

## HOW CONGRESS IS MAKING THE NEW ENVIRONMENT DEPARTMENT UNCONSTITUTIONAL

**As** the television lights and intense focus on Earth Day recede, the environment question is heating up a classic executive-legislative battle behind the scenes in Washington. The issue: who will control the new Department of Environmental Protection? Legislation to elevate the current Environmental Protection Agency (EPA) to a cabinet-level department passed the House of Representatives on March 28 and is headed for a Senate vote in early May! Contrary to custom and constitutional law, however, the House-passed bill would create an executive branch department firmly under the control of Congress and only nominally responsible to the President.

Section 111 of the House-passed bill would create within the new department a powerful Bureau of Environmental Statistics charged with collecting and analyzing environmental data. Far from simply collecting data, however, the new bureau is empowered to advocate federal environmental policy totally independent from the direction or approval of the Secretary of the Environment or the President. This is unprecedented, argues Representative Frank Horton, the New York Republican, who notes that the bill abandons principles that have guided this nation for more than 200 years. A leading proponent of such "good government" laws as the 1978 Inspector General Act and the 1989 Whistleblower Protection Act, Horton charges that the House is "creating an office, the head of which is answerable to no one, [and whose] work products — including policy analysis — can be reviewed by no one,... even the Inspector General."

**Who's In Charge.** The bill pointedly excludes the President and the Secretary of the Environment from having control over the Bureau. Instead, all functions "that relate to the gathering, analysis, and dissemination of environmental quality and related public health information" are vested in a newly created Director of Environmental Statistics. The proposed law requires that the \$75,000 per-year director be a career bureaucrat appointed by the Secretary of the Environment for a term of four years, and removable only for "malfeasance in office, maladministration, or neglect of duty." The meaning: neither the Secretary nor the President can fire the director.

Congress, by contrast, appears to have given itself adequate control over the director. While it prohibits the President and other executive branch officials from approving or previewing the bureau's reports, the bill requires that the director, upon request, shall "make special statistical compilations, surveys, and reports for Committees of the House of Representatives and the Senate" Congress it seems is not creating an executive branch department, nor even an independent agency, but a wholly owned congressional subsidiary that is merely housed within the executive branch.

Another way that Congress is seeking to control the new department is by limiting sharply the president's ability to appoint the senior policy staff of the new executive branch department. Section 103 of the bill, for example, requires that no fewer than two-thirds of the Deputy Assistant Secretaries of the new department "shall be filled by individuals who have at least five years of service in the Federal civil service." The meaning: non-bureaucrats need not apply. Section 113 imposes an even broader restriction, limiting unrestricted presidential appointees to no more than 10 percent of the department's total senior executive staff. Although the bill contains a clause that allows limited exceptions, the effect of the prohibition is to prevent the President from appointing policy makers who support his views. The result: senior level policy staff of the new department will be more likely to support and respond to Congress than to the President.

Non-civil servants appointed by the President to key executive branch policy positions are commonly referred to as political appointments. Such appointments are very important. They allow a President to employ a staff that is committed to his policies. Political appointees often come from the private sector where the range of creative thinking is not limited to such solutions as new government regulations or more government spending. Political appointees, moreover, represent a more democratic approach to governing since they usually support the policies that the President was elected to pursue. Career civil servants, by contrast, need have no commitment to the President's platform and are not accountable to the voters.

**Bureaucrats' "True Employers."** The notion of non-political bureaucrats is rooted in the dubious notion that politics can and should be separated from the "administration" of government. Yet experience has proved that bureaucrats are no less political than are presidential appointees. Rather than responding to a particular political party, however, bureaucrats are biased toward protecting and expanding bureaucracy. Bureaucrats quite naturally are most attentive to those who control their budgets: members of Congress and congressional staff. As noted in *The Imperial Congress* "...executive branch bureaucrats will respond to those who can most directly influence their long-term career advancement and prospects. In that sense it is clear that the professional bureaucracy of the federal government regards Congress as its true employer."

Rather than simply elevating the EPA to a cabinet-level department—a proposal that was strongly supported by George Bush and a bipartisan majority in Congress—the House has passed a bill that creates new bureaucracy that once again challenges and probably violates the constitutional separation of powers. It is a bureaucracy over which the President has very little control. Warns Representative Horton: "In Eastern Europe, government officials for the first time are becoming answerable to the people. In the House of Representatives, there seems to be a feeling that we should go the other direction."

Bush already has made clear his intention to veto the bill unless the offending provisions of the House bill are excised. As the bill nears consideration in the Senate, he should articulate his position to the public and be prepared to make good on his veto threat.

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For further information:

"The Tiff Over EPA," editorial, *The Washington Post*, April 1, 1990.

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Gordon S. Jones and John Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books, 1989).