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EMROCH LECTURE

RISK AND REGULATION: HOW MUCH IS TOO MUCH?*

*Peter H. Kostmayer***

The Emroch Lecture series was established through the generosity of the late Mr. Emanuel Emroch, his wife Bertha, and other family members and friends. Mr. Emroch held both undergraduate and law degrees from the University of Richmond. He was a distinguished civil trial practitioner in the City of Richmond for many years. Mr. Emroch was listed in Best Lawyers of America, was a Fellow of the International Academy of Trial Lawyers, and of the American College of Trial Lawyers, and was a charter member and past president of the Virginia Chapter of the American Board of Trial Advocates. He was also a member of the Advisory Committee on Rules of the Supreme Court of Virginia. Mr. Emroch received the Brotherhood Award of the National Conference of Christians and Jews, and was co-founder and former president of the Trial Lawyers Association of Richmond and the Virginia Trial Lawyers Association.

It's wonderful to be here to talk about these exciting issues. I like talking about national issues. It was one of the great joys

* Lisa Barnett assisted in the editing of the 1995 Emroch Lecture for publication.

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of being a member of Congress. I would get to go around and just talk. Lawyers know what fun that is. I would get to hold meetings like this one and talk about the issues which were pending in the Congress.

Early on when I was elected, I held my first town meeting, several hundred of my constituents came to talk about issues. I had prepared myself very diligently to speak about the great issues facing the Congress and the country: ozone depletion, the Latin debt, the defense budget, the state of welfare in the country. I was all ready and a woman put her hand up in the back row and said, "Kostmayer, my garbage is picked up on Mondays and Thursdays, and I want it picked up on Tuesdays and Saturdays." I said, "Well, I'm not really the right fellow to talk to. You ought to maybe go to see the mayor of your little village or maybe your sanitation commissioner or some local official at the local level." She said, "Well, I didn't want to start that high, I wanted to come right to you."

So that changed my perceptions of the role of Congress. It made me realize, and I think rightly so, that the issues which people care about the most deeply are issues which affect them, their families and their neighborhoods. I think that is a good thing. When I took this job a year ago, one of the first things I did was to go and visit something that you have been talking about here, one of the great ecological features of North America, the Chesapeake Bay. When I got down there, one of the things I did was to meet with some folks from the University of Maryland who had taken a public opinion poll in Maryland, Virginia and Pennsylvania, the three Chesapeake Bay states. They asked, "What do you think is the biggest single source of pollution in the Bay? What do you think is the smallest single source of pollution in the Bay?"

And some phenomenal number, something like sixty or seventy percent said, "Well, the biggest source of pollution are these big industries, these big chemical companies and oil companies that come down here late at night with barrels by the truckload and dump these toxic chemicals late at night into the Bay." And what is the smallest contributor? They said, "Well, the smallest contributor is us. We don't pollute the Bay." Of course as it turned out, they were exactly wrong. And having lost an election or two, I know that people do make mistakes.

These people had made a mistake. We have dealt with those large industrial sources of pollution, not with absolute success, there are still problems, but we've dealt with them largely.

Now, we're looking at problems of individual behavior which are much more difficult to regulate. We're looking at people's backyard barbecue cookers. We are looking at lawn mowers. When you run your lawn mower for an hour, it's the same as running your automobile for eight hours. We are looking at pesticides on people's lawns. We're looking at pesticides on small farms. Most of all, we're looking and trying with very little success to deal with the American automobile.

So we find ourselves having gotten what we call the low hanging fruit off the tree. We're now dealing with individual behavior, trying to regulate it. And we're trying to regulate it in an atmosphere in which any kind of regulation is increasingly unpopular.

So this is the situation we find ourselves in, in the spring of 1995, just about a month from Earth Day. Some would tell you, as we prepare to celebrate the 25th anniversary of Earth Day, that the past twenty-five years of environmental protection in this country has been an unmitigated regulatory nightmare. Nothing could be further from the truth. It has been really one of the great successes in American society. The great environmental statutes, passed by Congress and signed by presidents of both parties, remain the envy of the world today. We have cleaner water, cleaner rivers, cleaner air. The environment is better off than it's ever been.

Have there been any failures? Yes, there have been some failures, some excesses, some over-reactions, and there have been some problems. There is no doubt about that. But I don't think that any country would trade the progress which we've achieved in this country over the last twenty-five years.

I think that one of the best examples of this progress is the Chesapeake Bay. What's happened here is that local governments, state governments, environmental groups, and most importantly of all citizens, have combined with strong, tough federal regulation to produce an environmental model which really makes, I think, a lot of sense. Yet, much of the progress which we have made in the Chesapeake Bay over the past

twenty-five years is now threatened. The fact is that it's simply impossible to come here today to talk about these issues and not talk about what's happening in Washington, to not talk about the fundamental and frontal assault which is being waged against those laws which have been enacted over the past quarter century to protect the public health, the natural resources and the environment of this country.

The Contract with America is long on themes but unlike most contracts, it's very short on details. It simply doesn't contain the details that we need to have. The ideas that it does contain are very general. They fit very well on a bumper sticker or in a thirty-second spot. But the problems we're trying to deal with, I think, are terribly complex and terribly difficult. I think the problems the Contract with America is dealing with have been very, very over simplified. If you look at the work of hydrologists, toxicologists and epidemiologists, it's complex, it's often counter-intuitive, and it's difficult for people to understand.

One of the issues that's being dealt with is the issue of takings. More than two hundred years ago in Philadelphia, the provision on takings was drafted in the Constitution in the Fifth Amendment. It was quite clear, and it said that private property shall not be taken for public use without just compensation. The beauty of this provision of the Constitution, as I think is the beauty of many provisions in the Constitution, is its flexibility, and it really has worked. In 1922 the Supreme Court ruled in a decision called *Pennsylvania Coal v. Mahon*¹—let me read you the actual words from the decision: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."² So what we are looking at is when judges make these decisions on takings, they look at a variety of issues. They look at the public interest; they look at the landowner's interest; they look at the purpose of the taking and they make a judgment.

What the Contract with America would do is change this to make it inflexible: to create a one size fits all in which the

1. 260 U.S. 393 (1922).

2. *Id.* at 413.

people of the country would have to compensate for the environmental protection which we get. The fact of the matter is that homeowners and citizens' groups under these provisions of law would have to compensate companies or individuals who were denied a permit, or who were issued a permit with conditions or who were issued a cease and desist order. What that means is the federal budget would simply be busted and that those who are obeying the laws in this country would have to be paid for obeying those laws.

In addition to that, I think it would create a whole new area of speculation in which people would deliberately propose projects knowing that the permit would be denied. They would then go to court to claim compensation for the permit they had been denied. So we are talking about enriching corporations; we are talking about enriching speculators; we are talking about an enormous amount of litigation.

With all due respect to my audience, this really should be known as the Lawyers' Full Employment Act. If you think we have problems with excess litigation in the country today, this would be even more excessive. For example, if a restaurant chain decided under the American Disabilities Act that it had to install a ramp for patrons using wheelchairs, if that ramp occupied some space which could otherwise be used for additional tables at the restaurant, under this you can make a case that the federal government would have to compensate that restaurant for the revenue it lost as a result of installing the ramp. If you look at the notion of a hazardous waste incinerator being developed or built in a neighborhood, if a permit were denied to do that, or if the permit were issued with conditions, the developer of the hazardous waste incinerator would have to be compensated under this law by local taxpayers. Some in Congress say that's not so because there is an exception where there is an imminent and substantial danger. The fact of the matter is that we can't always demonstrate that there is an imminent and substantial danger with the hazardous waste incinerator. It may indeed be a long-range danger. Judges have ruled that way in the past and may again. There is a strong case that compensation would be required.

What's happening, of course, is that all of this is being done very quickly. Twenty-five years of law is being overturned in

three months. Twenty-five years of statutes are being overturned in a hundred days or less.

I remember as a member of Congress the issue of banning flag burning. It seemed to me like a bad idea to amend the Constitution to ban flag burning. Flag burning didn't seem to me to be one of the great issues facing the United States. But all of the public opinion polls indicated people thought it was a good idea and should be done. Time went by. Congress debated it. Newspapers wrote about it. Television commentators discussed it and gradually, slowly people in the country began to recognize that this would be the first time that the Congress had infringed on the First Amendment, and people began to think it was a very bad idea. It was defeated by a broad bipartisan coalition of liberals, conservatives, Republicans and Democrats.

There was a poll in the New York Times just a few days ago which asked people about warrantless searches. I would have thought that people in the country might have been supportive of this because of their fear of crime. The poll showed that sixty-three percent of the people in the country thought it was a bad idea to allow the police to search your home without a warrant from a judge.

That's reassuring. We need time to look at these proposals. The American people deserve time to decide whether it is a good idea or a bad idea. If a community denies a pornography shop or a hazardous waste incinerator or heavy industry to locate in the community, should the owner of that facility who has applied for that permit be compensated for the loss of revenue? That's what the law will say, and I think the American people need the opportunity to look at that.

Every single public opinion poll shows that people are not in favor of these kinds of proposals. That more than half of the people in the country don't know what's in the Contract with America. There are members of Congress who don't know what's in the contract with America. The Times Mirror Poll conducted just a few weeks ago asked people, "Do you think environmental laws in the country ought to be weaker, stronger or stay the same?" Seventeen percent said weaker; eighty percent said stay the same or stronger.

I was giving a talk last week in my home state in Montgomery County which is a bastion of Republican strength in suburban Philadelphia. I was speaking to a chamber of commerce, sixty or seventy people. With some trepidation, I asked the same question, a decidedly unscientific poll, but out of about 60 Republican business leaders, two said the laws should be weakened. The remainder said they should be toughened or at least left alone. I don't think that the American people are for the provisions in the contract. I think if they were clearly explained to the American people, they would be in strong opposition. I think we have an obligation to explain these things to people. It is not that we have not made any mistakes in the government. It's not that there haven't been any excesses. It's not that we aren't being attacked with a thousand anecdotes of things which happen, some of which are accurate, some of which are not accurate. The fact of the matter is that the government is changing and this agency is changing. We're doing a lot of things very differently.

We are looking, for example, at abandoned contaminated waste sites in our cities, revitalizing them, recognizing that the cleanup standard for those sites, frankly, doesn't have to be as high as it's been for other sites, depending on what you're going to use the site for. We are looking at providing a shield against liability for people willing to invest in those sites to attract investors. In this region we have done four of those brownfield sites in urban areas. We put more than 1,200 people back to work. This doesn't square with the image that the Speaker used to describe the EPA some time ago in a speech in Washington: "job crushing." We are cutting through red tape to create new jobs. We have something called Supplemental Environmental Programs, SEPS, in which a substantial portion of a fine levied against a violator can go back to that violator to perform environmental acts which are worthwhile. If a company is fined a million dollars, and they apply, we'll give them half a million dollars back to install high-efficiency lighting, and to train workers to be better equipped to handle environmental problems. Local neighborhoods in the community where the violation took place are eligible for those funds as well. We're trying to take this money not to the federal treasury, but to put it back in local communities where it can empower people.

We have an initiative called the common sense initiative with several industries. My jurisdiction is the printing industry. So we're talking with the printing industry in this part of the country, and we're saying to them, "Look, if you will move away from toxic-based inks and use soy based inks," for example, "we'll find ways to reduce the thirty federal regulations you have to deal with." That makes sense, creating a partnership, just as the Chesapeake Bay has created partnerships, with people to work on these kinds of problems and solve them.

We're looking at environmental indicators. We're not just looking at how many lawsuits have been filed or how many people have been sued or how many reports have been written or how many people work for us or how much money we're spending at the EPA. We're looking at the real environmental indicators. How clean is the water? How clean is the air? One of the things that we're beginning to do in this region is to get university students all across the five middle Atlantic states to engage in voluntary environmental monitoring in their communities.

I really think with this relatively new notion of community based environmental management from the bottom up, not from the top down, you can get people to recognize they have a stake in their neighborhoods. Instead of just passing laws in Washington and having them imposed by bureaucrats, you need to get people to recognize how important it is to protect the quality, not of streams, not of air, but of *their* streams and *their* air. If everybody does that, I think we can develop a commitment in the country toward environmental protection which will really mean something.

We are engaged in a review of all our regulations at the EPA, where we will look at every single line of every single regulation. No administration has ever done that. We are trying to develop these regulatory changes within the context of the market system to provide not just penalties but incentives. We want to create additional jobs. We're doing it through brownfields, for example, and we think that you can do that in environmental protection.

Let me tell you a little story about a community in Bucks County called Perkasio where this kind of approach is working.

In Perkasio people used to put their garbage out on the corner every other day or whatever. Then the little town of Perkasio passed a regulation that said, to put your trash out you've got to buy a big green plastic sack from the town for a dollar each. There was some indication on the sacks so people couldn't go to the store and buy similar looking sacks. There was a great outcry; people didn't want to do it, but they began to do it. People began to put out less trash because it cost them a dollar a bag to do it and they began to recycle more. In Perkasio, Pennsylvania trash disposal has gone down by seventy-eight percent. Recycling has gone up by seventy-eight percent. We can devise these solutions within the context of the market system.

I think that the agency really is changing. We're trying to come up with new solutions that will really work. We still have serious problems in the environment, both nationally and globally. I think that one of the most serious is the problem of population. Ninety million people are born on this earth every year, ninety-eight percent of them in the Third World. There are substantial problems here at home that we need to correct, but we need to educate people in the country so they can understand the real dangers of the Contract with America, the threat of weakening the basic environmental statutes that have protected people for so long in this country. In my own area in Pennsylvania, one of the biggest problems we have is the loss of farmland, the loss of open space. Everything is being cemented over in the Philadelphia suburbs. There is no control over what can be done. Little communities pass zoning ordinances to restrict the development of houses and shopping centers, and they're thrown out by the state courts.

Now, we would not only continue to lose those battles which we have to try to turn around, now we would have to compensate developers for not developing.

Some years ago when I was in Congress, I introduced a bill which added about two thousand acres to the Gettysburg National Park. When we were done with our work, I was visiting there and I met with a man who owned some property which abutted the park. It was adjacent to the park itself, but it was private property. He wanted to build something called the Battlefield Mall, 340,000 square feet on the edge of the Gettysburg

Battlefield. I said, "I think that's an atrocious idea." He said, "It's my property. I can do what I want with it. The government doesn't have the right to tell me I can't earn a living by building something on my property unless the government is willing to buy the property." I agree with that. But now not only would we have to buy the property, just to restrict the public interest in his right to deface a great national setting, we would have to compensate him for the value of the shopping center. We won't be able to protect the landscape in the country at all.

This kind of free enterprise taken to its extreme, I think, is not in the public interest, and unless the country wakes up fairly soon and begins to recognize some of the challenges which we face, I think all of the work which we've done over the last twenty-five years, all the work which so many of you have done, really may be undone.

Mr. Kostmayer then addressed questions from the audience.

Question: You suggested that you are working in your region with the printing industry and indicating to them that if they would move from a toxic print substance into a soybean-based printing compound that you would then lessen the impact of up to thirty federal regulations. Why not just dispense with those thirty federal regulations, if in fact they are not really necessary, and then use means other than the club to force people to move from toxic-based substances into more environmentally sound ones?

Mr. Kostmayer: I think to some degree we can do that. I actually think there are probably too many regulations. I think they are too complex. I think we need to reduce the number of regulations, and I think we need to reduce their complexity, and I think we need to increase their simplicity. I think we have to find ways of getting folks to do the things we want other than just by penalizing them.

I think this holds out a real incentive for printers, and brings them together with the regulators, to develop a system of pollution prevention. We spend so much time in the country talking about recycling and reusing. We need to talk about preventing the pollution from occurring. We generate more trash per capita in this country than any other country in the world. If we

would begin to get serious about waste minimization and pollution prevention, we could begin to deal with these problems. It seems to me that this will lead us in the direction. But your suggestion is not without merit as well. That's certainly another approach.

Question: You mentioned specifically the problem with the Americans' love of the automobile. Is there anything that the EPA is doing to try to encourage public transportation?

Mr. Kostmayer: I think this is almost an impossible problem, and I think that we are really asking for it if we mess around with the American people and their cars. I really have become convinced of that.

I think we have to find ways to do it through the market. I think that people talk about electric cars and alternate sources of fuel. We have the cheapest gasoline in the world. We have the cheapest gasoline we have had in this country for 40 years. Until that changes there is no economic incentive to develop alternatives. That's how alternatives get developed. That's how competition works. That's how the market system works. In light of that, to simply penalize people and say you can't drive your car to work, while it may be appealing to some of us, is going to create a political reaction which will undermine what we're trying to do. That is a very real danger in this atmosphere.

Question: Here in Virginia our Governor and Attorney General are suing the EPA. Is this, in your opinion, an environmental matter or is it more of a political matter?

Mr. Kostmayer: I think it's both. We really have tried to minimize conflict with Virginia. What is happening here is the state is saying to its citizens that we will not give you standing in these environmental trials. If a citizen wants to appeal, that's fine, but if they want to go beyond that and sue, they don't have standing. Yet the company that is turned down for a permit will have the right not only to appeal, but to also go to trial, and that is very unbalanced.

The people have the right in this state to protect their children and to protect their health. The law is biased against families and against the citizens of Virginia, and that's inconsistent with national law, which is why we're trying to change

it.

If it is not changed, what happens is EPA takes over the water permit program and the air permit program. We don't want to do that. We don't want to run Virginia's air permit program. We think it should be run by Virginians in Virginia; so we're hopeful we can resolve it. If it can't be resolved, we're prepared to stand up for American citizens who live in Virginia and stand up for their rights.

Question: I farm for a living and I find it very frustrating that a lot of discussion goes on between groups and people who say they represent people, but yet the dialogue is over issues that really don't exist. What is frustrating to me is how we get the individual to go beyond the Virginia beltway and go into the system to say, look, we all have a common share in this plan. How do we break this lawyer/judicial deadlock that just seems to go around and around?

Mr. Kostmayer: I don't think the other side is ever entirely wrong. This side comes as close as you can get, but it is not entirely wrong. There have been some excesses. We have all read of the anecdotes. There have been some mistakes. I read regulations and they are enormously complex. They are too complex. They don't have to be that long. We have to do a better job. I think that the answer to part of your problem is moving toward place-based management, where people really have a stake in their own community. That's what happened with the Chesapeake Bay. People who live in this part of the country feel a commitment to the Chesapeake Bay. They think of it as their own and when they protect it, they are not protecting it because the federal government has told them to, they're protecting it because it's in their neighborhood, because they see it, it's in their region. Even if they don't swim in it and don't fish in it, they care about the conditions that prevail in the Chesapeake Bay.

I think that the idea of empowering people at the local community to be environmental monitors to protect their own environments is really a step in the right direction. That's what we've done here recently. We have almost a thousand people who work in Region III at upper level offices in headquarters around the region. I think we should take some of those people

and put them in state capitals, put them in the local towns, put them in the local communities. Instead of sitting behind desks in Philadelphia, put them in the fields helping local watershed groups, helping local ecosystem groups, helping local small business people. Those are the things I think we have to do. I think that will help a lot. But don't be discouraged. We don't have the luxury of being discouraged. These issues are too important to be discouraged about.

Question: Who is it that will ultimately make the decision as to whether or not to send these people out in the field?

Mr. Kostmayer: We're doing it. We're in the process of working with the states. For some reason Virginia doesn't even want these people. I think that Virginia needs help and it needs help in a number of issues.

We have toxicologists, we have epidemiologists, we have marine biologists, and we have planners. We would like to give them to Virginia to work with. They would be working for Virginia, not for us. I would like to get several hundred EPA employees out of Philadelphia and into our state capitals, not only there but also into rural counties that need planning help.

We went up to Monroe County, Pennsylvania, a rural county in the Pocono Mountains in eastern Pennsylvania. We provided a lot of planning assistance and then we left. Now the local planners in Monroe County are doing things they never would have done before. They're looking at protecting new watersheds. We enable them and then we get out. People want to protect their local environments. People are very good on these issues.

Question: You've addressed how the basic population doesn't see themselves as the problem. We have a secretary of National Resources who basically believes that growth is good for the Bay. From your perspective as part of the interstate cooperative effort to revive the Bay, what kind of threats do you see in that?

Mr. Kostmayer: I think uncontrolled and unplanned and unmanaged growth is a very serious threat. I think if it's planned and managed, then it's not necessarily a threat. I think if we begin to revitalize our urban centers and protect our farmlands around our urban centers, that we would really be moving in the right direction. But this kind of anything goes

free enterprise, where anybody can build anything wherever they want, I don't think makes any sense. I don't think the people are in favor of that. I think people want to protect their neighborhoods. I think they want to protect their communities. I think we made some serious mistakes. I think my own party in Congress has made some mistakes. Looking at low income housing, for example, I think the Democratic housing programs have been a disaster. We have taken all the poor uneducated people we can find and put them in the same high-rise building in the middle of a city. That doesn't make any sense. That's not going to work.

We have made plenty of other mistakes, too. But I think we can be for strong environmental protection and economic growth at the same time. I think if you do these things in the market context, environmental protection can lead to economic growth more often than not.

Question: You talked about some legislation on hazardous waste. Are you talking about a specific bill introduced before Congress right now?

Mr. Kostmayer: It's Republican Leadership Bill HR 9, which has a number of titles. One of the titles deals with takings. Other titles deal with risk assessment. This would provide compensation to people who were denied the right to use their property if it exceeds the ten percent loss in the way in which they want. The examples I gave actually came from testimony provided by the Department of Justice before a congressional committee.

People in Richmond need to recognize that if they like their neighborhoods, and they like the notion of protecting the kind of neighborhoods where there are primarily residences and backyards, that they face the prospect of anything happening in those neighborhoods from a porno shop to a hazardous waste incinerator, unless they can pay those people for the value they would lose by not locating those facilities in their neighborhoods. This is the biggest single threat to private property rights we've seen in this country in a long time.

Question: Are you satisfied with the Chesapeake Bay restoration? If not, what do you think needs to be done?

Mr. Kostmayer: I think it's one of the great success stories. I think that when you deal with this problem of non-point pollution, pesticides in the agricultural community, it's very, very sensitive and very, very difficult. I think we have to move carefully and with great sensitivity. I think if we don't, we're going to alienate large numbers of people who are supportive of what so many are trying to do in the Chesapeake Bay. I think I would like to see it sped up somewhat, but generally I think the progress has been excellent. I think one of the greatest strengths is this interstate cooperation agreement. Governor Allen now chairs this, and I think he is doing a good job. So this voluntary cooperation between the states can sometimes replace the hammer approach. I think it has worked quite well here.

