

## CHAPTER 4

# **Destruction, Confusion, Confrontation, and Disarray: EPA Enforcement and Congressional Oversight in the Gorsuch Era**

The arrival of the Reagan administration in January 1981 heralded a dramatic change in the tone, structure, and operation of EPA's enforcement program. The two years that followed would see a sharp decline in the initiation of new enforcement cases, a precipitous drop in career staff morale, and a drastic loss of public credibility for EPA in general. To appreciate the reasons for these trends and the pervasiveness and profundity of their impact, one must first appreciate the manner in which EPA's new top managers were selected by the Reagan administration, the attitudes they held upon taking office, and the specific ways in which they approached EPA's enforcement responsibilities.

The Reagan administration's search for a new set of top EPA managers proceeded at a deliberate pace. Almost all EPA officials who had been political appointees in the Carter administration resigned from their positions before Reagan took office on January 20. Anne McGill Gorsuch,<sup>1</sup> the new administration's choice to succeed Douglas Costle as EPA administrator, was not nominated for that position until February 21, 1981, and her formal confirmation was delayed until May 5. Most of the other Reagan administration appointees to high-level EPA positions were also installed in the mid- or late spring. Rita M. Lavelle, an EPA official whose attitude and activities were ultimately to have an important effect on the administration of the Superfund Program, did not assume the office of assistant administrator for solid waste and emergency response until March 31, 1982, more than fourteen months after the Reagan administration had begun.<sup>2</sup>

The administration's method of choosing EPA's new management team emphasized the selection of individuals with an ideological affinity

for the conservative wing of the Republican Party. According to one former high-level EPA civil servant, “The White House personnel office was extremely powerful and it was obsessed with getting those with definite political views, regardless of qualifications, into their place[s].”<sup>3</sup>

Some chosen for high-level management posts had no specific interest in enforcement. William Sullivan, for example, the administration’s choice for enforcement counsel and deputy associate administrator for enforcement, stated, “I handled Reagan’s stop in Youngstown as a candidate and when they were recruiting they asked for my resume. The EPA was the last agency I wanted to go to, and enforcement was the last job I wanted at the Agency.”<sup>4</sup> Furthermore, in selecting EPA’s leadership, little thought was given to the manner in which those chosen would relate to one another once they assumed office. Anne Gorsuch, the Agency’s new administrator, had little influence over the selection of EPA’s regional administrators and senior headquarters managers, many of whom she had not known before taking office.<sup>5</sup>

The initial attitude of EPA’s new leadership toward the Agency’s enforcement program was, like a number of things during this period, controversial. In an interview five years later, Anne Gorsuch indicated that she had favored an effective enforcement program at EPA from the outset of her administratorship.<sup>6</sup> William Sullivan, who led EPA’s national enforcement program during the first year of Gorsuch’s tenure as administrator, stated that “to think there was a conspiracy to defeat enforcement is crazy.”<sup>7</sup>

Conspiracy, in its technical, legal sense, may be too strong a word. Nonetheless, there is *very* considerable evidence that the initial enforcement attitude of a number of the Reagan administration’s first set of political appointees was far more negative to environmental enforcement than the remarks of Gorsuch and Sullivan suggest. For example, Sheldon Novick, the regional counsel of EPA Region III at that time, later stated:

[T]here were plainly people in the administration, within EPA, who believed that the EPA itself should be dissolved, that the statutes that it implemented were senseless, and that the federal government had no business in environmental management. Those people, who found enforcement of federal law particularly distasteful, expressed that the EPA should be dismantled, beginning with its enforcement functions. . . . Political appointees at senior levels [other than Anne Gorsuch] began saying things like that.<sup>8</sup>

Novick's recollections with respect to the Reagan administration's first enforcement attitudes find support in an article that appeared in the *Washington Post*. In it James C. Miller III, at that time director of the Vice President's regulatory task force, was quoted as saying, "[T]here is a strong feeling on the part of the White House staff that we ought to be decentralizing regulatory enforcement." The article also indicated that "[f]inal decisions on the roles of OSHA and the Environmental Protection Agency have not yet been made within the Administration . . . but the agencies' enforcement activities will necessarily be cut back, assuming the budget cuts proposed by President Reagan are enacted."<sup>9</sup>

Valdas Adamkus, the regional administrator of Region V recalled that "when [Gorsuch] came into power, her attitude to enforcement in general was negative; there was no question."<sup>10</sup> Edward Kurent, the Agency's water enforcement division director and associate general counsel for waste enforcement during the Gorsuch era, went so far as to suggest that Gorsuch-era political appointees implemented what was "very obviously a deliberate plan to paralyze if not totally dismantle the enforcement program."<sup>11</sup>

Gorsuch subsequently indicated that she and her colleagues had not entered the Agency with any negative predisposition toward the career staff.<sup>12</sup> However, a number of EPA's permanent enforcement staff left the Agency with an entirely different sense. One headquarters enforcement attorney and manager stated, "They came in with the feeling that the existing career enforcement staff probably weren't the type of employees they would want. They didn't approach them as a professional staff who were competent and who were trying to do their jobs. They came in, I think, with a bias."<sup>13</sup>

Whatever their initial attitudes, motivations, and intentions, it is clear that, toward the beginning of their tenure, EPA's new enforcement leadership made several important changes in EPA's enforcement program and personnel policies. Concerned that the Agency's previous enforcement efforts had become unnecessarily litigious and antagonistic,<sup>14</sup> they adopted what became known as a "non-confrontational" approach to enforcement.<sup>15</sup> The "file first, negotiate later" attitude of the Carter administration was replaced by the notion that, as one EPA enforcement attorney stated it, "[Y]ou were to talk first and file later only if it was absolutely necessary and only if you could clear it with headquarters."<sup>16</sup>

Informal attempts at encouraging voluntary compliance became the enforcement procedure of choice. At least one EPA regional adminis-

trator was directly informed by William Sullivan, the Agency's enforcement counsel, that every enforcement case referred to headquarters by his region "will be considered a black mark against you." That individual, who took the view that Sullivan was "one of the level-headed and professional individuals who wanted to do a good job and was only following instructions from others," stated that he considered Sullivan's statement to him the "strongest indication" that federal environmental enforcement was being "dismantled."<sup>17</sup> Additionally, considerable emphasis was placed upon deferring federal enforcement activities in favor of state enforcement.<sup>18</sup>

Beyond these enforcement policies, EPA's new managers carried out a series of reorganizations of the Agency's enforcement structure. On June 1, 1981, Anne Gorsuch sent a memorandum to all EPA employees in which she announced that the Office of Enforcement was "abolished" and that its components would be transferred to various media programs (e.g., air, water, and hazardous waste). An Office of Legal and Enforcement Counsel also was established. This office reported directly to the administrator on the activities of the general counsel and in regard to Agency-wide enforcement.<sup>19</sup>

On September 15, 1981, Gorsuch formally eliminated EPA's regional enforcement divisions. The legal functions of those divisions were transferred to the Offices of Regional Counsel, which reported directly to the Office of General Counsel at EPA headquarters. Members of the technical staff of the regional enforcement divisions were transferred to various media-operating divisions in the regions.<sup>20</sup> Then, in late December 1981, headquarters *legal* enforcement activities were centralized in a new Office of Enforcement Counsel. The headquarters *technical* enforcement staff, however, remained with the various media offices; thus the legal enforcement and technical staffs were permanently divided into separate organizations.<sup>21</sup> A number of these changes were implemented over objections made by some of the Agency's senior career enforcement managers, who argued that the reorganizations would have a disruptive and counterproductive effect on the Agency's overall enforcement efforts.<sup>22</sup>

In addition to these reorganizations, a number of other trends and developments in the early Reagan days played an important role in EPA's enforcement work. On his first day in office, President Reagan issued a "Memorandum for the Heads of Executive Departments and Agencies," which imposed "a strict freeze on the hiring of federal civilian employees to be applied across the board in the executive branch."<sup>23</sup> This action, described as a "first step towards controlling the growth and size of gov-

ernment and stopping the drain on the economy by the public sector,” effectively prohibited EPA’s mid-level supervisory management from replacing any staff members that left the Agency.

Beyond this, EPA’s enforcement program was impaired by budget reductions, as well as rumors of plans to discharge or reduce in force (“rif”) the enforcement staff. With the exception of the Superfund Program, which was supported by dedicated monies, between 1980 and 1983 EPA’s budget as a whole declined, in constant 1972 dollars, from \$701 million to \$515 million, and the number of full-time positions at the Agency, excluding Superfund, declined by 26 percent, mostly through attrition.<sup>24</sup> Indeed, as two scholarly observers have concluded, “There is ample evidence that the Reagan administration’s adoption of an administrative presidency strategy did result in significantly lower levels of EPA expenditures and in dramatic shifts in internal program priorities away from abatement, compliance, control and enforcement.”<sup>25</sup>

Though EPA’s enforcement personnel were only minimally affected by rifs during Gorsuch’s tenure as administrator, there is evidence that significant cuts in EPA’s enforcement force were seriously considered. As Richard Wilson, an EPA career manager, remembered:

There were certainly people looking at major budget cuts in EPA [enforcement]. In fact, we saw proposed budget cuts from OMB that the only way to accomplish them was to rif. In that sense it was real. . . . What you didn’t know from day to day was whether or not they were going to bite the bullet and in fact rif down to those levels or [just] let attrition take its toll.<sup>26</sup>

Ultimately, no major termination of career enforcement staff actually occurred during the Gorsuch era. However, various enforcement programs, elements, and innovations were eliminated as a result of budget reductions, and funding for staff travel and training was significantly cut.<sup>27</sup> Moreover, EPA’s enforcement effort was impaired by a relatively high rate of attrition.<sup>28</sup>

Deeply concerned about actual and possible budget cuts and effectively sealed off from the decision-making process, a number of career enforcement managers and staff members began to perceive that ideological and partisan political considerations were playing an increasing role in the evaluation of their professional work.<sup>29</sup> In part this notion resulted from a statement by William Sullivan at a meeting of the entire headquarters enforcement staff in late December 1981. During the month or two before

this meeting, several staff attorneys had been hired (at relatively high salaries), notwithstanding the continuing EPA hiring ceilings.<sup>30</sup> As Richard Mays, then a career enforcement manager at EPA, remembered:

Sullivan made the announcement about the latest reorganization and then following that had a question-and-answer series. Some member of the staff asked him about the hirings of attorneys and whether political affiliation had played any role in these hirings. Sullivan's response was that essentially this was "a political world." The Republicans were the administration in power and, all things being equal, he would rather hire a Republican than someone who was not a Republican. The staff didn't like that too much, obviously, because this is a group of people who believe, and I think rightly so, that politics and ideology should have little to do with environmental protection or qualifications in terms of hiring staff.<sup>31</sup>

Other events also contributed to the career staff's sense that the Agency's enforcement program was becoming "politicized." Peter Broccoletti, whom Sullivan had selected to be his deputy enforcement counsel and whose approach to the career staff was seen as "domineering and intimidating,"<sup>32</sup> conducted a series of interviews with EPA enforcement attorneys in which at least some of them were asked questions about their memberships in environmental organizations.<sup>33</sup>

Broccoletti allegedly told EPA attorney and manager James Bunting that all of the EPA enforcement attorneys' original job application forms were under political review. Broccoletti subsequently denied this.<sup>34</sup> Nonetheless, Bunting specifically recalled: "People were being evaluated on the basis of what it was they had said there. If someone had listed a Democratic congressman as a reference, then that particular individual . . . was going to be viewed with suspicion."<sup>35</sup>

In addition to politicization, some EPA managers and staff members had the impression that the leadership of the Agency had regular contact with representatives of potential candidates for enforcement action outside of the presence of EPA staff members assigned to their cases. As William Hedeman stated, "[B]ehind the scenes, in the Sullivan-Burford era, industry was getting to these individuals quietly and having a major influence on how the enforcement policy took shape."<sup>36</sup>

An extreme but politically significant instance of this arose in EPA's negotiations with representatives of Inmont Corporation concerning a California hazardous waste disposal site. In early September 1981 Thornton ("Whit") Field, then special assistant to the administrator for hazard-

ous waste, had a series of conversations with Inmont's attorney regarding Inmont's responsibility for site cleanup which were not reported to the Agency's designated negotiators. During one of those conversations, Field revealed EPA's bottom-line settlement figure to Inmont, an event which had a critical effect on the outcome of those negotiations.<sup>37</sup>

More generally, during this time some of the regulated parties that were involved in settlement discussions with the EPA's enforcement staff sought meetings with higher-ranking Agency officials in the hope that they might receive a more sympathetic hearing.<sup>38</sup> As a result, from one attorney's perspective, "there never was any certainty that the deal you felt you had negotiated above board [and] across the table was going to be something that you could carry through when it came back to headquarters [for approval]."<sup>39</sup> A number of EPA enforcement staff members also developed the perception that the people they reported to—the Agency's career enforcement managers—had little influence on setting enforcement policy. Two incidents served to reinforce that notion.

In November 1981 the entire hazardous waste management staff had a meeting in Denver, Colorado. During the course of this meeting, Douglas MacMillan, EPA's highest-ranking career official with specific responsibility for hazardous waste enforcement, made a presentation about the Agency's enforcement policy. He indicated that EPA would be using administrative orders to redress RCRA violations. He also stated that when state agencies took RCRA enforcement actions against a regulated party that EPA officials perceived to be inappropriate or inadequate, the Agency would, in some instances, be prepared to pursue its own enforcement case against the same party. Shortly thereafter, at the same meeting, Thornton ("Whit") Field explicitly rejected the policies that MacMillan had announced. Stating, "I don't buy that and I don't think Anne Gorsuch does either," Field indicated that a formal enforcement approach was "too confrontational for this administration."<sup>40</sup> MacMillan later scarcely remembered this event,<sup>41</sup> but several enforcement staff members perceived Field's statements as a strong signal. His remarks appeared to indicate not only that MacMillan's pronouncement no longer represented the Agency's policy but also that the former task force director had been "slapped down very publicly."<sup>42</sup>

Another critical incident occurred seven months later when Rita M. Lavelle, EPA's assistant administrator for solid waste and emergency response, removed Lamar Miller from his position as chief of the technical component of the hazardous waste enforcement program. Miller, whom most staff members viewed as an outspoken advocate of firm enforce-

ment, had been less successful than his counterpart, William Hedeman, in gaining Lavelle's confidence. As one former member of Miller's staff recalled:

They announced the change on a day when he was going into the hospital for some sort of surgery. At the time it was really pretty strange. He wasn't for it. Lavelle said that Lamar was going to head up some sort of a groundwater-monitoring branch in OSW [Office of Solid Waste and Emergency Response] which didn't exist at the time and never subsequently materialized. When he came back, they gave him a task on some sort of a "sludge project."<sup>43</sup>

In the minds of a number of EPA's headquarters enforcement staff, Miller's abrupt removal marked an important turning point. Following Miller's removal, one knowledgeable official recalled, the staff "pushed less hard" and negotiated with regulated parties by "taking deals because they were there."<sup>44</sup>

If the authority of the Agency's top career enforcement managers had been dramatically undermined, however, it was not at all clear who was actually in charge of EPA enforcement work. Almost from the outset of the Reagan administration, EPA's enforcement program was marked by intense rivalries among the new political appointees. As one seasoned civil servant put it: "In eighteen years in government, I have never seen a group of people as intent on doing one another in as that crowd was."<sup>45</sup>

During the early months of the Reagan administration, Anne Gorsuch relied heavily on William Sullivan in enforcement matters to the relative exclusion of Sullivan's superior, associate administrator Frank Shepherd, and Robert Perry, the Agency's general counsel. A competition for authority grew among these three attorneys.<sup>46</sup> Within a few months, Shepherd resigned, leaving Sullivan and Perry, two strong-willed individuals, to vie for influence in the enforcement field. In the end, Perry prevailed. He assumed complete control of EPA's legal operation in April 1982. Perry's ascendancy did not end the rivalry within the upper echelons of EPA's enforcement program, however. As Anne Gorsuch told me, there was "almost a constant conflict" between Perry and Rita Lavelle over the strategy to be followed in hazardous waste enforcement cases.<sup>47</sup> There was also considerable disagreement among the Agency's regional administrators on a variety of enforcement issues.<sup>48</sup>

With respect to hazardous waste enforcement in particular, the first two years of the Reagan administration saw the institution of several new



policies and trends. It is notable, however, that despite the bevy of new policy questions that arose from EPA's initial attempts to implement the Superfund Program, the Agency's headquarters provided little written guidance to its regional enforcement personnel.<sup>49</sup> Furthermore, those few Superfund policies that did emerge were sometimes changed with great rapidity.

In general, the Superfund approach that was followed during this period was based on the preference of EPA's top management for strict conservation of the \$1.6-billion CERCLA trust fund. This approach was intended to strengthen the argument that the Superfund Act, and the corporate taxes that support it, should not be renewed after the Act's expiration on October 1, 1985.

To implement the Superfund approach, EPA's leadership adopted a strategy that has been described as "lawyers first, shovels later."<sup>50</sup> In fact, this label is misleading. It implies that a tough, litigious approach to Superfund enforcement preceded any use of the CERCLA trust fund for site cleanup activities. In reality, with the exception of hazardous waste enforcement matters that were already pending, EPA's earliest Superfund enforcement effort was anything but litigious. Rather than "lawyers first, shovels later," the slogan "ineffectual negotiation first, shovels never" is a more apt description.

The Agency placed heavy emphasis on providing the potentially responsible parties at inactive hazardous waste sites with the option of voluntarily cleaning up those sites. The expenditure of trust fund monies for remedial actions at Superfund sites was not permitted unless and until it had been demonstrated, to the satisfaction of the Agency's top headquarters officials, that responsible parties at those sites had been identified, that they had been notified of their potential liability for site cleanup expenditures, and that they had voluntarily and intentionally declined to carry out measures on their own.<sup>51</sup>

Other EPA policies and procedures also contributed to a sparing use of the CERCLA trust fund. In March 1982 the Agency required states to contribute 10 percent of the cost of RI/FS preparation as a condition to the use of Superfund monies for planning and designing hazardous waste site cleanups. Because most states had limited resources to come up with this 10 percent match, this policy significantly inhibited the use of the Superfund for cleanup activity.<sup>52</sup> In addition, the Agency began to interpret the "imminent and substantial endangerment" language of CERCLA section 106 (and RCRA section 7003) as requiring that the Agency demonstrate a present public health emergency, as opposed to the mere threat

of one, in order to obtain relief.<sup>53</sup> Because of the difficulty of making this showing in many cases, EPA's use of the CERCLA and RCRA imminent hazards sections to redress contamination problems at inactive hazardous waste sites was significantly curtailed.<sup>54</sup>

The Agency's leadership placed other restrictions on EPA's use of its emergency or "immediate removal" authority under CERCLA. This was accomplished by the promulgation of a set of regulations, incorporated as part of the Agency's National Contingency Plan, which were consistently more restrictive than the statute required.<sup>55</sup> It was also affected by a policy that forbade EPA's regional offices from expending trust fund monies in excess of \$50,000 for removal actions without the personal approval of the agency's assistant administrator for enforcement.<sup>56</sup>

The Reagan administration's first EPA managers centralized decision making in other ways as well. Authority over expenditures, case-specific enforcement strategy, and the wording of documents filed in enforcement litigation was retained in the Agency's Office of Solid Waste and Emergency Response and its Office of Enforcement Counsel. Regional officials were given little autonomy in implementing these vital aspects of the Superfund law.<sup>57</sup>

Finally, the Reagan administration's initial approach to RCRA enforcement continued the high level of inattention and inaction that had characterized RCRA enforcement during the Carter years. As one former EPA enforcement official expressed: "[V]irtually nothing was done in terms of writing guidance, making policy decisions or establishing an RCRA enforcement program."<sup>58</sup> State environmental agencies, which in many cases had "minimal training and too few resources," were delegated total responsibility for RCRA enforcement, with little federal guidance or oversight.<sup>59</sup> The Agency's RCRA enforcement program was afforded few resources, and many RCRA hazardous waste management regulations were placed in limbo by the Agency's plans to reconsider and revise them extensively.<sup>60</sup>

The cumulative impact of these innovations on EPA's enforcement policies was dramatic and pronounced. The number of new civil enforcement actions forwarded by EPA regional offices to Agency headquarters fell by 79 percent in 1981, compared with the previous year, and the Agency's civil referrals to the Justice Department fell 69 percent. In the Superfund area, EPA referred no new enforcement cases to the DOJ from January 20, 1981, until April 1, 1982, and only three such cases were filed between the latter date and September 29, 1982. With respect to RCRA

civil enforcement actions, EPA filed no cases in 1981 and only three cases during the first nine months of 1982, a sharp contrast to the forty-three RCRA civil cases the agency had initiated during 1980.<sup>61</sup>

In addition to a drop in its workload, EPA's enforcement staff was faced with considerable confusion. As William Sullivan candidly admitted: "The poor regional attorneys were left in a position where they didn't know who the hell they worked for. They couldn't even tell what the procedures were from day to day."<sup>62</sup> Apparently, the continuing reorganizations of the Agency's enforcement programs significantly contributed to the enforcement staff's confusion. Some present and former EPA officials saw clear organizational advantages in the demise of EPA's preexisting structure.<sup>63</sup> Nonetheless, a large number of those I spoke with viewed this series of organizational changes as harmful to the enforcement effort. In particular, they believed that the reorganization created barriers to effective communication among the Agency's interdisciplinary enforcement staff, giving rise to turf battles and red tape that had not existed previously.<sup>64</sup> In the face of these changes and uncertainties, a number of the Agency's mid-level managers became unwilling to make firm policy decisions, fearing that any position they took would be reversed at higher levels.<sup>65</sup>

Not surprisingly, enforcement staff morale declined precipitously in this period, notwithstanding Gorsuch's later recollection that the Agency had been "fun" and "jumpin'."<sup>66</sup> As one regional enforcement manager described it: "There was this feeling that the EPA was kind of a ship adrift in the water and that if we wanted to do anything it was time to leave, move on."<sup>67</sup> Staff members "feared for their jobs and for their reputations."<sup>68</sup> In the view of a former headquarters enforcement manager:

You spent a lot of time figuring out ways to get around obstacles which were internal [to EPA] now, rather than external. You were trying to survive, trying to continue to do your job, while most of your days were spent worrying about whether you would actually have a job, in some cases, or whom you would be working for and whether that person would be a rational human being.<sup>69</sup>

With few exceptions, the Agency's political appointees were the objects of intense resentment from the enforcement staff. Their motives were distrusted, their enforcement policies were disliked, and the professional competency of some was questioned. Out of anger and despair,

some headquarters enforcement staff members cultivated informal relationships with members of congressional committees, relationships that were to have increasing significance as the Gorsuch years wore on.<sup>70</sup>

In addition to internal disarray, EPA's relationships with various elements outside the Agency began to deteriorate. Fearful that budget cuts would result in lost federal grants, a number of state pollution control agency managers also began to mistrust EPA's new approach.<sup>71</sup> In addition, the Agency lost considerable credibility with the press.<sup>72</sup>

EPA's weakened enforcement effort also met with increasing disenchantment from some elements of industry. During this period, a number of regulated firms became concerned that the decline in EPA enforcement was contrary to their interests. They feared that this trend would disadvantage companies that had already expended money to comply with environmental requirements. They were also concerned that weak enforcement would lead to a public backlash in which EPA would be forced to subject industry to draconian measures.<sup>73</sup>

With respect to the Superfund Program, the staff became involved in what one enforcement scientist and manager referred to as "interminable negotiations" with PRPs.<sup>74</sup> In some instances, it was unclear who had responsibility for various aspects of the Superfund Program.<sup>75</sup> As a result, the site cleanup effort was marked by struggles between those organizational components with responsibility for expending CERCLA trust fund monies and those units charged with enforcing the Superfund Act.<sup>76</sup>

Slowly, almost imperceptibly at first, Congress and the public became concerned about the difficulties emerging in EPA's enforcement efforts. This concern was partly the result of informal analyses by congressional committee staff of enforcement statistics and other information provided by the Agency and its staff. It was also affected by the efforts of Save EPA, a committee of former EPA officials headed by William Drayton which had been formed to lobby against the administration's proposals for drastic decreases in EPA's budget.

In the second half of 1981, Congressman John Dingell (D-MI), then the politically influential chairman of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (the Dingell Committee), was supplied with information from EPA documenting the decline in new civil enforcement cases. Additionally, Congressman Dingell took note of the failure of EPA to establish a criminal enforcement program, a step that was first recommended in 1979 by James Moorman, the DOJ's assistant attorney general for lands and

natural resources. Additionally, two attorneys on Dingell's subcommittee staff, Richard Frandsen and Mark Raabe, learned informally from members of EPA's career enforcement staff of the confused and demoralized state of the Agency's enforcement efforts.<sup>77</sup>

In the fall of 1981 the Dingell Committee held a series of hearings that focused on EPA's need to hire criminal investigators.<sup>78</sup> Although these hearings resulted in a commitment from Gorsuch to initiate a criminal enforcement program, Congressman Dingell and his staff remained privately critical of other aspects of EPA's enforcement work. They began to prepare for additional subcommittee hearings to air their concerns and to press the Agency for a more vigorous enforcement approach in the hazardous waste area.

In the meantime, several events took place that served to heighten public awareness of the problems EPA's new enforcement approach had created. During the week of January 25, 1982, *Doonesbury*, the syndicated comic strip by Garry Trudeau, ran a series in which Ted Simpson, a mythical EPA employee, was portrayed as sitting on an office window ledge to protest Gorsuch's purported plans "to dismantle the whole enforcement team." After eliciting a promise from the EPA administrator "to reinstate the enforcement division" and to let the enforcement staff prosecute pollution violators "until such time as the President can gut the laws," Simpson was shown returning from his window ledge only to be told, "I lied. You're fired."<sup>79</sup>

This series of cartoons, which appeared in many newspapers, including the *Washington Post*, increased the visibility of the Reagan administration's EPA enforcement failures. Among other things, it prompted Gorsuch to send a memorandum to all EPA employees on February 5, 1982, in which she denounced "windowsill politics" and "countless press reports and rumors of massive personnel reductions planned for this agency." Gorsuch pledged that "there will be no involuntary separations due to reductions-in-force at the Environmental Protection Agency during the remainder of fiscal year 1982" and stated, "I expect to continue the same policy . . . through fiscal year 1983."

Shortly after the Ted Simpson *Doonesbury* cartoons appeared, Russell E. Train, EPA's second administrator, published a guest column in the *Washington Post* in which he sharply criticized the management of EPA and warned of disastrous consequences if proposed budget cuts in the Agency's staffing levels were permitted to occur.<sup>80</sup> Because of Train's prominence in the environmental field, his Republican credentials, and

his credibility with moderate elements in the business community, his written remarks were seen to weaken the EPA administration's political credibility significantly.

In addition, approximately three weeks later, EPA began a series of actions that, though not directly related to its enforcement program, brought EPA's approach to hazardous waste regulation into sharp focus. On February 25, 1982, the Agency formally proposed to reverse rules that had prohibited the burial of hazardous liquids in landfills for a period of at least ninety days on the basis that these prohibitions had been unworkable and unnecessarily costly.<sup>81</sup> This proposal gave rise to vehement protests from environmental organizations, so-called high-tech waste disposal companies, and congressional critics of EPA, including Congressman James Florio (D-NJ), whose Subcommittee on Commerce, Transportation and Tourism held public hearings with respect to the liquids-in-landfills proposals. Within several weeks, EPA withdrew its proposal, establishing instead an interim rule that prohibited the burial in landfills of any container in which liquid toxic chemical wastes were "standing in observable quantities."<sup>82</sup> Although this action quieted the immediate controversy and won guarded praise from some of EPA's leading congressional critics, including Congressman Toby Moffett (D-CT), the chairman of the environmental subcommittee of the House Committee on Government Operations, the entire incident served to further tarnish EPA's reputation with respect to its regulation of hazardous wastes.

Shortly thereafter, the Dingell Committee opened its second set of hearings into the Reagan administration's enforcement approach. Administrator Gorsuch, Enforcement Counsel Sullivan, and other high-ranking EPA officials were called to testify and were subjected to pointed and embarrassing questions with regard to EPA's hazardous waste enforcement program.<sup>83</sup> The Agency's site cleanup negotiations with Inmont Corporation were spotlighted, along with the dramatic decrease in its civil enforcement case referrals and the continual reorganization of its enforcement structure.

These hearings were widely publicized. They provided much of the basis for a subcommittee report, ultimately published in December 1982, which contained sharp criticism of EPA's Superfund and RCRA enforcement efforts.<sup>84</sup> In response to the political pressures that the Dingell hearings generated, EPA's leadership continued to institute a series of management and policy changes that they hoped would place the Agency's enforcement work in a more favorable light.<sup>85</sup>

In late March 1982 William Sullivan was relieved of his leadership

role in EPA enforcement matters. In Sullivan's stead Robert M. Perry, the agency's general counsel, was given expanded responsibility in the enforcement area. Seeking to distance himself from Sullivan's informal "voluntary compliance" approach to environmental enforcement, Perry, with the support of Gorsuch, initiated several measures designed to bolster the Agency's faltering efforts. Perry appointed a committee of five experienced career managers to review all aspects of EPA's enforcement program and to suggest improvements.<sup>86</sup> He also appointed Michael Brown, a forceful and dynamic attorney and manager with considerable prior experience in the Consumer Product Safety Commission, to replace Sullivan as enforcement counsel.

In response to congressional criticisms of excessive industry influence on EPA enforcement policies and of the alleged execution of sweetheart deals in particular hazardous waste enforcement cases, Perry instituted a policy prohibiting Superfund enforcement agreements with PRPs unless the government obtained all that it sought in negotiation. This policy effectively forbade settlements in Superfund enforcement matters unless PRP defendants agreed that (1) they would enter into a formal written agreement, usually in the form of a consent decree; (2) they would not be formally released from future liability, even if they fully complied with the terms of the agreement; and (3) they would assume all costs of site cleanup. Few PRPs actually agreed to settle on these extremely stringent terms.<sup>87</sup> Perry also began to place pressure on regional enforcement officials to generate large numbers of new enforcement actions.<sup>88</sup> This last initiative resulted in what one former DOJ official described as a "blitzkrieg of referrals" in late September 1982, at the end of the Agency's fiscal year.<sup>89</sup>

Beyond this, during this time the Agency and DOJ took small yet meaningful steps toward the establishment of a permanent criminal enforcement effort. In the summer of 1982 sixteen full-time criminal investigators were hired from a pool of nearly three hundred applicants from other law enforcement agencies. The addition of these individuals—all of whom had served as criminal investigators for a minimum of five years and some of whom had more than twenty years of investigative and supervisory experience—raised to twenty-three the Agency's total number of investigators. This was soon followed by the creation of small environmental crimes units within the Justice Department's Criminal Division and its Land and Natural Resources Division.<sup>90</sup>

In a political sense, these modifications to EPA's enforcement approach were too little and too late. Most of the administration's critics, both on

Capitol Hill and within the Agency, remained unpersuaded that EPA's enforcement program had become truly aggressive or effective. On June 15, 1982, Congressmen Dingell and Florio sent Anne Gorsuch an eleven-page, single-spaced letter in which they requested "actual data, rather than unsupported estimates" concerning some 144 indicators of enforcement activity over a three-and-a-half-year period.<sup>91</sup> This letter, which gave rise to an intensive and time-consuming search of EPA's enforcement records and statistics,<sup>92</sup> was supplemented by a second Dingell-Florio letter to Gorsuch on August 31, 1982, in which seventy-three specific requests for additional information were also submitted to the Agency.<sup>93</sup>

Other congressmen began to pursue parallel investigations. On September 15, 1982, staff attorneys for the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation, under the chairmanship of Congressman Elliot Levitas (D-GA) (the Levitas Committee), traveled to EPA's Region II office in New York to examine enforcement files pertaining to certain Superfund cases. Upon their arrival, these attorneys learned, to their surprise and distress, that the Agency would not permit access to the documents they sought. On the Justice Department's advice, the Reagan administration had decided to rely upon the executive privilege doctrine as a basis for withholding from congressional investigators enforcement files that the Agency deemed "enforcement sensitive" in content.<sup>94</sup> There is considerable evidence that this decision was made by the Department of Justice and imposed upon skeptical EPA officials. In a carefully documented report, the House Judiciary Committee concluded that before executive privilege was claimed, the Justice Department was aware of at least nine different incidents which demonstrated that EPA was willing to turn the disputed documents over to Congress.<sup>95</sup>

Notwithstanding its genesis, however, the decision to claim executive privilege proved a fateful one for most of EPA's top managers. On November 22, 1982, after EPA General Counsel Robert Perry had reiterated the Reagan administration's position in correspondence with Congressman Levitas, the House Committee on Public Works and Transportation formally subpoenaed Anne Gorsuch to appear before the Levitas Committee on December 2, 1982, and to bring with her enforcement-related documents regarding some 160 abandoned hazardous waste sites.<sup>96</sup> Gorsuch appeared before the Levitas Committee on December 2, but rather than supply the requested documents, the EPA administrator testified that President Reagan had instructed her to withhold those papers from the House. Later that day, the Levitas Committee voted to hold Gorsuch in



contempt of Congress,<sup>97</sup> an action that was reiterated by the full House of Representatives on December 14, 1982, by a vote of 259 to 105.<sup>98</sup>

During the same period that the Levitas Committee encountered resistance to its requests for EPA Superfund documents, the Dingell Committee, which had begun an investigation of the possible allocation of Superfund monies for partisan political advantage, met with similar administration intransigence. On September 17, 1982, Congressman Dingell sent a letter to Anne Gorsuch requesting EPA documents with respect to three Superfund sites. These documents were formally subpoenaed by the Dingell Committee approximately one month later. As she had done in response to the Levitas Committee's subpoena, Gorsuch appeared before the Dingell Committee on December 14, 1982, and expressly refused to provide a number of the subpoenaed documents on the grounds of executive privilege. The Dingell Committee voted to hold Gorsuch in contempt on the same day.<sup>99</sup>

These actions set the stage for a major constitutional confrontation between Congress and the executive branch. On December 16, 1982, the Department of Justice brought suit against the House of Representatives in the U.S. District Court for the District of Columbia. The department sought to enjoin enforcement of the Levitas Committee's subpoena and to have that document declared invalid and unconstitutional. Attorneys for the House promptly moved to dismiss the DOJ's suit, a motion that the District Court took under advisement.<sup>100</sup>

In the meantime, the controversy over the documents, the attitudes and record of Anne Gorsuch and other high-ranking EPA officials, and virtually all aspects of the management of EPA since the advent of the Reagan administration became the focus of intense media scrutiny. Believing the "EPA scandal" to be the beginning, at least potentially, of a Watergate-style cover-up, the media provided prominent coverage of the management of the Superfund Program by Anne Gorsuch, Rita Lavelle, and others. This extensive publicity lasted for a period of several months.<sup>101</sup> During that time, EPA's top leadership developed what one civil servant later described as a "bunker mentality."<sup>102</sup> Besieged by the press and Congress, EPA's leaders became isolated from their staffs and increasingly uninvolved in matters not pertaining to the documents controversy.

EPA's enforcement staff was deeply immersed in the executive privilege dispute as well. Enforcement attorneys in EPA's headquarters and its regional offices were asked to respond to Congress's information request by reviewing all of the Agency's enforcement files to determine which of

the documents contained therein were “enforcement sensitive.” This was an extremely time-consuming task, involving the review of thousands of letters, memos, records, and reports.<sup>103</sup> In addition, approximately thirty members of the Agency’s career enforcement staff were subpoenaed to testify before executive sessions of the Dingell Committee as part of its continuing investigation into Superfund abuses.<sup>104</sup> Many other staff members devoted a good deal of their time to responding to inquiries by the press and individual members of Congress concerning EPA’s handling of particular Superfund matters.<sup>105</sup>

On February 3, 1983, U.S. District Judge John Lewis Smith Jr. granted the motion of the House of Representatives to dismiss the DOJ’s executive privilege suit. Judge Smith stated, “The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties.”<sup>106</sup> With this judicial admonishment, high officials of the Reagan administration decided to enter into serious compromise negotiations with their congressional adversaries. On March 9, 1983, Congressman Dingell and White House Counsel Fred Fielding executed a written agreement under which the Dingell Committee was to be furnished all of the documents it had sought regarding Superfund sites.<sup>107</sup> A similar understanding was reached between the DOJ and the Levitas Committee approximately two weeks later.<sup>108</sup>

As part of the Reagan administration’s plan to limit the political damage created by the documents controversy, Anne Gorsuch was compelled to resign as EPA’s administrator.<sup>109</sup> She left office on March 9, 1983. Immediately preceding or shortly following that event, some nineteen other top-level EPA officials left their posts, resulting in a nearly complete turnover in the Agency’s highest leadership.<sup>110</sup>

In other fallout from the congressional investigations, Rita M. Lavelle was indicted by a federal grand jury for providing false testimony to some of the congressional committees that investigated her administration of the Superfund Program. On December 1, 1983, Lavelle was convicted by a jury of most of the felony charges made against her. She was sentenced to six months’ confinement, five years’ probation (during which time she was required to perform community service), and a \$10,000 fine.<sup>111</sup>

By almost any measure, the period from January 1981 until March 1983 was a devastating time for EPA’s enforcement work. The number of new civil actions initiated by the EPA fell dramatically during those years. Additionally, the Agency’s enforcement programs during this period

experienced unprecedented levels of disorganization, demoralization, and internal strife. Although there is disagreement about whether the Agency's political leadership specifically intended those results, there can be little doubt that it was their actions and omissions that caused them.

It seems inevitable that every incoming administration will place its own political appointees in positions responsible for implementing regulatory requirements. The approach of the EPA's early Reagan administration managers, however, led to an almost complete politicization of the enforcement process. This politicization interfered with the Agency's remedial application of hazardous waste statutes and its enforcement of other federal laws, objective tasks requiring persistent professional effort and institutional stability. Beyond this, the EPA managers of the early 1980s failed from the outset to enunciate a clear and defensible approach to EPA's enforcement work. In this respect, their efforts stand in sharp contrast not only to the litigious EPA enforcement strategies of the Carter administration but also to enforcement regimes of the Nixon, Ford, and George H. W. Bush administrations. Indeed, in the words of four congressmen from the Reagan administration's own party: "[T]he poor performance of the Superfund program [in the 1981 to 1983 period] resulted from a lack of expertise, inexperience, incompetence and mismanagement" by those responsible for implementing the program.<sup>112</sup>

If the stormy history of EPA's enforcement efforts in the Gorsuch era demonstrates that the political leadership of administrative agencies has a practical ability to inhibit or forestall vigorous enforcement, what can it teach us with respect to Congress's effectiveness in restoring enforcement vitality? Here, the answer appears somewhat more sanguine. In many respects, congressional pressure on EPA's leadership to reverse the failings of the Gorsuch era was effective. Through oversight hearings, extensive requests for information, publicity, and informal attempts at persuasion, Congress appears to have motivated EPA's top management in the summer and fall of 1982 to stem the decline of the Agency's hazardous waste enforcement programs. In addition, aggressive congressional oversight activity during the 1983 documents controversy led to the replacement of Gorsuch and her colleagues with new managers who had different enforcement attitudes and management techniques.<sup>113</sup>

In view of these evident congressional successes, it might be surmised that our government has created a check on the enforcement failings of administrative agencies. On that theory, ineffective administrative agency enforcement programs—particularly when they involve regulatory legislation that enjoys broad public support—will invariably be identified by

concerned members of Congress and their staffs. These ineffective enforcement efforts will be brought to light at oversight hearings and by other means, and top administrative managers—fearing unwelcome publicity and congressional displeasure—will necessarily be forced to energize and reform their agency’s enforcement efforts or face dismissal and political disgrace.

On the surface, this hypothesis has some plausibility. However, upon closer examination, it is clear that it fails to grasp some of the larger implications of this phase of EPA’s enforcement history. Congress’s “victory” in its confrontations with EPA’s top managers had a number of critical components, none of which in retrospect seems the natural or inevitable result of EPA’s enforcement shortcomings. First, the congressional oversight effort was led by an experienced and influential legislator, Congressman John Dingell, who had a reputation for assertive, thorough, and detailed oversight work. No matter how politically self-interested his efforts may have been, without Dingell and the skillful work of his subcommittee staff, the congressional investigation of EPA’s enforcement programs would probably not have been as successful as it was.

Second, the dispute between EPA and Congress over the Agency’s hazardous waste enforcement efforts was marked by a number of costly tactical errors on the part of administration officials. For example, the decision of administration officials in February 1982 to permit the land-fill burial of liquid hazardous wastes led to an intense, damaging, and entirely avoidable public controversy, a dispute that lowered the Agency’s credibility in the hazardous waste area during a critical time. Similarly, the Reagan administration’s decision to withhold subpoenaed documents from the Levitas and Dingell Committees converted what had been a simmering dispute over EPA’s enforcement record into a major constitutional confrontation. It seems far from inevitable that Congress would have achieved the level of dominance in the area of EPA waste enforcement that it did if the Reagan administration had avoided these damaging errors.

Third, the competition between EPA and Congress with respect to enforcement questions was played out in the spotlight of intense national publicity. This situation, which resulted partly from the constitutional dimensions of the documents dispute and partly from the fact that the dispute appeared to the media to parallel the Watergate scandal of the 1970s, served to raise the political stakes for all concerned. Had the press chosen to pay less attention to the “EPA scandals” of the early Reagan administration (particularly during the autumn of 1982 and the winter of 1983),

the March 1983 resignation of the Agency's top leadership would not, in retrospect, appear unavoidable.

Rather than demonstrating that it is inevitable that congressional reaction will effectively reverse poor regulatory enforcement performances by federal administrative agencies, EPA's 1981 to 1983 disputes with Congress concerning enforcement appear to yield a much more modest conclusion. They indicate that, at least in some instances, congressional investigation and oversight of weak administrative agency enforcement have the potential to effectively force a non-enforcing agency into a more vigorous enforcement posture. When the congressional opposition to agency non-enforcement is well publicized, when it is spearheaded by influential and determined legislators, and when it is aimed at administration officials unable to project a politically credible image of moderation and managerial competence, that opposition can indeed create a climate in which ineffectual enforcement practices must and will be reversed.