

EAGLETON AND THE ENVIRONMENT: PROMISES MADE; PROMISES KEPT

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Senator Tom Eagleton will be remembered for many things. He once told me that even though he served eighteen years in the United States Senate,¹ he would likely be best remembered for bringing professional football back to St. Louis.² Too many of his obituaries focused on his brief tenure as the Democratic nominee for Vice President in 1972.³

But these are history's footnotes. Self-deprecating, humorous, and provocative, Tom Eagleton should best be remembered for changing, and perhaps reasserting, the role of the Congress of the United States.

Prior to 1969, Congress largely "advised" the Executive Branch. Congress "authorized" federal agencies; restricted federal agencies; funded federal agencies; and, whenever possible, avoided responsibility for the actions of the government. It is not entirely clear why this all changed so suddenly in the first two years of the administration of Richard Milhous Nixon. But change it did, and Tom Eagleton was on its cutting edge. Indeed he personally wielded the scalpel!

When Eagleton was elected in 1968,⁴ there were lots of things going on in the nation's capital. Congress was still overwhelmingly Democrat.⁵ Nixon

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1. Jo Mannies, *Loss of a Statesman*, ST. LOUIS POST-DISPATCH, Mar. 5, 2007, at A1.

2. *Id.*; Jim Thomas, *Game Here Culmination of Long March for Eagleton*, ST. LOUIS POST-DISPATCH, Sept. 11, 1995, at 8C.

3. See Mannies, *supra* note 1.

4. Adam Clymer, *Thomas F. Eagleton, 77, a Running Mate for 18 Days, Dies*, N.Y. TIMES, Mar. 5, 2007, at B7.

5. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 363 (1969).

was a divisive symbol having achieved political visibility by red-baiting prominent, well-liked Democrats as he climbed to the Vice Presidency sixteen years earlier.⁶ The campaign had been nasty and the GOP barely won the White House.⁷

The Vietnam War dominated politics and divided the country. President Lyndon Johnson had retired because of a failed Vietnamese strategy,⁸ and the Democratic Party was sharply divided by the conflict. Members of the Senate and House were besieged by anti-war activists, at home and in their offices. Members began to turn attention to domestic problems, in part to change the subject, and in part to define themselves on issues other than the war.

It was onto this scene that Eagleton stepped. And, by the accident of his committee assignments, he was first thrown into the effort to rewrite the nation's worker safety laws and then to the initiative to craft a code of environmental law. He noted frequently his frustration with the failure of the Senate Education and Labor Committee to demand and require that government make good on its occupational health and safety promises. So when he came to the Subcommittee on Environmental Pollution chaired by Senator Edmund S. Muskie,⁹ he was in for a major surprise.

First, Muskie invited open and freewheeling debate among his colleagues. He sought and accepted ideas. He encouraged bipartisanship. And he wanted to enact an aggressive environmental agenda. Muskie was just off a failed run for the vice presidency¹⁰ and was viewed as the front runner for the Democratic nomination in 1972.¹¹ He wanted to establish his environmental leadership early with a bold stroke.

Second, Eagleton had not witnessed the kind of non-partisan interaction between senators that Muskie encouraged. He was completely unprepared to work out ideas with members of the GOP.

Finally, he was immediately a part of a process which did not have any preconceptions as to the direction national policy should take. This meant that

6. See JULES WITCOVER, FROM ADAMS AND JEFFERSON TO TRUMAN AND QUAYLE: CRAPSHOOT—ROLLING THE DICE ON THE VICE PRESIDENCY 106–15 (1992).

7. U.S. DEP'T OF COMMERCE, *supra* note 5, at 355.

8. See generally HERBERT Y. SCHANDLER, THE UNMAKING OF A PRESIDENT: LYNDON JOHNSON AND VIETNAM (1977). In retiring, Johnson stated that “[w]ith America’s sons in the fields far away . . . I do not believe that I should devote an hour or a day of my time to any personal partisan causes or to any duties other than the awesome duties of this office—the Presidency of your country. Accordingly, I shall not seek, and I will not accept, the nomination of my Party for another term as your President.” *Id.* at 287.

9. Leon G. Billings, The Muskie Legacy: Policy and Politics (Apr. 14, 2005), available at <http://www.muskiefoundation.org/billings.lecture.041405.html>.

10. RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 317, 333–36 (1978).

11. *Id.* at 542.

new ideas had a real audience and good ideas, however innovative and some would say radical, had a chance of enactment.

The first environmental legislation to which Eagleton was exposed were the 1970 amendments to the Clean Air Act.¹² Muskie had been expanding the role of the federal government in clean air policy for nearly a decade and had recently been attacked by a Ralph Nader group for “selling out” to the pulp and paper industry.¹³ It is not clear whether Muskie was more stung personally or politically by the Nader attack, but taken together with the efforts by Nixon to paint himself green and by Democratic Senate colleagues like Washington state’s Henry M. Jackson and Warren G. Magnuson and Wisconsin’s Gaylord Nelson to grab “his” issue, he was ready for new ideas and new approaches.

Eagleton was the right person in the right place at the right time. Coming off his experience with Occupational Safety and Health amendments,¹⁴ he spoke eloquently and dramatically about the failure of government to keep its promises. He said, in essence, “we declare war on poverty but we don’t fight that war. We profess an interest in a safer workplace but don’t mandate standards. The American public is sick and tired of a government which makes rhetorical promises and never keeps them. We need to demonstrate that we are willing to back up the promises we make with deadlines and penalties for failure.”

His idea of setting deadlines for executive action was unheard of. The initial reaction from most of his colleagues was extremely negative. But Muskie liked the idea and so did GOP Senator Howard Baker (TN). Backed by GOP Senators J. Caleb Boggs (DE) and John Sherman Cooper (KY), the Subcommittee quickly adopted Eagleton’s initiative and began to mold a bill around it.¹⁵ Baker insisted that clean air policy be based on technologically demonstrable emission control technology, and Muskie demanded that, at a minimum, air quality standards that protected public health be the statutory mandate.

To support Eagleton’s insistence on “promises made; promises kept,” the Muskie Subcommittee removed most of the discretionary authority previously granted the Executive in implementing federal clean air law. Eagleton knew that deadlines would be meaningless if bureaucrats could simply sit on policy

12. See Howard H. Baker, Jr., Ambassador to Japan, Remarks by Howard H. Baker, Jr. at The University of Tennessee, Knoxville, Cleaning America’s Air—Progress and Challenges (Mar. 9, 2005), available at <http://muskiefoundation.org/baker.030905.html>; Billings, *supra* note 9.

13. See JOHN C. ESPOSITO & LARRY J. SILVERMAN, VANISHING AIR: THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION 272–98 (1970).

14. Baker, *supra* note 12.

15. See generally 116 CONG. REC. 42,381–95 (1970) (statements of Sens. Muskie, Baker, Boggs, and Cooper submitting and discussing a conference committee report on amending the Clean Air Act).

and the courts could not order action. Therefore, mandates became a key element of the Eagleton package.

Finally, there was the question of how the public was to be assured that mandates with deadlines were not simply ignored. While the amendments provided ample opportunity for the public to participate in the decision-making process, there was no assurance that the public could enforce its preferences as to what ought to be done and who should do it. Once again, Eagleton provided the senatorial leadership to shape the solution.

Earlier in that session, Muskie's best friend in the Senate, Senator Philip A. Hart of Michigan, had proposed legislation to empower the courts to accept class action suits to protect the environment.¹⁶ Muskie detested the idea of empowering the judiciary to set environmental standards. He had fought long and hard for a competent agency with scientific and technological knowledge necessary to determine what could be done to control pollution. The idea of turning matters of this complexity over to the courts was simply unacceptable. However, he did not want to ignore Senator Hart.

To address Hart's interest and meet Muskie's objection, the Subcommittee developed the idea of authorizing citizens to go to court to force both state and federal government to take the actions mandated by law in the time frame established by law. This so-called citizen suit provision gave citizens judicial standing without regard to interest or diversity. Eagleton became the principal advocate of this "private attorneys general" provision, selling it first to Senator Hart and then defending it to his colleagues.

The importance of "private attorneys general" is underscored by the comments of Richard Ayres, a Washington, D.C. attorney, who was one of the founders of the Natural Resources Defense Council (NRDC).¹⁷ In a note commenting on this article, he observed, "My 1972 case in the U.S. Court of Appeals for the [Fifth] Circuit is another important citizen suit case that held tall stacks could not be substituted for emission controls."¹⁸ A citizen suit in 1973 was responsible for forcing the EPA to implement the concept of non-degradation to which Senator Eagleton was so committed.¹⁹

More recently Earthjustice and NRDC have won a series of cases against EPA attempts to gut the MACT (maximum achievable control technology standards) of the hazardous air pollutant program by creating subcategories of hazardous air pollutant emitters that EPA claims do not emit enough to

16. 116 CONG. REC. 6,578, 6,581-82 (1970).

17. Bonner R. Cohen, *Natural Resources Defense Council: Weapons in the Environmentalist Arsenal—Lawsuits, Blacklists and Publicity*, ORGANIZATION TRENDS, Aug. 2003, at 1-2.

18. Letter from Richard Ayres, to author _____ (on file with author).

19. *Id.*

endanger human health, then exempting the members of the new subcategories from the MACT requirements.²⁰

Attorney Ayres concludes:

In the enforcement context, citizen suits have also been invaluable. I represented NRDC and citizen groups in the Tennessee Valley Authority who used it (citizen suit) to obtain court orders that forced TVA to reduce air emissions by more than 1 million tons per year (then more than 50% of TVA's emissions and about 5% of the total US emissions), in the largest enforcement case ever brought under the Clean Air Act.²¹

Finally, the Clean Air Act amendments of 1970 established a precisely defined provision for judicial review of agency actions.²² This, too, was integral to the Eagleton objective of "promises made; promises kept." The provision for judicial review was intended to require bureaucrats to implement statutory requirements as and when Congress intended or to be subject to judicial intervention.

But more than that, the judicial review provision departed from historical practice of relying on the Administrative Procedures Act²³ as the basis for review of agency actions. By including a provision applicable solely to the Clean Air Act, Congress was able to designate which courts would hear which cases, significant because Congress mandated that nationally applicable regulations could only be reviewed in the U.S. Court of Appeals for the District of Columbia.²⁴ This provision bypassed the Federal District Courts and limited forum shopping (the option of taking a case to a district or circuit court perceived to be more favorable to polluters).

Also, the provision limited the time in which a challenge to a rule could be filed.²⁵ Rules containing standards and requirements could only be judicially reviewed at the time of promulgation and not, as had been the practice, at the time of civil or criminal enforcement.²⁶

Taken together, deadlines, mandatory statutory requirements, citizen suits and judicial review became the structure of the Clean Air Act²⁷ which subsequently migrated in nearly identical form to the Clean Water Act,²⁸ Superfund,²⁹ and a host of other environmental statutes.

20. *Id.*

21. *Id.*

22. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 307, 84 Stat. 1676, 1707-08 (1970).

23. 5 U.S.C. §§ 500-96 (2000).

24. 42 U.S.C. § 7607(b)(1) (2000).

25. *Id.*

26. *Id.*

27. 42 U.S.C. §§ 7401-7671 (2000).

28. 33 U.S.C. §§ 1251-1387 (2000).

29. 42 U.S.C. §§ 9601-9675 (2000).

While it is unfair to say this would not have happened but for Tom Eagleton, it is equally unfair to conclude that all of it would have happened had he not been where he was in 1970. For sure, Ed Muskie's presidential ambitions, Howard Baker's genius of forcing technology, Phil Hart's class action initiative, the public health commitment, and the odious air pollution episodes of the summer of 1970 that occurred as the Subcommittee wrote the bill, all contributed to the final unanimously approved product.

Absent the successful demand for meaningful deadlines, an idea unique to Tom Eagleton, it would be hard to envision the Clean Air Act³⁰ we have today.

As a result of Eagleton's successful endeavor to make sure promises made were promises kept, Congress, at least until the early '90s, has more frequently legislated in directive terms. This innovative mixture of deadlines, statutory mandates, citizen access to the courts, and judicial oversight of statutory implementation represented a sea change in the relationship between Legislative and Executive branches of government. It represented a restoration of the balance, perhaps even the imbalance, the Founders had intended 250 years ago.

History may write that Tom Eagleton was briefly a candidate for Vice President³¹ or that he brought football back to St. Louis,³² but historians who do a little digging will find that Tom Eagleton's insistence on deadlines, with the willing support of his committee colleagues, may have been much more important for its redefinition of the balance of power between Congress and the Executive than what he accomplished for environmental protection. And he did so simply by empowering the American public.

30. 42 U.S.C. §§ 7401–7671 (2000).

31. Mannies, *supra* note 1.

32. Thomas, *supra* note 2.