720-21 (1972).

<sup>80</sup> Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & Contemp. Probs. 127, 133 (Autumn 1991).

<sup>81</sup> Exec. Or. 12044, 3 C.F.R. 152 (1979).

<sup>82</sup> Percival, *supra* n. 80, at 143-46.

<sup>83</sup> Exec. Procl. 4611-4627, 3 C.F.R. 69 (1978).

<sup>84</sup> 16 U.S.C. §§ 3101-3233 (1994).

<sup>85</sup> Presidential Task Force on Regulatory Relief, [Year End Summary of the Administration's Regulatory Relief Program] (Dec. 30, 1981) (reporting that 54 of 91 existing regulations designated for reconsideration during 1981 were environmental or health and safety regulations) (copy on file with author).

details of all significant EPA decisions.<sup>86</sup> President Reagan also created a Task Force for Regulatory Relief, chaired by Vice-President Bush, which invited industry executives to recommend regulations that should be relaxed or repealed.<sup>87</sup> The regulatory review program established by the Reagan administration provided a vehicle for pursuing such goals.<sup>88</sup>

Section 3(c) of Executive Order 12291 required EPA to submit all notices of proposed rulemaking and final rules to OMB (along with a Regulatory Impact Analysis for major rules) in advance of publication in the Federal Register.<sup>89</sup> If OMB and EPA disagreed, section 3(f) of Executive Order 12291 provided that OMB could request EPA to consult with it, and that in the interim, EPA shall "refrain from publishing" the proposed or final rule in the Federal Register.<sup>90</sup> Section 3(f)(2) stated that EPA should not publish a final rule until it had responded to OMB's views "and incorporated those views and the agency's response in the rulemaking file."<sup>91</sup> In practice, OMB interpreted these provisions as giving it the authority to block indefinitely any proposed or final rule that it opposed. This allowed OMB to bludgeon EPA into making concessions to get its rules cleared.

Executive oversight had a profound influence on EPA's ability to issue regulations. During the early years of the Reagan administration, OMB used the Executive Order 12291 process to involve itself in the details of virtually every significant regulatory decision by EPA. This provoked protests from environmentalists and members of Congress who argued that OMB was secretly attempting to dictate major changes in EPA regulations that often were at odds with statutory requirements.<sup>92</sup> Congress responded by holding numerous oversight

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<sup>86</sup> *Id.* at 150-51.

<sup>87</sup> The other members of the Task Force included the director of OMB, the secretaries of treasury, commerce and labor, the attorney general, the chairman of the council of economic advisors and the assistant to the president for policy development. *Role of the OMB in Regulation*, Hearings before the Subcommittee on Oversight and Investigations of the House Energy & Commerce Committee, 97th Cong., 1st Sess 43 (1981).

<sup>88</sup> Exec. Or. 12291, 3 C.F.R. 127 (1982).

<sup>89</sup> *Id.* at 128.

<sup>90</sup> *Id.* at 129.

<sup>91</sup> *Id.* at 130.

<sup>92</sup> See George C. Eads & Michael M. Fix, *Relief or Reform? Reagan's Regulatory Dilemma* (The Urb. Inst. Press 1984) (reviewing the consequences of the Reagan administration's regulatory relief effort); Jonathan Lash, *A Season of Spoils: The Reagan Administrations Attack on the Environment* (Pantheon Books, 1984); National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies* (1987) (summarizing the debate over presidential oversight of rulemaking); Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. Politics 864 (1988) (discussing OMB review from a political science perspective); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533 (1989) (providing the perspective of legal scholars); Thomas O. McGanty, *Regulatory Analysis and Regulatory Reform*, 65 Tex L. Rev. 1243 (1987); Peter L. Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181 (1986).

hearings at which administration officials were asked to appear as witnesses to defend their actions.<sup>93</sup> These hearings helped document arguments that the process was being abused to block regulations required by law.

The legality of presidential involvement in rulemaking was first addressed in *Sierra Club v. Costle*,<sup>94</sup> a case involving a challenge to a major Clean Air Act regulation which established emissions standards for new coal-fired power plants. President Carter had summoned the EPA administrator to a White House meeting to discuss the rule after the close of the public comment period.<sup>95</sup> The court noted that section 307 of the Clean Air Act specifically requires that any written comments by other executive agencies be included in the rulemaking docket, but that this provision does not extend to oral comments.<sup>96</sup> Endorsing the notion that the Constitution provides for a unitary executive, the court approved presidential oversight of rulemaking.<sup>97</sup> Writing for the court, Judge Wald recognized that "there may be instances where the docketing of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary" if a statute specifically requires that essential information be docketed.<sup>98</sup> However, she declined to create such a requirement.<sup>99</sup>

Judge Wald cautioned that rulemaking actions must be based on information or data in the record in order to withstand judicial review.<sup>100</sup> She indicated that even if "undisclosed Presidential prodding" resulted in a different regulatory outcome from that which otherwise would have been obtained, so long as it is an outcome that is "factually based on the record," courts should not intervene.<sup>101</sup> While recognizing that this would permit the political process to have some influence on rulemaking, Judge Wald doubted that "Congress intended

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<sup>93</sup> See H.R. Subcomm. on Oversight & Investigations of the Comm. on Energy & Commerce, *Role of OMB in Regulation*, 97th Cong. (June 18, 1981); H.R. Comm. of Govt. Operations, *Office of Management and Budget Control of OSHA Rulemaking*, 97th Cong. (Mar. 11, 18, 19, 1982); H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *EPA: Investigation of Superfund and Agency Abuses*, 98th Cong. (1984); H.R. Subcomm. on Oversight & Investigations of the Comm. on Energy & Commerce, *EPA's Asbestos Regulations*, 99th Cong. (Apr. 16, 1985); Sen. Subcomm. on Intergovernmental Regulations of the Comm. on Govt. Affairs, *Oversight of the Office of Management and Budget Regulatory Review and Planning Process*, 99th Cong. (Jan. 28, 1986); H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *OMB Review of EPA Regulations*, 99th Cong. (May 8, 1986).

<sup>94</sup> 657 F.2d 298 (D.C. Cir. 1981).

<sup>95</sup> *Id.* at 388.

<sup>96</sup> *Id.* at 404-05.

<sup>97</sup> *Id.* at 405-06.

<sup>98</sup> *Id.* at 406-07.

<sup>99</sup> *Id.* at 407.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 408.

that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power."<sup>102</sup>

The *Costle* decision provided strong support for the propriety of presidential oversight of rulemaking by recognizing that the president is charged by the Constitution with responsibility "to take Care that the Laws be faithfully executed."<sup>103</sup> The decision did not state that the president may *displace* agency decisionmaking when a statute directs that certain decisions be made by the head of an executive agency. However, it suggested that it is proper for the president to use his influence to persuade the agency head concerning what decision to reach.<sup>104</sup> Since the president can always fire the EPA administrator, the president is likely to get his way in virtually all cases, although a threat of resignation by an agency head may preserve some degree of independence. Regardless of how agency decisions are reached, they must conform to law and be based on the rulemaking record.<sup>105</sup> Thus, it does not follow that the president or OMB may direct agencies to ignore statutory requirements or to act in a manner that is inconsistent with them. This was confirmed by a federal district court five years after *Costle* in *Environmental Defense Fund v. Thomas*.<sup>106</sup>

*Thomas* represents the clearest articulation of the legal bounds on executive oversight. The decision involved a situation where EPA had missed a statutory deadline for promulgating a regulation that OMB was blocking.<sup>107</sup> The environmental plaintiffs surprised the Justice Department, which had been assiduously seeking to avoid legal challenges to OMB's regulatory review authority, by expressly joining OMB as a defendant in the action.<sup>108</sup> The Justice Department took the unusual step of asking the court to issue a court order against EPA in an effort to avoid any consideration of OMB's role in blocking the regulation.<sup>109</sup> However, the court ruled against OMB, issuing declaratory relief stating that the agency had no authority to block EPA's promulgation of regulations.<sup>110</sup>

The court confirmed that the president has the authority under Article II of the Constitution to supervise the activities of the executive branch and to "take Care that the Laws be faithfully executed."<sup>111</sup> However, the president cannot

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<sup>102</sup> *Id.*

<sup>103</sup> U.S. Const. art. II, § 3.

<sup>104</sup> *Costle*, 657 F.2d at 408.

<sup>105</sup> *Id.* at 407-08.

<sup>106</sup> 627 F. Supp. 566 (D.D.C. 1986).

<sup>107</sup> *Id.* at 567.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 571.

<sup>111</sup> U.S. Const. art. II, § 3.

require agencies to take actions that are contrary to law. The decision in *Thomas* indicates that the president lacks the authority to block the issuance of regulations required by statutory or judicial deadlines.<sup>112</sup> If issuance of a regulation is required by law, but no deadline has been established by Congress, courts are authorized by the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed."<sup>113</sup>

Perhaps the most intriguing set of legal questions raised by presidential oversight of rulemaking concerns what happens when the rulemaking record and the underlying regulatory statute provide support for more than one outcome, but OMB and the agency disagree over the proper course of action. Most federal environmental statutes (except for CERCLA),<sup>114</sup> state that the EPA administrator is to issue the regulations required by them. Presumably the president could not transfer EPA's responsibilities to another agency such as OMB. It is precisely for this reason that Executive Order 12291 stated that nothing in it "shall be construed as displacing the agencies' responsibilities delegated by law."<sup>115</sup> However, as Judge Wald's opinion indicates, "Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement."<sup>116</sup> As noted above, because the president's ability to fire agency heads is a powerful tool, a president who indicates that he wants agencies to listen to OMB could effectively give OMB the most important voice in regulatory decisions.

The capacity of a president to influence decisions by agency heads is so great that it may seem a needless formality to require that decisions nominally be made by the agency head. However, agency heads are not entirely without influence because their resignation can have important political consequences for the president. Former EPA administrators William Ruckelshaus and Russell Train were able to exhibit considerable independence from the White House by threatening to resign. President Nixon (and in Ruckelshaus's return stint, President Reagan) realized the high political cost of having a respected administrator quit.<sup>117</sup>

OMB's influence appeared to wane during the early days of President George Bush's administration, which courted environmentalists in a successful

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<sup>112</sup> 627 F. Supp. at 570.

<sup>113</sup> 5 U.S.C. § 706(1) (1994).

<sup>114</sup> 42 U.S.C. §§ 9601-9675 (1994).

<sup>115</sup> Exec. Or. 12291, 3 C.F.R. at 130.

<sup>116</sup> *Costle*, 657 F.2d at 408 (emphasis added).

<sup>117</sup> See Barbara Rosewicz, *The War Within: Environmental Chief Clashes With New Foe: Deregulation Troops—EPA's Reilly Strains to be Both Loyal Bush Aide and Good Conservationists—Next Bout: Global Warming*, Wall St. J. A1 (Mar. 27, 1992) (providing an excellent description of how this political dynamic operated in the case of William Reilly).

effort to break the legislative logjam that had stalled amending the Clean Air Act. President Bush later reversed course about the time a *Wall Street Journal* editorial accused him of being "The Reregulation President."<sup>118</sup> The White House announced that its Council on Competitiveness (created to improve international competitiveness of United States businesses) would "exercise the same authority over regulatory issues as did the Presidential Task Force on Regulatory Relief under Executive Order 12291 . . . ."<sup>119</sup> Few people realized that this signaled the start of a new deregulation campaign until the Bush administration announced that it was imposing a ninety-day freeze on the issuance of federal regulations.<sup>120</sup> In his 1992 State of the Union Message, President Bush announced that he was extending this freeze for an additional 120 days.<sup>121</sup>

Because it was of limited duration and imposed ostensibly in the interest of improving the quality of regulations, the Bush administration's regulatory moratorium probably raised no legal problem except with respect to regulations subject to expiring statutory or judicial deadlines. An indefinite moratorium would raise far more difficult questions because it would suggest that the president has determined not to perform his duty to "take Care that the Laws be faithfully executed."<sup>122</sup>

Ironically, the Bush administration's regulatory freeze substantially delayed implementation of the 1990 Amendments to the Clean Air Act, which President Bush claimed as his principal environmental achievement. On April 29, 1992, the administration held a press conference in the Rose Garden to announce that its regulatory moratorium was being extended for an additional 120 days. The president also announced that he was directing federal agencies to conduct cost-benefit analyses of legislative proposals under active consideration by Congress or to be proposed by the agency. The administration claimed that the initial ninety-day moratorium had produced reforms that would save \$15 to \$20 billion per year.<sup>123</sup>

At the press conference, the administration was embarrassed when Fred Krupp, the executive director of the Environmental Defense Fund, unexpectedly stepped to the microphone and denounced the extension of the regulatory moratorium as a sell out to big business.<sup>124</sup> Michael Boskin, chairman of the

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<sup>118</sup> Editorial, *Review & Outlook: The Reregulation President*, Wall St. J. A10 (June 17, 1991).

<sup>119</sup> Marlin Fitzwater, Press Secretary, Statement, *Review of Regulatory Issues by the Council on Competitiveness*, 1990 Pub. Papers I, 883.

<sup>120</sup> Memo. from George Bush, Pres., to Certain Department and Agency Heads, *Implementing Regulatory Reforms*, 1992 Pub. Papers I, 665.

<sup>121</sup> George Bush, Address, *State of the Union*, 1992 Pub. Papers at 156, 159.

<sup>122</sup> U.S. Const. art. II, § 3.

<sup>123</sup> George Bush, Remarks, *Regulatory Reform*, 1992 Pub. Papers at 663-64.

<sup>124</sup> Ann Devroy, *Environmental Expert Steals Show at Deregulation Party*, Washington Post A24



refinement of regulatory programs has generated conflicts between the branches, focusing on presidential oversight of rulemaking by environmental agencies.

### I. THE CONSTITUTIONAL POWERS OF THE PRESIDENT

The Constitution vests the executive power in the president and instructs him to "take Care that the Laws be faithfully executed."<sup>1</sup> The president is also given the power to appoint "Officers of the United States" as established by law,<sup>2</sup> although Congress may vest the appointment power for inferior officers in the "President alone, in the Courts of Law, or in the Heads of Departments."<sup>3</sup> Furthermore, the president is given supervisory power over the executive branch as reflected in Article II's directive that "he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."<sup>4</sup>

Among the most significant of presidential powers for influencing regulatory policy is the president's power to veto legislation. Article I grants Congress all legislative power,<sup>5</sup> but article I, section 7 requires that every bill passed by the House and Senate be presented to the president for approval.<sup>6</sup> If the president vetoes legislation, it can be enacted into law only if subsequently approved by a two-thirds vote of each house.<sup>7</sup> The Constitution allows the president to play an active role in the legislative process. It requires him to give Congress information on the state of the union and it directs him to recommend to Congress "such Measures as he shall judge necessary and expedient."<sup>8</sup> Other constitutional powers of the president that are occasionally relevant to environmental policy include his powers to make treaties, to appoint judges and ambassadors, his role as commander-in-chief of the armed forces, and his authority to grant pardons for offenses against the United States.<sup>9</sup>

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<sup>1</sup> U.S. Const. art. II, §§ 1, 3.

<sup>2</sup> U.S. Const. art. II, § 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> U.S. Const. art. I, § 1.

<sup>6</sup> U.S. Const. art. I, § 7.

<sup>7</sup> *Id.*

## II. PRESIDENTIAL INVOLVEMENT IN ENVIRONMENTAL POLICY: A HISTORY

Government policies have affected the environment long before government officials understood what it meant to have an environmental policy. As Richard Andrews notes: "[T]he 'real' environmental policy of a government is not necessarily what its officials say their policy is, nor what the statutes and regulations say, but the cumulative effect of what government actions actually *do* to the natural environment."<sup>10</sup> Although early administrations paid little attention to the environment, their policies for acquiring western land and promoting its development had significant environmental consequences. The vast size of the nation's natural resources kept these consequences from becoming a significant public concern until the late nineteenth century.

### A. The Republic's Early Days

In the early days of the Republic, environmental issues were rarely part of the president's agenda. President Thomas Jefferson had read Thomas Malthus's warnings about the impact of population growth, but dismissed them as inapplicable to the United States because of the nation's vast untapped resources.<sup>11</sup> Following the Louisiana Purchase, the United States was viewed as possessing limitless resources and public policy was designed to foster exploitation of these resources.<sup>12</sup> In 1806, President Jefferson eschewed a tax reduction in favor of investing the government's surplus in "roads, rivers, canals, and other objects of public improvement . . ."<sup>13</sup>

Early presidential involvement in the legislative process focused generally on measures to assist in the development of the nation's infrastructure. Conflict over creation of a national bank overshadowed other disputes concerning the distribution of federal funding for projects to improve roads, rivers, and harbors.<sup>14</sup> While the veto power was rarely exercised in the early years of the Republic,<sup>15</sup> President James Monroe vetoed H.R. 50, legislation for the

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<sup>10</sup> Richard N.L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* 4 (Yale U. Press 1999).

<sup>11</sup> *Id.* at 397 n. 3.

<sup>12</sup> *Id.* at 76.

<sup>13</sup> *Id.* at 88 (citation omitted).

<sup>14</sup> Roy M. Robbins, *Our Landed Heritage: The Public Domain, 1776-1936*, at 57-58 (U. Neb. Press 1962).

<sup>15</sup> Louis Fisher, *Constitutional Conflicts Between Congress and the President* 123 (Princeton U. Press 1985) (during the first twenty-eight years of Congress, only seven bills were vetoed by the president). *See*

## Separation of Powers, the Presidency and the Environment

Robert V. Percival\*

The structure of American government is designed to avoid concentration of power by separating executive, legislative and judicial functions and by creating a system of shared sovereignty between federal and state authorities. Despite inefficiencies fostered by this diffusion of power, this system of government has proven remarkably successful at adapting to vast economic and social changes while preserving democratic values. Profound changes have occurred in government and politics since the Constitutional Convention. These include the rise of political parties, the enormous expansion of the federal bureaucracy, and the creation of the regulatory state. Yet the constitutional structure that the framers erected has endured even as the doctrine of separation of powers has spawned spirited inter-branch competition to influence policy.

Competition between executive, legislative and judicial actors has been particularly intense in the environmental policy area. This article provides a historical perspective on this competition by focusing on the role of the president. Beginning with President Theodore Roosevelt, the presidency has played a major role in shaping federal environmental policy. While most early environmental conflicts focused on federal management of public lands and natural resources, the rise of the regulatory state in the 1970s created new avenues for inter-branch competition. Conflicts over regulatory policy between the president, Congress, and the judiciary have become routine staples of political life. These conflicts have generated new techniques used by each branch to influence regulatory policy. This article examines these evolving mechanisms of regulatory oversight and their effect on the balance of power between the branches of government.

This article begins by briefly reviewing how the Constitution allocates power between the three branches of the federal government and the checks and balances it establishes to ensure that no single branch acquires excessive influence. The article then illustrates how the powers of the presidency have come into play in the environmental policy arena. It sketches a history of federal environmental policy from the early days of the Republic through the regulatory legislation of the 1970s. Finally, the article examines how the implementation and

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President's Council of Economic Advisors, expressed outrage and dismissed Krupp as an extremist.<sup>125</sup> This was particularly ironic because Mr. Krupp and his organization played a major role in crafting the emissions trading provisions of the 1990 Clean Air Act. Indeed, when President Bush unveiled these proposals at another Rose Garden briefing on June 12, 1989, the President specifically commended the "Environmental Defense Fund for bringing creative solutions to longstanding problems; for not only breaking the mold, but helping to build a new one."<sup>126</sup>

Responding to intense criticism of regulatory review by environmentalists during the Reagan and Bush administrations, President Bill Clinton repealed Executive Order 12291.<sup>127</sup> He replaced it with his own regulatory review program that kept the basic structure of the prior administrations' programs.<sup>128</sup> Executive Order 12866 retains regulatory review by OMB's Office of Information and Regulatory Affairs (OIRA) and it continues to require agencies to perform detailed cost-benefit analyses of major rules.<sup>129</sup> The most important difference in the Clinton administration's program is that it is far more selective in the number of rules subject to pre-publication review by OMB. Rather than subjecting *all* proposed and final rules to pre-publication review, as was required during the Reagan and Bush administrations, Executive Order 12866 requires only that actions identified by the agency or by OIRA as "significant regulatory action" be subject to regulatory review.<sup>130</sup> Because regulatory review has been conducted in a far more selective and even-handed manner by the Clinton administration, it has not generated the kind of controversy that it did in the Reagan and Bush administrations.

#### IV. CONGRESSIONAL OVERSIGHT OF RULEMAKING

During the Reagan and Bush administrations, Congress responded to executive oversight of rulemaking with aggressive oversight hearings that sought to expose abuses of the process. These hearings had considerable success in getting OMB to release regulations that had been blocked for improper purposes.<sup>131</sup> The political dynamic between Congress and the White House

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(April 30, 1992).

<sup>125</sup> *Id.*

<sup>126</sup> Barry Commoner, *Making Peace with the Planet* 188 (Pantheon Books 1990).

<sup>127</sup> Exec. Or. 12886, 3 C.F.R. 638, 649 (1993).

<sup>128</sup> *Id.* at 638.

<sup>129</sup> *Id.* at 639-40.

<sup>130</sup> *Id.* at 645.

<sup>131</sup> Percival, *supra* n. 80, at 154.

changed dramatically during the Clinton administration, particularly after the Republicans took control of both houses of the 104th Congress.

The Republican majority in the House expressed particular hostility toward environmental interests and sought to pursue an agenda that included sweeping cutbacks in the environmental laws.<sup>132</sup> In February 1995, newly installed House Speaker Newt Gingrich labeled environmental policy "absurdly expensive" and described EPA as "the biggest job-killing agency in the inner city of America today."<sup>133</sup> One month later, Congress acted to fulfill a pledge in the Republican's controversial "Contract With America" by enacting the Unfunded Mandates Reform Act.<sup>134</sup> This legislation "makes it procedurally more difficult to apply new environmental regulations to entities of state and local governments unless federal funding for compliance is provided."<sup>135</sup>

Other legislative proposals that members of the Republican leadership promoted included a regulatory moratorium, legislation dramatically weakening the Clean Water Act and Endangered Species Act, requirements that future regulations meet risk-assessment and cost-benefit criteria, and legislation that would require compensation of landowners whose property values are adversely affected by regulation.<sup>136</sup> Despite vigorous opposition from EPA and the Clinton administration, in March 1995, the House of Representatives approved legislation that would require all major regulatory decisions to be justified on the basis of cost-benefit analyses as well as legislation requiring the government to provide compensation to landowners whenever regulations reduce property values by twenty percent or more.<sup>137</sup>

A threatened presidential veto and less sympathetic Senate leadership blocked direct congressional efforts to roll back environmental regulation. The Republican majority succeeded in using appropriations riders to prevent implementation and enforcement of various provisions of the environmental laws. "[A]lthough repeals by implication are especially disfavored in the appropriations context," the Supreme Court has confirmed that "Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."<sup>138</sup> In appropriations legislation that became law in 1995, Congress imposed a temporary freeze on the listing of new endangered species and it

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<sup>132</sup> Percival, *supra* n. 19, at 113.

<sup>133</sup> Newt Gingrich, Speech (Nat'l. Envtl. Policy Inst., Wash. D.C., Feb. 16, 1995).

<sup>134</sup> 2 U.S.C.A. §§ 1501-1571 (West 1997).

<sup>135</sup> Percival, *supra* n. 19, at 113.

<sup>136</sup> *Id.*

<sup>137</sup> *Unfunded Mandates Reform Act of 1995*, 2 U.S.C.A. §§ 1501-1571 (West 1997).

<sup>138</sup> *Robertson v. Seattle Audubon Socy.*, 503 U.S. 429, 440 (1992) (citations omitted).

required the United States Forest Service to increase timber harvests on federal lands.<sup>139</sup>

After the storm over appropriation riders eased, congressional critics of EPA succeeded in winning enactment of congressional review provisions in the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>140</sup> This legislation requires agencies to submit to Congress and the comptroller general copies of *all* final rules, prior to their effective date, along with copies of any cost-benefit analyses, regulatory-flexibility analyses, or unfunded-mandate analyses conducted for the rules.<sup>141</sup> Major rules having an economic effect of more than \$100 million are to be stayed for sixty calendar days to provide an opportunity for a member of Congress to introduce a resolution of disapproval.<sup>142</sup> If such a resolution is introduced within this period, special fast-track procedures for considering the resolution take effect for sixty "legislative days" in the House and 60 "session days" in the Senate, a period that may extend for anywhere from four to seven months.<sup>143</sup> If the rule is submitted to Congress less than sixty days before it adjourns, the next Congress has an opportunity to review it for seventy-five session days.<sup>144</sup> The fast track procedures allow: 1) the discharge of the resolution from committee upon a petition signed by thirty senators; 2) limited debate that does not allow filibusters; and 3) an immediate up-or-down vote in each house at the end of the debate.<sup>145</sup> Once one house of Congress has passed a joint resolution of disapproval, it may not be referred to a committee in the other house. It cannot be amended, therefore, no conference committee ever will be necessary.<sup>146</sup>

The Supreme Court's decision in *INS v. Chadha*<sup>147</sup> deprived Congress of the authority to exercise a "legislative veto" over regulations without complying with the usual procedures for presenting legislation to the president for signing or vetoing. Thus, SBREFA's review provisions do not allow Congress to veto regulations without presenting the joint resolution of disapproval to the president for signing or vetoing.<sup>148</sup> As a result, the president can always veto a resolution of disapproval, and Congress would have to override that veto by a two-thirds

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<sup>139</sup> Percival, *supra* n. 19, at 113.

<sup>140</sup> *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, 110 Stat. 857-74 (1996).

<sup>141</sup> 5 U.S.C.A. § 801(a)(1) (West Supp. 2000).

<sup>142</sup> *Id.* § 801(a)(2)-(3).

<sup>143</sup> *Id.* § 801(d)(1)(a)-(b).

<sup>144</sup> *Id.* § 801(d)(2)(a)(i)(I)-(II).

<sup>145</sup> *Id.* § 802(c)-(d).

<sup>146</sup> See Daniel E. Troy, *New Congressional Review Procedures of Agency Rules*, 21 Admin. & Reg. L. News 4 (Summer 1996).

<sup>147</sup> 462 U.S. 919 (1983).

<sup>148</sup> 5 U.S.C.A. § 801(a)(3)-(d)(1).

majority vote in each house. However, the fast-track procedures that SBREFA authorizes make it easier for Congress to pass resolutions of disapproval. If such a resolution is signed into law by the president, or enacted when his veto is overridden, the agency is barred from issuing any rules substantially the same as the rules disapproved by Congress unless expressly authorized by subsequent legislation.<sup>149</sup> While this legislation undoubtedly will increase the temptation for opponents of regulations to take their cases to Congress—opening up a new front on which agencies must fight in order to issue rules effectively—early returns suggest that the congressional review provisions of SBREFA have not had dramatic consequences.

While the partisan split on environmental issues in Congress still generates considerable sparring over appropriations riders, bipartisan support for environmental legislation is not entirely a thing of the past. In 1996, Congress demonstrated that it was still capable of enacting environmental legislation. As the 1996 presidential election approached, it became increasingly apparent that strong public support for environmental protection measures had moderated some of the 104th Congress's hostility toward environmental law.<sup>150</sup> A moratorium on listings of endangered species was lifted in spring 1996 when budget legislation was enacted.<sup>151</sup> Consensus food safety legislation (the Food Quality Protection Act of 1996)<sup>152</sup> that amended the Federal Insecticide, Fungicide and Rodenticide Act and the Federal Food, Drug and Cosmetic Act<sup>153</sup> to improve public health protection against pesticide residues on food breezed through Congress and was signed on August 3, 1996. Legislation to reauthorize the Safe Drinking Water Act was approved overwhelmingly by Congress and signed on August 8, 1996.<sup>154</sup> Both were the product of compromises between environmental interests and the regulated community because of fear that failure to act would lead to even less desirable results for all interests.

## V. THE JUDICIARY AND ENVIRONMENTAL REGULATION

The judiciary is responsible for interpreting the legal ground rules that govern competition between the president and Congress, and has played a major role in shaping regulatory policy. Even before the rise of the regulatory state, the

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<sup>149</sup> *Id.* § 801(a)(5)(2).

<sup>150</sup> Tom Wicker, *A Political Conversion*, 13 *Envtl. F.* 26, 28 (Mar.–Apr. 1996).

<sup>151</sup> Pub. L. No., 104–134, 110 Stat. 1321 (1996).

<sup>152</sup> Pub. L. No. 104–170, 110 Stat. 1489 (1996).

<sup>153</sup> 21 U.S.C. §§ 301–395 (1994).

<sup>154</sup> Pub. L. No. 104–182, 110 Stat. 1613 (1996).

Supreme Court's decision in *Baker v. Carr*<sup>155</sup> set in motion a process of reapportionment that ultimately generated a Congress more responsive to public concern for the environment. The judiciary has umpired disputes between Congress and the president, as illustrated by the Supreme Court's decision in *Chadha*. By invalidating the "legislative veto" on constitutional grounds, the Court deprived Congress of a tool for exercising greater control over regulatory policy decisions by executive agencies.<sup>156</sup>

In the late 1960s and early 1970s, the judiciary played a major role in the rise of federal environmental regulation by opening up the courts to environmental interests and requiring agencies to implement the new regulatory programs enacted by Congress.<sup>157</sup> Judicial review then swung from the "hard look" approach initially championed by the D.C. Circuit to more deferential doctrines embodied in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*<sup>158</sup> and *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>159</sup> Despite deference to agencies, the judiciary has continued to play an active role in reviewing environmental regulations. Important environmental regulations routinely are challenged in court and a significant proportion of them are vacated or remanded to agencies for reconsideration.<sup>160</sup>

Currently, the Supreme Court is about to decide the most important environmental case it has heard in at least twenty years. *Browner v. American Trucking Association*<sup>161</sup> has the potential to alter the balance of power between the legislative and executive branches by resuscitating the non-delegation doctrine and restricting the ability of agencies to set regulatory standards. While this case demonstrates that even long dormant legal doctrines have the potential to effect radical change if used by an activist judiciary, it now appears likely that the Supreme Court will eschew this invitation to judicial activism.

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<sup>155</sup> 369 U.S. 186 (1962).

<sup>156</sup> *Chadha*, 462 U.S. at 959.

<sup>157</sup> See, e.g., *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>158</sup> 435 U.S. 519 (1978).

<sup>159</sup> 467 U.S. 837 (1984).

<sup>160</sup> See, e.g., *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (striking down regulations have that jeopardized EPA's ability to regulate asbestos in a comprehensive manner); *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992) (preventing OSHA from updating its standards for worker exposure to air contaminants to keep pace with national consensus standards); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (dismissing legislative findings by attacking as "regulatory takings" programs to protect sensitive coastal areas and to control development were necessary to prevent environmental harm).

<sup>161</sup> No. 99-1257 (U.S., cert. granted, May 22, 2000); *Am. Trucking Assn. v. Browner*, No. 99-1426 (U.S., cert. granted, May 30, 2000).



## VI. CONCLUSION

Just a century ago, Theodore Roosevelt became the first president to make environmental protection an important priority for his administration. Today, the legal infrastructure that has been erected with the rise of the modern regulatory state has made great strides in protecting the environment. Efforts to shape federal environmental policy now have become the subject of fierce competition between actors in all three branches of government. This competition has intensified as each branch has developed new tools for influencing regulatory policy.

As this article goes to press, a sharply split electorate has ushered in a new administration less sympathetic to environmental concerns, but one whose platform did not garner even a plurality of the popular vote. The Senate is now evenly divided fifty/fifty on party lines while Republicans maintain a single-digit majority in the House of Representatives. This narrowly divided government may be a recipe for further gridlock in Congress and renewed inter-branch conflict. Or it may give rise, out of sheer necessity, to greater efforts to resuscitate bipartisan cooperation on environmental policy issues.

APPENDIX  
PRESIDENTIAL VETOES OF ENVIRONMENTAL & NATURAL RESOURCES  
LEGISLATION

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
G. Washington	None	1789-1797	1	0	
			2	0	
			3	0	
			4	0	
J. Adams	Federalist	1797-1801	5	0	
			6	0	
T. Jefferson	Democratic/ Republican	1801-1809	7	0	
			8	0	
			9	0	
			10	0	
J. Madison	Democratic/ Republican	1809-1817	11	0	
			12	0	
			13	0	
			14	0	
J. Monroe	Democratic/ Republican	1817-1825	15	0	
			16	0	
			17	1	H.R. 50: Preservation and repair of roads
			18	0	
J. Q. Adams	Democratic/ Republican	1825-1829	19	0	
			20	0	

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
A. Jackson	Democratic	1829-1837	21	1	H.R. 304: Improvement of harbors
			22	1	H.R. 516: Improvement of harbors
			23	1	S. 97: Improvement of Wabash River
			24	0	
M. Van Buren	Democratic	1837-1841	25	0	
			26	0	
W.H. Harrison	Whig	1841	27	0	
J. Tyler	Whig	1841-1845	27*	0	
			28	2	H.R. 203: Improvements to rivers and harbors
					H.R. 541: Improvements to rivers and harbors
J. Polk	Democratic	1845-1849	29	1	H.R. 18: Improvements to rivers and harbors
			30	0	
Z. Taylor	Whig	1849-1850	31	0	
M. Fillmore	Whig	1850-1853	31*	0	
			32	0	
F. Pierce	Democratic	1853-1857	33	0	
			34	0	

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
J. Buchanan	Democratic	1857-1861	35	0	
			36	0	
A. Lincoln	Republican	1861-1865	37	0	
			38	0	
			39	0	
A. Johnson	National Union	1865-1869	39*	0	
			40	0	
U. Grant	Republican	1869-1877	41	0	
			42	0	
			43	1	H.R. 921: Prevention of useless slaughter of buffaloes
			44	0	
R. Hayes	Republican	1877-1881	45	0	
			46	0	
J. Garfield	Republican	1881	47	0	
					H.R.: 6242: Appropriations for construction, repair and preservation of harbors and rivers OVERRIDDEN
C. Arthur	Republican	1881-1885	47*	1	
			48	0	

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
G. Cleveland	Democratic	1885-1889	49	1	H.R. 10419: Appropriations for preservation of public works, rivers and harbors
			50	1	S. 1870: Granting lands for a public park
B. Harrison	Republican	1889-1893	51	0	
			52	0	
G. Cleveland	Democratic	1893-1897	53	1	S. 2799: Granting lands for a public park
			54	2	H.R. 7977: Appropriations for construction, repair, and preservation of certain public works on rivers and harbors OVERRIDDEN
					H.R. 4058: To set apart certain lands for a national park.
W. McKinley	Republican	1897-1901	55	0	
			56	0	
			57	0	
T. Roosevelt	Republican	1901-1909	57*	0	
			58	0	

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
			59	0	
			60	1	H.R. 17707: Authorization of dam construction to generate hydroelectric power
W. Taft	Republican	1901-1913	61	1	S. 1751: Establishment of Mesa Verde Park
			62		
W. Wilson	Democratic	1913-1921	63	1	H.R. 1162: To amend act to authorize entry of public lands for park.
			64	1	H.J. Res. 116: Providing for invention of utilization of free energy.
			65	0	
			66	1	H.R. 517: Amendment to act to provide for drainage OVERRIDDEN
W. Harding	Republican	1921-1923	67	1	H.R. 77: Consolidation of forests in national forest lands
C. Coolidge	Republican	1923-1929	68	0	

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
			69	0	
			70	2	H.R. 13383: Construction and maintenance program for U.S. Bureau of Fisheries
					S. 675: Establishment of national park
H. Hoover	Republican	1929-1933	71	0	
			72	0	
F.D. Roosevelt	Democratic	1933-1945	73	1	S. 3741: Convey lands for public park
			74	3	H.R. 4018: Provide for investigation and control of marine organisms injurious to shellfish
					H.R. 7349: Amend act for flood control
					H.R. 3019: Amend act to stop injury to public grazing lands, overgrazing and soil deterioration

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
			75	3	S.J. Res. 57: To provide comprehensive national plan for flood prevention and control and soil conservation
					S. 3774: Cooperation between U.S. and NY on protection of forest lands
					H.R. 2711: Create Division of Water Pollution Control
			76	5	S. 2: Convey lands for public park
					S. 6: Return Grand Canyon to public domain
					H.R. 7411: Authorize construction, preservation and repair of public works on rivers and harbors



PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 2728: Add lands to forest
					H.R. 6264: Authorize construction, preservation and repair of public works on rivers and harbors
			77	1	H.R. 5945: Compact between states with respect to waters of river basin
			78	0	
			79	0	
H.S. Truman	Democratic	1945-1953	79*	3	H.R. 3477: Improvements of harbors
					S. 1273: National park land exchange
					H.R. 4435: Establishment of national park
			80	3	H.R. 597: Prevent garbage dumping in U.S. waters

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 1602: Establish national mineral resources division
					S. 1639: Authorize reparation and rehabilitation of flood, irrigation planning
			81	3	H.R. 1746: Aid for fish restoration
			82	1	S.J. Res. 20: Provide for mineral leasing of continental shelf.
					H.R. 5134: Promotion and development of federal reclamation project regarding fish and wildlife
					H.R. 1758: Amend Natural Gas Act

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
D. Eisenhower	Republican	1953-1961	83	3	H.R. 3087: Permit to improve DC property
					S. 1706: Taxation on national park
					H.R. 3300: Control Lake Michigan water level by diverting lake water
			84	6	H.R. 6373: Amend act to extend development of domestic minerals
					H.R. 7195: Adjustments for reservoir projects
					H.R. 6645: Amend Natural Gas Act
					S. 1384: Provide for interest in mineral and reservoir projects

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 3210: Authorization to test diversional lake water
					H.R. 12080: Authorization for construction, preservation and repair of public works on rivers and harbors; flood control
			85	1	S. 497: Authorization for construction, preservation and repair of public works on rivers and harbors; flood control
			86	4	H.R. 6940: Amend Mineral Leasing Act
					H.R. 6596: Stimulate research and development regarding coal preservation

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 3610: Amend Federal Water Pollution Act to increase grants for sewage treatment.
					H.R. 8860: Mining Stabilization Act
J.F. Kennedy	Democratic	1961-1963	87	0	
			88	0	
L.B. Johnson	Democratic	1963-1969	88*	0	
			89	2	S. 1674: Authorization for disposition of geothermal resources
					H.R. 13955: Authorization for Colorado River research
			90	0	
R. Nixon	Republican	1969-1974	91	0	
			92	5	S. 575: Authorization of funding for Appalachian Development Act

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					S. 2770: Amend Water Pollution Control Act OVERRIDDEN
					S. 635: Amend Mining Act
					S. 4018: Authorization for construction, preservation and repair of public works on rivers and harbors; flood control
					H.R. 56: Amend National Environmental Policy Act and provide for national environmental data system
			93	3	H.R. 3298: Restore rural water and sewage grant program
					S. 2589: Contingency plans for the reduction of petroleum consumption

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 15472: Appropriation for agriculture, consumer, and environmental protection programs
G. Ford	Republican	1974-1977	93*	6	S. 3537: Flood control modification
					H.R. 11541: Amend. National Wildlife Refuge Act.
					H.R. 15323: Amend Atomic Energy Act.
					S. 425: Regulation of surface mining and acquisition and reclamation of abandoned mines.
					S. 3943: Extend time for using funds to carry out rural environmental assistance.

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 11929: To amend Tennessee Valley Authority Act to provide expenditure for pollution control activities.
			94	6	S. 1849: To extend Emergency Petroleum Allocation Act
					H.R. 25: Regulation of surface coal mining and acquisition and reclamation of abandoned mines
					S. 391; To amend Mineral Leasing Act OVERRIDDEN
					H.R. 8800: To authorize energy research to promote electronic vehicles OVERRIDDEN



PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 12944: To extend Insecticide, Fungicide, and Rodenticide Act for 6 months
					S. 2081: To provide for furthering the conservation, protection and enhancement of water, land, and other related resources.
J. Carter	Democratic	1977-1981	95	4	S. 1811: Authorize appropriations for the Energy Research and Development Administration
					H.R. 10882: Authorize appropriation to carry out conservation programs on military and public lands

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					H.R. 12928: Energy and Water Development Appropriation Act
					H.R. 9370: To provide for the development of aquaculture in the U.S.
			96	2	S. 2096: To provide for study of long-term health effects in humans of exposure to dioxin research.
					H.R. 6257: To convey certain National Forest System Lands
R. Reagan	Republican	1981-1989	97	3	S. 1503: Standby Petroleum Allocation Act of 1982

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
					S. 2577: To Authorize Appropriation for environmental research and development
					H.R. 9: National Wilderness Preservation System in Florida
			98	2	S. 684: To authorize ongoing program of water research OVERRIDDEN
					S. 1097: National Oceanic and Atmospheric Administration, Atmospheric Satellite Program Authorization Act

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
			99	3	H.R. 1404: To establish Eastern Shore of Virginia National Wildlife Refuge and Training Center
					S. 1128: To amend Clean Water Act
					H.R. 5465: To amend Energy Policy and Conservation Act
			100	3	H.R. 1: To amend Federal Water Pollution Control Act and provide for renewal of quality of nation's waters OVERRIDDEN
					S. 2751: To designate certain lands in Montana as wilderness.
					H.R. 2596: To improve federal management of lands in Alaska.

PRESIDENT	PARTY	TERM	CONG. SESS.	ENVTL. VETOES	SUMMARY OF VETOED ENVTL. BILL
G. Bush	Republican	1989-1993	101	0	
			102	3	H.R. 2109: To conduct study of and to include Revere Beach, MA and to include in National Park System
					H.R. 5021: New River Wild Scenic Study Act of 1992
					H.R. 5061: To establish a national park in Florida.
W. Clinton	Democratic	1993-2001	103	0	
			104	1	H.R. 2909: To amend Silvio O. Conte Fish and Wildlife Act.
			105	0	
			106	1	S. 1287: Regarding the storage of nuclear fuel.



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Everett Ruess was an artist and a writer who wandered throughout the Southwest, and mysteriously disappeared in southern Utah at the age of twenty. His woodblocks, which depict natural scenes in the Sierra Nevada, along the California coast, and in the deserts and canyons of the Four Corners region, were recently discovered, restored, and reprinted. A limited number of prints are available from:

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