

HOW DID WE GET INTO THE LOGJAM, AND HOW DO WE GET OUT OF IT?

SUMMARY OF PANEL I DISCUSSION AT THE *BREAKING THE LOGJAM* CONFERENCE HELD AT NYU SCHOOL OF LAW
MARCH 28–29, 2008

Panel I was chaired by Lawrence Huntington.¹ Philip Sharp² gave the keynote address. E. Donald Elliott³ and David T. Buente, Jr.⁴ then offered their perspectives on the idea that environmental law confronts a logjam.

Lawrence S. Huntington – Introduction

Mr. Huntington led off the discussion by suggesting “somewhat facetiously” that “the modern hero of the environmental movement in this country is Paul Wolfowitz” because he brought us higher gas prices. According to Huntington, \$100+ petroleum prices are the “most profound cause of the grassroots conservation movements that are taking place across this country.” Because the federal government has been AWOL in the environmental field, he said, state initiatives and grassroots movements are arising organically to fill the void.

Huntington then cited the following recent Harris Poll⁵ statistics as evidence of the timeliness of the *Breaking the Logjam* project:

- 71% of respondents believe that greenhouse gases are leading to climate change.
- 81% of respondents believe that the U.S. needs to lead the effort to deal with climate change.
- 53% of respondents believe that the government is doing too little in the environmental and conservation fields.

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⁵ *Global Warming Seen as a Problem that Needs to be Addressed Globally, but Most People Want U.S. to Take the Lead*, THE HARRIS POLL # 109 (2007), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=828.

- 51% of respondents disapprove of the behavior of Congress in dealing with climate change, and approximately the same number disapprove of President Bush's behavior.
- By contrast, only 44% of respondents disapprove of the behavior of business in this regard.

Given the state of public opinion, Huntington suggested that the *Logjam* conference is a useful initiative.

Philip Sharp – Keynote Address

Mr. Sharp said he agreed with the characterization of the situation in Washington as a logjam. He stated that it was “not a tolerable ongoing situation, given what we confront economically” and “environmentally in this country and around the world.” He echoed Mr. Huntington’s “praise of high oil prices” and said that they were useful for generating the political will necessary to address the pressing environmental and economic issues that the country faces.

1. *Climate Change*

Sharp then moved on to the topic of getting in place a policy on climate change, which he called “the most profound challenge we face on the environmental front.”

He believes that climate change will finally move onto the national decision-making agenda. He pointed to a number of developments since 2006 as having raised the profile of climate change: California’s various actions to reduce the emission of greenhouse gases (GHGs), which he called federalism in its positive form; the IPCC assessments, which brought scientists to a higher level of consensus about the imperative of action; *Massachusetts v. EPA*, which made the Clean Air Act a default means of regulating GHGs in the absence of action by Congress to implement a better system;⁶ the passage of the Energy Act in 2007, which made “a down-payment on climate” regulation through energy efficiency mandates; the advance of the Lieberman-Warner bill through the Senate Committee on Environment and Public

⁶ With reference to the Clean Air Act, Mr. Sharp noted that he did not think it was the wisest means of regulating GHGs, and he noted his concern that in adopting a cap-and-trade regime for GHGs Congress will fail to restructure the CAA to eliminate such requirements as “best available technology,” thereby undermining the effectiveness of the cap-and-trade system.

Works; the appropriation by Congress of funding to set up an emissions registry at EPA; and the grassroots anti-coal campaign, which he said has reduced the number of coal-fired electric utility plants that will be built in this country.

2. *What Is Needed to Break the Logjam*

Sharp said that while he agreed with the four principles around which the *Breaking the Logjam* project is organized,⁷ he felt another principle needed to be added, and that is the need to “get to decisions.” He then spoke about the factors that, in his view, will determine the success or failure of any effort to meaningfully reform US environmental laws.

First, he said, it is absolutely critical that a diversity of expertise be brought to bear in the analysis of any proposed policy initiatives. One proposal that he indicated needs to be vetted by a diverse group of experts is the idea of the proposed carbon market efficiency board.

Second, he cautioned, issues of federalism and the dispersal of public authority must be constantly borne in mind when crafting proposed legislation.

Third, he noted that legislators face a multiplicity of competing goals and demands, which makes it difficult for legislators to keep any single group of issues (such as environmental issues) “front and center” in their minds. Legislators must constantly deal with trade-offs and are limited in their ability to juggle numerous issues at one time by dint of simply being human and by the legislative process itself. On that point, Sharp noted that the primacy of the need to deal with climate change may keep Congress from dealing with other environmental issues, at least on a temporary basis.

Fourth, he noted the need to have sophisticated and in-depth analysis of the financial incentives any legislation will create for private capital. It is necessary to ensure that any legislation has its intended effects.

3. *Conclusion*

The new presidential administration, Sharp noted, will have

⁷ Cross-cutting regulatory approaches that address underlying causes, openness about trade-offs, scaling regulatory authority to the problem, and expanding the use of market incentives and information.

two major challenges just on the climate change front alone: to get a domestic program in place and to achieve an international agreement. He emphasized the need to recognize the limits of people's individual capacities and well as institutional capacities and employed the metaphor of a house to make his overarching point. He said that rather than breaking a logjam and having the logs then just flow downstream, "what we're engaged in at that point is taking those logs and building structures." He noted that, given the many environmental law structures already in place, it is far more likely that "a roof is going to be patched or a room added on" than that the entire structure will be torn down and rebuilt from the ground up. So, in his view, giving good advice to the EPA or Congress or the new administration or even state governments on "how to patch the roof" or "add on a kitchen" is enormously valuable and in the end more likely to be achieved than "blowing up the house and starting from scratch." At the same time, he said, imagining what you would do if you were going to build a new building from scratch is a "wonderful intellectual thing to attempt" and will ultimately facilitate better "remodeling" and "roof patching."

In conclusion, Sharp said that he remained "fervently convinced that there are enormous opportunities for change." He said the *Breaking the Logjam* project was "onto the right thing, and we critically need it."

E. Donald Elliott

Mr. Elliott began by arguing that efforts to reform environmental law and policy in Washington are currently hobbled by a "blood feud" between Democrats and Republicans. He contrasted the current tendency to jockey for political advantage on environmental issues at the expense of making good policy with the bipartisan mood that prevailed on environmental issues in 1989–1990 when the acid rain trading regime was legislated.

Elliott suggested that it be may be impossible to break the political logjam in the current politically partisan atmosphere. Taking a cue from what canoeists do when they are confronted with logjams, he recommended that we try "portage solutions" in environmental law. Portage solutions "go around the politicians rather than through them."⁸ Portage solutions can take several

⁸ E. Donald Elliott, *Portage Strategies for Adapting Environmental Law and*

forms: environmental issues can be addressed at the state and local levels rather than the federal level; the courts can solve problems through statutory interpretation; administrative agencies can act, relying on the *Chevron* doctrine; experts can develop “consensus recommendations” and then present them to Congress as “a pre-packaged compromise.”⁹

In his remarks Elliott stressed the potential for legislation to emerge from consensus recommendations from experts. He suggested that the *Breaking the Logjam* project could qualify as an expert proposal that could pave the way for reform. He also recalled a past instance where input from academic experts had helped pave the way for Congressional legislation. When the Bush Administration proposed a trading regime to reduce acid rain in 1989, the idea was initially denounced by environmentalists, much to the dismay of then President Bush. One of the things that helped get the legislation passed were endorsements that were obtained for the trading program from every living Nobel Prize-winning economist.

Elliott emphasized that legislation does not “get written” by Congress acting as a unified body. Rather, legislation gets written through a “perfect storm” when all the elements necessary for action happen to align. He identified one necessary precondition as presidential leadership. Echoing Mr. Sharp, he said he felt that a lawmaking moment was approaching on climate change because, among other things, *Massachusetts v. EPA* has created a threat of a default solution of regulation under the Clean Air Act that is worse than the compromises most politicians would accept.¹⁰

In conclusion, Elliott returned to the potential for expert proposals to create momentum for change. Elliott emphasized that “if you can get diverse groups to come together and work out compromises, you have a chance that the Congress will not ‘demagogue’ the issue, but that we’ll get meaningful change.”

David T. Buente, Jr.

Mr. Buente spoke “in defense of the logjam.” He noted that

Policy During a Logjam Era, 17 N.Y.U. ENVTL. L.J. 24, 41 (2008).

⁹ *Id.* at 49.

¹⁰ Mr. Elliott said, however, that he disagreed with the papers by Jonathan Wiener and William Pedersen, to be found elsewhere in this issue, that there will be significant radiative effects from climate change legislation.

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the logjam is the consequence of the evolution over the past 200 years of our constitutional system, which is designed to move incrementally, and avoid episodic sweeping changes. He referred in particular to the difficulties of getting reforms through Congress. “The larger and greater the problem,” he suggested, “the much more complex the decision-making is” in Congress. As an example, about twenty-five to thirty different committees and scores of subcommittees will have to be involved in addressing climate change.

Buente described the challenge facing the *Breaking the Logjam* project as figuring out how to work *with* the institutionalized logjam in Congress to achieve environmental law reform. Doing this requires an analysis of how Congress absorbs information from the outside, and how Congress communicates internally. Buente suggested that it would be important to focus on the legislators’ staffers.

Buente agreed that Elliott’s portage concept could provide a means of addressing technical problems. But he doubted that big issues such as climate change could be addressed through portage solutions. Furthermore, he suggested that legislation on climate change could be difficult to achieve, as in his view we have yet to reach a “fundamental consensus” on how to deal with the problem.