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CONGRESS AND THE CONGLOMERATE MERGER PHENOMENON: THE INTRODUCTION OF ANTITRUST PROPOSALS TO ADDRESS NON-ANTITRUST CONCERNS

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The United States has recently observed periods of heightened corporate merger and acquisition activity. Unlike horizontal and vertical acquisitions, conglomerate merger activity has been relatively less constrained by existing antitrust statutes and therefore the focus of various congressional efforts to expand the scope of those laws.

In this Article, Mr. von Kalinowski and Mr. Starr argue that substantial new congressional initiative in the conglomerate merger area is unnecessary. Both authors contend that Section VII of the Clayton Act currently provides adequate protection from any direct harm to economic efficiency. They argue that passage of any bills precluding large conglomerate mergers would constitute legislative overkill.

Introduction

In the last 100 years, the United States has experienced several periods of heightened corporate merger and acquisition activity. The first two periods occurred from 1898 to 1902 and from 1925 to 1929, and primarily involved mergers that consolidated competitors (horizontal mergers) or combined customers and suppliers (vertical acquisitions).[1] The third period of merger activity has extended from the immediate post World War II years to the present time, with particularly increased levels of corporate acquisition activity in the last two decades.[2]

Strengthened antitrust constraints contained in Section 7 of the

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1 125 CONG. REC. S2417 (daily ed. March 8, 1979) (remarks of Sen. Kennedy).

2 *Id.* The peak of the present merger wave among large firms occurred in 1968. FORTUNE, May 7, 1979, at 306. Some speculate that a sharp resurgence in merger activity in 1978 may have been sparked by fears of anti-conglomerate legislation. *Id.*

Clayton Act of 1914 and the Celler-Kefauver Amendments of 1950, coupled with stepped up Justice Department enforcement efforts, were implemented to restrain horizontal and vertical combinations in recent years. Overall merger activity, however, has not abated in the face of these new enforcement tools. In fact, the total dollar value of corporate mergers in the United States has increased substantially in recent years. In 1971, 59 mergers or acquisitions involved acquired companies with total assets of more than $10 million. In 1977 there were 99 transactions of that size.[3] By 1978, the value of the 2,106 publicly announced mergers effected during that year reached $34.2 billion, an increase of 56 percent over the 1977 level of $22 billion.[4]

In the past several decades, mergers have increasingly involved corporate acquisitions of firms which are neither competitors nor customers or suppliers of the acquiring firm — the conglomerate merger.[5] Indeed, the acquisition by one corporation of the stock or assets of another firm has become a widely-used vehicle for corporate diversification.

In contrast to horizontal and vertical acquisitions, conglomerate merger activity has been somewhat less impeded by existing antitrust statutes, thereby spawning various congressional efforts to expand the scope of those laws. The ensuing debate over the regulatory framework governing conglomerate mergers has heightened the historical tension in antitrust law between populist hostility towards large concentrations of economic power and the economists' concern with the efficient organization of and competitiveness within the marketplace.[6] While these two disparate concerns have in the past combined in varying ways to undergird antitrust legislation, these somewhat inconsistent goals have prompted a

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3 U.S. Federal Trade Commission, Statistical Report on Mergers and Acquisitions (1972).

4 *Hearings on S. 600, The Small and Independent Business Protection Act of 1978, Before the Subcom. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess., Part 1, at 144-45 (1979) [hereinafter cited as *Hearings on S. 600*] (statement of Alfred F. Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission).

5 This article focuses essentially on the pure conglomerate merger — one that combines two firms in unrelated markets. *See infra* notes 17-18.

6 *See generally* Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy — In Defense of Antitrust,* 65 COL. L. REV. 377 (1965); Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979); Scherer, *Book Review,* 86 YALE L. J. 974, 975-81 (1977). *See also* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 571-82 (2d ed. 1980) [hereinafter cited as SCHERER].

marked division of views regarding conglomerate merger antitrust policy.

I. The Scope of Present Antitrust Laws

Like other forms of corporate acquisitions, conglomerate mergers fall within the ambit of Section 7 of the Clayton Act.[7] Section 7's coverage has expanded over the years to cover all forms of mergers, outlawing any acquisition "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." Prior to the 1950 amendments to the Clayton Act, it was widely assumed that Section 7 applied to horizontal mergers but not to vertical acquisitions.[8] Congress made clear in the 1950 amendments that Section 7, as revised, covered all types of mergers, including vertical and conglomerate mergers.[9]

Notwithstanding the applicability of the Clayton Act by its terms to all mergers, Section 7 as judicially construed is strongly wedded to horizontal and vertical merger standards and analysis. Under Section 7, the analysis of legality *vel non* of a merger focuses principally upon the quantitative shares of the relevant markets controlled by the acquiring and acquired companies. This market-share analysis flows from application of the statutory standard of Section 7, namely whether the effect of an acquisition "may be substantially to lessen competition, or to tend to create a monopoly."[10] With respect to conglomerate mergers, however, market shares of the acquiring and acquired companies are not

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7 15 U.S.C. § 18 (1976). Section 7 provides in relevant part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

8 *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 613-16 (1957) (Burton, J., dissenting).

9 H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

10 15 U.S.C. § 18 (1976).

decisive benchmarks[11] since in a pure conglomerate merger, the parties to the transaction are by definition not in competition with each other.[12]

Attempts have nonetheless been made to extend the coverage of Section 7 of the Clayton Act to conglomerate mergers, to the extent that conglomerate acquisitions may have anti-competitive effects. The Justice Department's 1968 enforcement guidelines provide for challenges by antitrust enforcers to conglomerate mergers "that on specific analysis appear anti-competitive."[13] The guidelines set forth three distinct categories of suspect mergers. The first category involves combinations between a likely entrant into a market and a firm that is already a significant competitive force in that market.[14] This "potential competition" doctrine applies when the perceived possibility of the acquiring firm's entry into the market prior to the merger caused existing firms in that market to keep prices down in order to deter market entry.[15] When a "potential entrant" enters the market through the acquisition of a large existing competitor, price discipline among competitors in that market is lost. Thus, under this analysis Section 7's requirement that the merger substantially lessen competition in a line of commerce would be met.[16]

Mergers successfully challenged under the potential-competition doctrine have involved acquiring companies which were already poised "on-the-fringe" of the market which was then entered through conglomerate merger. Examples of such acquisitions are a beer company with sales concentrated in one region expanding through merger into an adjacent region[17] (geographic market extension) or a soap company expanding into the bleach market by

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11 *See generally,* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1315-16 and 1394-95 (1965).

12 *See* United States v. International Telephone and Telegraph Corp. (ITT), 324 F. Supp. 19, 54 (D. Conn. 1970); United States v. Northwest Industries Inc., 301 F. Supp. 1066, 1096 (N.D. Ill. 1969). *But see* Blake, *Conglomerate Mergers and the Antitrust Laws,* 73 COLUM. L. REV. 555, 566-67, 585 (1973) (contending that Section 7, as amended in 1950, is aimed directly at economic concentration).

13 *Merger Guidelines of Department of Justice, reprinted in [1977]* TRADE REG. REP. (CCH) ¶4510 at 6887, paragraph 17.

14 *Id.* at paragraph 18.

15 U.S. v. Falstaff Brewing Corp., 410 U.S. 526, 531-37 (1973); F.T.C. v. Proctor & Gamble Co., 386 U.S. 568, 581 (1967).

16 *Id.; supra* note 7.

17 U.S. v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

acquisition (product market extension) provide examples of such acquisitions.[18] True conglomerate mergers, however, are not likely to fall within the potential-competition doctrine, inasmuch as they do not involve geographic or product market extensions by potential competitors.

Moreover, despite urgings by the Federal Trade Commission (FTC), the Supreme Court has not expanded the potential-competition doctrine to cover the entry by merger of firms not perceived by existing companies in the relevant market as de novo entry threats sufficient to prompt a restraint in price increases.[19] The fact that a firm may have entered de novo or through acquisition of a small firm (toehold merger), thus lowering concentration levels in an industry, instead of entering through acquisition of a substantial firm in terms of market share, has not yet led the Supreme Court to strike down a conglomerate merger.[20] A lessening of *competition* is prohibited by Section 7; a lessening of *concentration* is not required.

Conglomerate mergers also face Justice Department challenge when they create a significant threat of reciprocal buying,[21] the second category of suspect conglomerate acquisitions under the Department's 1968 guidelines. This phenomenon occurs when a company gives preference in its own purchasing decisions to firms which are good customers for their own products. Thus, when a firm in Industry A that purchases products from companies in Industry B acquires a firm that sells to companies in Industry B, pressure can be exerted by that large purchaser on firms in Industry B to buy from the newly acquired company, or lose sales. Successful challenges to mergers based on the danger of increased reciprocal dealing usually occur when a firm's acquisition amounts to a product market extension into a line of commerce related to the acquiring firm's present business.[22] Pure conglomerate mergers are the least likely to offer such opportunities.

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18 F.T.C. v. Proctor & Gamble Co., 386 U.S. 586 (1967).

19 The FTC has been the main proponent of the doctrine. *Note*, 89 HARV. L. REV. 800 (1976).

20 *See* U.S. v. Marine Bancorporation, 418 U.S. 602, 639 (1973); U.S. v. Falstaff Brewing Corp., 410 U.S. at 537-38.

21 *Merger Guidelines of Department of Justice, supra* note 13, at ¶4510, paragraph 19.

22 *Compare, e.g.*, F.T.C. v. Consolidated Food Corp., 380 U.S. 592 (1965), *with* U.S. v. International Telegraph and Telephone Corp., 324 F. Supp. 19 (D. Conn. 1970).

Finally, court challenges have been mounted against mergers that threaten to "entrench" the market power of acquired firms.[23] When a leading competitor in a relatively small market is acquired by a large conglomerate, antitrust enforcement officials fear that the conglomerate parent's resources can be used, among other things, for massive advertising outlays that create barriers to market entry and stimulate product differentiation, thereby making oligopolistic pricing more likely.[24] Alternatively the threat of retaliatory predatory pricing on the part of a large conglomerate may inhibit any tendency by other firms in the market to cut prices.[25]

Antitrust challenges to corporate combinations resulting in a conglomerate firm far larger than the competitors of the formerly independent company have been sustained, such as Proctor and Gamble's acquisition of Clorox which was invalidated by the Supreme Court.[26] Because the Court also feared that acquisition of Clorox had obviated Proctor and Gamble's independent entry into the bleach market ("potential competition doctrine") it is by no means clear from this decision that the resulting size of the conglomerate firm will, standing alone, invalidate a mergers. While some commentators argue that the *Clorox* case enunciated a doctrine prohibiting a large proportion of conglomerate mergers,[27] subsequent cases have not borne out this theory.[28] The government, in fact, has not won a litigated conglomerate merger case since 1974.[29] Courts focus, of course, on the potential competition impact of a merger within a single line of commerce or market, but not, as the proponents of anticonglomerate merger laws urge, on the effect of concentrated economic power in the economy as a whole.[30]

In the course of stepped-up merger activity and increased con-

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23 *Merger Guidelines of Department of Justice, supra* note 13, at ¶4510, paragraph 20.
24 F.T.C. v. Proctor & Gamble Co., 386 U.S. at 579-81.
25 *Id.* at 578.
26 *Id.* at 579.
27 *E.g., Note,* 5 HOUS. L. REV. 100 (1967).
28 Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation,* 58 B.U. L. REV. 199 (1978).
29 *Id.* at 199-200; 125 CONG. REC. S2418 (daily ed. March 8, 1978) (remarks of Sen. Kennedy).
30 *Id.*

cerns by antitrust enforcers about conglomerate mergers, Congress in 1976 passed the most recent legislation with respect to corporate mergers, Section 7A of the Clayton Act — The Antitrust Improvements Act. Known commonly as "Hart-Scott-Rodino," the law does not further constrain firms' freedom to acquire other companies.[31] Instead, Hart-Scott-Rodino imposes a requirement that antitrust agencies be afforded advance notice in cases of mergers between firms of a designated size.[32]

While commentators have suggested that existing statutes, such as Section 5 of the Federal Trade Commission Act,[33] be used to challenge pure conglomerate mergers,[34] there appears to be support in Congress in favor of adopting new prohibitions to address specifically the unique characteristics of conglomerate mergers.[35]

II. Current Legislative Proposals: Purpose and Effects

In response to increased concerns over merger activity, legislative proposals were drafted last year which would either prohibit or limit certain kinds of conglomerate mergers. Both the FTC and Senator Edward M. Kennedy drafted legislative proposals which, if enacted, would add to existing antitrust laws significant new provisions dealing specifically with conglomerate mergers.

A. *FTC Proposal*

The FTC's Bureau of Competition proposed a bill which would apply to any merger of two firms that would result in an entity with average total assets and revenues exceeding $2 billion. Under the FTC's proposal, such acquisitions would be barred unless the

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31 Pub. L. No. 94-435, 90 Stat. 1383 (1976), codified at 15 U.S.C. §§ 1311-1331 (1976).

32 Hart-Scott-Rodino was designed to strengthen Section 7 enforcement by requiring pre-merger notification when, with various exceptions, the acquiring company has assets or sales over $100 million annually, and the acquired firm has sales or assets over $10 million yearly, a figure increased recently by administrative regulation to $15 million. Without pre-merger notification resulting in an injunctive action, a post-acquisition challenge by antitrust enforcers may be meaningless as a practical matter, with operations of the combined firms irrevocably intertwined. H.R. Rep. No. 94-1373, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 2637-48.

33 15 U.S.C.A. § 45 (1973, Supp. 1979 & Supp. Nov. 1979).

34 Carstensen and Questal, *The Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers,* 63 Cornell L. Rev. 841 (1978).

35 *See generally,* Kennedy, *The Case for Limiting Conglomerate Mergers: To Preserve a Democracy of Opportunity,* Executive Perspective 48 (Second Quarter 1979).

acquiring firm divested itself of a firm with assets of comparable size.

The key provision of the FTC's proposal is the divestiture requirement.[36] While firms, regardless of size, would be allowed to acquire other companies, the acquiring company would have to sell or otherwise dispose of a previously acquired business entity of "comparable value" to the firm sought to be acquired. The divestiture mandated by the proposal would have to be effected within one year after the acquisition and would have to be reported in detail to the antitrust enforcement agencies.[37]

The FTC's proposal contains a "small merger" exemption, excluding from coverage any acquisition of assets valued at less than $100 million, or any purchase of voting securities that confer working control over an issuer with total assets of less than $100 million. The proposal also exempts acquisition of United States firms by foreign entities, "unless as a result of the acquisition, the sum of the total United States assets and the annual net sales of the acquiring person in or into the United States, divided by two, would exceed $1 billion."[38]

Unlike other proposals, the FTC's measure expressly avoids a flat ban on large mergers. As stated by the Director of the Bureau of Competition:

> The staff supports a 'cap and spinoff' proposal rather than a total ban on certain large acquisitions because a divestiture proposal, while still preventing much of the growth of the largest firms, preserves many economic benefits of mergers. By prohibiting sudden large increases in size unaccompanied by spin-offs, the proposal would be a major step to combat the dangers inherent in corporate bigness and might channel corporate funds into more productive uses. However, because no acquisitions, not even the largest ones, would be prohibited by the proposal, some transactions that might yield important synergies, preserve a major competitor in a market, replace inefficient management, or produce other

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36 *Hearings on S. 600, supra* note 4, Part 1, at 225 (statement of Alfred F. Dougherty, Jr.).

37 *Id.* Part 1, at 232-33. Under the proposed statute, the plan of divestiture would have to "specify the business entity (or entities) to be divested, its value, the means by which divestiture will be accomplished and the person or persons to which such entity will be divested."

38 *Id.* Part 1, at 234-35.

> economic benefits would still be able to be consummated. For example, smaller firms that may need an infusion of new capital to survive or expand would still be permitted to be acquired, even by the largest corporations. The proposal would merely require the largest corporations on occasion to re-evaluate, on an equal footing, the desirability of maintaining their existing businesses or entering new ones. If a new entry through a large acquisition appears desirable, a company would be able to take that route by divesting itself of a comparably sized business entity.[39]

B. *Senator Kennedy's Proposal: S. 600*

In contrast to the FTC staff proposal, Senator Kennedy's proposed bill, S. 600, "The Small and Independent Business Protection Act of 1979,"[40] would completely prohibit mergers between corporations of a specific size and would bar two other categories of mergers unless the acquiring firm could demonstrate affirmatively that the acquisition would increase competition or would result in substantial efficiencies. In the absence of such a showing, the acquiring company could escape the measure's prohibition only if, as with the FTC's proposal, the firm divested assets at least as great as those acquired in the merger.[41]

Specifically, Senator Kennedy's bill would absolutely prohibit mergers of corporations where each corporation has total assets or annual sales exceeding $2 billion.[42] In addition, the measure would ban, subject to the establishment of certain affirmative defenses or a spin-off provision, mergers of corporations each having total assets or annual sales exceeding $350 million[43] and mergers of corporations in which one company has assets or sales exceeding $350 million and the other company has 20 percent or more of sales "in any significant market."[44]

Section 3 of S. 600 enumerates the affirmative defenses applic-

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39 *Id.* Part 1, at 226-27.

40 The bill, which was introduced on March 8, 1979, was cosponsored by Senators Metzenbaum, McGovern, Melcher, and Pressler. 125 CONG. REC. S2417 (daily ed. March 8, 1979).

41 S. 600, 96th Cong., 1st Sess. (1979). The full text of S. 600 may be found in *Hearings on S. 600, supra* note 4, Part 1, at 641-44.

42 *Id.* § 2(a).

43 *Id.* § 2(b).

44 *Id.* § 2(c).

able to section 2(b) and 2(c) mergers (*i.e.*, $350 million firms or one with a 20 percent market share). First, section 3(a)(1) permits the parties to the acquisition to show that "the transaction will have the preponderant effect of substantially enhancing competition"; second, section 3(a)(2) permits an affirmative showing that "the transaction will result in substantial efficiencies"; and third, section 3(a)(3) provides for a spin-off of "one or more viable business units, the assets and revenues of which are equal to or greater than the assets and revenues of the smaller party to the transaction."[45]

As explained by Senator Kennedy, S. 600 is not an attack on business or on bigness.

> [It and similar proposals] challenge, at only the highest levels, only one avenue by which businesses grow larger. . . . Bigness alone is not the problem. The pattern of merger activity is the problem,which permits a sudden and radical transformation of the economic landscape without substantial economic benefit. For that reason, the costs of radical growth by merger are unacceptable.[46]

C. *Rationale of the Proposals To Limit Conglomerate Mergers*

As evidenced by Senator Kennedy's statements, proponents of antimerger legislation emphasize that their quarrel is not with corporate size as such; rather, the problem needing treatment, in their view, is the trend toward corporate growth by the acquisition of previously independent firms. Current legislative proposals therefore do not seek to restrict corporate growth if that growth is effected by internal expansion into markets, even if the same result is achieved in terms of total corporate size and market presence.

The arguments mounted by antimerger advocates against conglomerate mergers fall into two categories: economic and sociopolitical. Under the rubric of economic concerns, antimerger advocates argue that the increase in absolute corporate size resulting from conglomerate mergers gives rise to anti-social economic prac-

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45 Section 3(b), however, proscribes the applicability of the affirmative defenses provisions of Section 3(a) if either party to the acquisition "has within one year previous to the transaction been a party to a prior transaction coming within the provisions of Section 2(b) or 2(c)."

46 Kennedy, *supra* note 35, at 61.

tices such as predatory pricing, reciprocal buying, interdependent conglomerate behavior (described as corporate "spheres of influence"), and non-maximization of profits.

These arguments, however, do not analytically draw a distinction between bigness per se and conglomerate growth accomplished through merger. While expansion into a market through de novo entry may be initially more pro-competitive, the important question (little addressed in the debate thus far) is whether, after entry, the rivalry among surviving firms is more or less vigorous than previously.[47] It is not clear that a conglomerate's behavior after it is an established competitor will differ depending on its means of entry. Oligopolistic behavior, at least in theory, would be as attractive in either case.

Moreover, the difficulty with these economic arguments is that current antitrust law already interdicts specific economic evils that may flow from corporate acquisitions. Specifically, many of the practices feared by critics of conglomerate acquisitions such as predatory pricing and reciprocal buying, are illegal under present law. Under existing law, conglomerate mergers can be challenged if they threaten to lead to such prohibited practices.[48] As a result, the additional benefits flowing from a prophylactic antimerger rule seem speculative. The sacrificed efficiencies that would result from a broad conglomerate merger bar, discussed below,[49] thus do not seem warranted.

Supporters of antimerger legislation further argue, however, that the "deep pockets" of large conglomerate firms enable them to engage in predatory pricing after entering a market in order to discipline smaller competitors or drive them out of the market.[50] While large corporations may indeed be better equipped to sustain temporary losses when pricing below cost, it is not clear that this practice is a profitable one over the long run in most cases, or that enforcement of present antitrust laws does not prevent the practice in circumstances where it is profitable.[51]

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47 SCHERER, *supra* note 6, at 339.

48 *See, e.g.*, F.T.C. v. Proctor & Gamble, 386 U.S. 568 (1967); F.T.C. v. Consolidated Food Corp., 380 U.S. 592 (1965).

49 See text at notes 104 to 128 *infra.*

50 SCHERER, *supra* note 6, at 335-40.

51 *Id.*

Again, even if a link may correctly be established between absolute size and an enhanced ability to engage in, and profit from predatory pricing, no evidence suggests that conglomerate mergers enhance the likelihood of the practice any more than other means of corporate growth. Indeed, one commentator noted recently that ". . . extremely diversified firms are probably less likely to engage in predation than firms serving multiple but functionally related markets, all else being equal."[52]

Increased dangers of reciprocal buying are also involved as a rationale for banning large conglomerate mergers. Again, however, present antitrust laws can be used to attack mergers threatening increased reciprocal buying; indeed no evidence has been mustered to show such challenges to be unsatisfactory in achieving those enforcement goals.[53] Moreover, in contrast to large, economically integrated firms, the divisional organization of most conglomerate firms, with decentralization of purchasing and marketing decisions, serves to render reciprocal buying difficult to accomplish, even if conglomerate firms wanted to engage in such practices. Courts have noted this market reality as a significant factor in striking down challenges to pure conglomerate mergers based upon the perceived threat of reciprocal dealing.[54] More fundamentally, reciprocal dealing, while anti-competitive, is not viewed by most observers as a serious economic problem.[55] Above all, the increasing awareness among businessmen of its illegality appears to have brought about a substantial decline in the practice.[56]

Another objection to conglomerate mergers is based upon the assumption that in an economy with a significant number of large conglomerates, those conglomerates will tend to respect each other's areas of operation or "spheres of influence" and that the resulting interdependent conglomerate behavior will hold prices at artificially high levels.[57] It is feared, under this view, that conglom-

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52 *Id.* at 340.

53 *See* text at notes 21-22 *supra.*

54 U.S. v. I.T.T. Corp., 324 F. Supp. 19, 45-46 (1970).

55 SCHERER, *supra* note 6, at 345.

56 U.S. v. I.T.T. Corp., 324 F. Supp. at 44, 47 n.212.

57 125 CONG. REC. S2418 (daily ed. March 8, 1979) (remarks of Sen. Kennedy); Areeda & Turner, *Conglomerate Mergers: Extended Interdependence and Effects on Industry Competition as Grounds for Condemnation,* 127 U. PA. L. REV. 1082, 1083-91 (1979) [hereinafter cited as Areeda & Turner].

erates facing each other in many markets will shun price cuts in any one market due to possible reprisal in other markets.

Much effort has been expended to investigate alleged instances of such behavior in countries where antitrust policies either allow or encourage the formation of large industrial combines.[58] No clear consensus has emerged, but the conditions thought necessary for such conglomerate interdependence are fairly specific, restrictive and unlikely to occur often,[59] especially in the diverse American economy operating under highly different antitrust restrictions. First, the affected markets have to be oligopolistic. Second, the markets must be dominated by the conglomerates which in turn must have similar stakes in the relevant markets. Thus while the "spheres of influence" hypothesis is plausible, the evidence generated to date is ". . . fragmentary and to some extent conflicting."[60]

In addition to the argument that conglomerate mergers have deleterious economic effects, the second broad proposition advanced by anti-conglomerate advocates is that mergers of a conglomerate nature do not, upon close scrutiny, bring about the desirable economic consequences, such as increased management efficiency, which promerger advocates suggest are achieved through such transactions.

According to this antimerger view, the benefits purportedly conferred by conglomerate mergers are either speculative or illusory. Efficiency of management, for example, is not typically increased by such mergers, this view holds, inasmuch as statistics show that in a majority of mergers the management of the acquired firm remains intact after the acquisition.[61] Indeed, chief executive officers of acquisition-minded conglomerates have publicly stated that finding a company with good existing management is a key criterion in identifying target companies for acquisition.[62] In addi-

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58 The debate is summarized in SCHERER, *supra* note 6, at 340-42.

59 Areeda and Turner, *supra* note 57, at 1091. Areeda and Turner conclude that pitting conglomerate firms against each other in many markets is as likely to increase as decrease competition. *Id.*

60 SCHERER, *supra* note 6, at 342.

61 *Hearings on S. 600, supra* note 4, Part 1, at 177-79 (statement of Alfred F. Dougherty, Jr.).

62 *See, e.g.*, G. William Miller, *Organizing the Conglomerate Company*, THE CONFERENCE BOARD SUPPLEMENT JAN. 19-20 (1967) (former Chairman and Chief Executive Of-

tion, supposed efficiencies in the flow of capital as a result of conglomerate mergers are likewise speculative, according to this view. In any event access to financial markets can be achieved in other, less socially costly ways.

At the same time, however, advocates of merger curbs largely admit that the evidence as to the lack of efficiencies achieved by mergers is inconclusive. Therefore, another reason, based solely upon social and political policy, needs to be found for invalidating or curbing conglomerate mergers.

The third broad proposition of the antimerger school is, therefore, that conglomerate mergers have undesirable social and political consequences. According to antimerger proponents, while the evidence as to the efficiencies obtained through mergers may be inconclusive, it is clear that the trend toward increases in aggregate concentration eliminates independent decisionmakers, increases the discretionary (*i.e.,* non-market related) power of already large corporate firms, and augments the considerable political power of large firms.[63] Continued expansion of large corporations by acquisition of independent companies is, under this view, inconsistent with basic Jeffersonian ideals of diffused power in a pluralistic society. As Chairman Pertschuk of the FTC stated in his Senate testimony on the antimerger proposals:

> A firm with significant discretionary power in economic and social spheres may also have substantial discretionary power in the political arena — power to support a particular candidate, to facilitate or hinder a particular bill, to challenge or accept a particular bill, to challenge or accept a particular regulation. . . . [T]here is striking evidence that the largest, most diversified firms may possess political advantages denied to smaller, less diversified firms.[64]

As a result of this perception, Chairman Pertschuk stated: "The

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ficer of Textron, Inc.); David Judelson, *The Role of the Conglomerate Corporation in Today's Economy,* FINANCIAL EXECUTIVE, Sept. 1968, at 22 (President of Gulf & Western Industries, Inc.).

63 *See generally, Hearings on S. 600, supra* note 4, Part 1, at 15-16 (statement of Michael Pertschuk, Chairman, Federal Trade Commission); speech by Michael Pertschuk, "What's Wrong With Conglomerate Mergers?", at Time, Inc. Antitrust Seminar, Washington, D.C. (May 7, 1979).

64 *Hearings on S. 600, supra* note 4, Part 1, at 15 (statement of Michael Pertschuk).

Jeffersonian preference for dispersed power is therefore vital to our proposal."[65]

Similarly, Senator Kennedy has written in explaining the need for new legislation:

> [T]he pattern of corporate growth has social and political consequences whether we think it should or not. The largest of our corporations are getting larger by a process of radical and instantaneous growth. They are changing the economy as we know it.[66]

As Senator Kennedy further stated in introducing S. 600:

> This legislation reflects far more than a narrow or technical concern with the interaction of forces within a given market structure. It represents a far broader perspective — a social concern with the impact of corporate power not only upon the character and responsiveness of individual economic markets, but upon the very social and political fabric of a nation committed to diversity and individual freedom of choice.[67]

In support of new legislation, therefore, the draftsmen of antimerger proposals ultimately ground their position upon this third broad proposition — that given the uncertain economic consequences of such transactions, conglomerate mergers entail socially undesirable consequences of sufficient severity to require regulation either to restrict or prohibit such acquisitions. As two commentators have aptly observed in this respect:

> *[O]pponents of conglomerate mergers tend to approach the subject from a social policy standpoint.* In contrast, those advocating the legality of such mergers usually take a more economic approach, with the apparent view that a combination having no significant, discernible anticompetitive potential impact must, *ipso facto,* be desirable.[68]

Fundamentally, however, Senator Kennedy's bill and other similar proposals should be taken for what they are — early, perhaps crude, responses to a broad social and political issue, namely the value or dangers (depending upon one's perspective) of

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65 *Id.* Part 1, at 14.
66 Kennedy, *supra* note 35.
67 125 CONG. REC. S2417 (daily ed. March 8, 1979).
68 Carstensen and Questal, supra note 34, at 848 n.38 (emphasis added).

the growth of large corporations by acquisition of other, non-competitor firms. A detailed analysis of Senator Kennedy's bill or similar bills is therefore of limited importance. What is more important, however, is to analyze whether conglomerate mergers are now an appropriate target for prohibitory legislation.

III. Is New Antitrust Legislation to Restrict or Ban Conglomerate Mergers Necessary or Appropriate?

In our view, the nation's antitrust laws are of sufficient sweep to address fairly effectively economic schemes that would unreasonably impair full and fair competition. Whether rightly or wrongly, existing law forbids a variety of business activities, ranging from monopolization and attempted monopolization to such restrictive competitive practices as price fixing and group boycotts, regardless of the circumstances or business motives which gave rise to those practices.

In order for new legislation to be required, it is therefore necessary to conclude that these antitrust laws should be modified to address concerns ordinarily deemed outside the ambit of case-by-case analysis of the impact of business conduct upon *competition.*

More to the point, existing antitrust laws contain a stringent antimerger provision, which since 1950 has applied to conglomerate as well as other mergers, regardless of the method of corporate acquisition. In fact, Section 7 was beefed up in 1950 due to fears of that increasing economic concentration could injure free competition.

> The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . . Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values, a trend toward concentration was thought to pose.[69]

The concern about aggregation of corporate financial resources was thus at the heart of Congress' intent when it put new teeth into

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69 Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 315-16 (1962).

Section 7 thirty years ago. As stated by the *Brown Shoe* Court:

> [A] keystone in the erection of a barrier to what Congress said was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.[70]

Congress itself made it clear that Section 7 was to be considerably stricter in its prohibitions than the Sherman Act. The legislative history of the 1950 Amendments stated that Section 7's antimerger constraints were not "to revert to the Sherman Act test" but were to reach "far beyond [that] Act" in its prohibitions.[71]

In addition to Section 7, the Hart-Scott-Rodino Act of 1976[72] eliminates any likelihood that larger acquisitions will escape careful government scrutiny for anticompetitive impact. As implemented by administrative regulations,[73] Hart-Scott-Rodino establishes detailed reporting requirements prior to consummation of a merger or acquisition, thereby enhancing already existing opportunities for challenge of any suspect merger by either the Justice Department or the FTC.

By virtue of existing statutes, implementing regulations, Justice Department guidelines, and judicial decisions, it is therefore clear that a comprehensive regulatory framework equipped to deal with mergers posing threats to *competition* is already in place. And, while fears are expressed that the federal judiciary is relatively inhospitable at present to vigorous antitrust enforcement,[74] the cur-

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70 *Id.* at 317.

71 S. REP. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

72 15 U.S.C. § 18a (1976).

73 16 C.F.R. §§ 800 *et. seq.*(1979).

74 *See generally,* Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation,* 58 B.U. L. REV. 199 (1978) ("[S]ince the 1973 Term, the government has lost more antitrust cases than it has won [in the Supreme Court]. The change in enforcement patterns has been most noticeable in the area of merger law. The United States was successful in all merger cases not involving regulated industries decided by full opinion of the Supreme Court between 1950 and the Court's 1972 Term. Since 1974, however, four of the five antitrust enforcement cases lost by the government in the Supreme Court have involved mergers. Similarly, there has been a noticeable trend favoring defendants in conglomerate merger cases in the federal courts at all levels. Overall, there have been eleven successful challenges to conglomerate mergers since 1964; significantly, none of these occurred after 1974. Moreover, twelve of the

rent calls for new antimerger legislation[75] do not seek to overturn either a promerger judicial decision or a perceived promerger trend in the federal court decisions under Section 7. In light of the existing statutory framework, the call for new legislation is not for a return to free and fair competition; rather, it is directed toward other, broader values.[76]

As such, the desire for new restrictions on corporate growth by merger or acquisition is outside the mainstream of traditional antitrust concern with economic efficiency.[77] This fact renders analysis of the desirability and effects of new curbs on mergers more difficult, inasmuch as traditional antitrust perspectives are of limited applicability.[78] Consequently, analysis of the proposition that new restrictions on conglomerate mergers are needed — in addition to those restrictions already imposed by Section 7 and the reporting requirements of Hart-Scott-Rodino — plainly turns upon considerations beyond those of the preservation and enhancement of competitive markets. What is at issue is essentially a social and political judgment; nonetheless, it is a judgment with considerable impact upon freedom in the marketplace.

In our view, there are two broad reasons why *new* restrictions should *not* be placed upon corporate growth by acquisition or merger.[79] First, the reasons propounded by the antimerger ad-

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twenty-two unsuccessful conglomerate merger attacks took place between 1974 and 1977.") *Id.* at 199-200 (citations omitted).

75 *Cf.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) *rehearing denied,* 434 U.S. 881 (1977). The *Illinois Brick* decision was the subject of vigorous legislative efforts to overturn it.

76 *See supra,* text at notes 63-68. A press release by Sen. Kennedy, dated March 8, 1979, announcing hearings on S. 600 stated in this respect: "The Small Business Protection Act is introduced to avoid the dangers [of increases in corporate political powers]. For over a century, that has been the purpose of our antitrust laws — not just to preserve competition within individual markets — but to preserve as well the value which competition represents. It represents a social commitment to diversity — to individual freedom of choice — and to democracy itself."

77 While social concerns clearly undergirded enactment of the nation's landmark antitrust laws, these concerns arose out of perceived damage to free competition in the market place.

78 *See, e.g., Hearings on S. 600, supra* note 4, Part 2, at 10 (statement of Richard A. Posner); *id.* Part 2, at 49 (statement of Ira Millstein).

79 Throughout the remaining discussion, it is, of course, assumed that Section 7 and Hart-Scott-Rodino are in place and available for invocation by antitrust enforcement agencies. But that obvious assumption should be kept in mind by the reader, lest the remaining discussion, challenging as it does the need for new legislation in addition to existing law, become misleading.

vocates in favor of new legislation do not withstand careful scrutiny. Second, the effects of such new legislation, which would render large conglomerate mergers very difficult, would be injurious to the domestic marketplace.

A. *Reasons for Antimerger Legislation*

1. Aggregate Concentration. Proponents of new antimerger legislation base their concern over the "unprecedented wave of merger activity"[80] upon increases in levels of aggregate concentration. In this respect, the Justice Department, for example, has pointed to an increase in total corporate assets held by the 50 largest corporations from the period 1968 to 1974.[81] The FTC staff has likewise expressed concern about the rise from 46 percent to 61 percent in the ownership of total manufacturing assets by the largest 200 manufacturing firms in the U.S.[82]

The difficulties with this analysis are twofold. Initially, the analysis assumes that increases in aggregate concentration are undesirable, which of course assumes the conclusion to the ultimate issue at stake here. In fact, concentration levels have traditionally been examined under antitrust analysis only in relation to specific markets, not to overall trends in the economy as a whole. The relevancy of aggregate concentration figures standing alone has not been established.

In addition, and more manageable for purposes of this portion of our analysis, close examination shows that aggregate concentration has *not* in fact been increasing substantially. Several points are relevant in this respect. First the FTC's Director of the Bureau of Economics has testified that aggregate concentration levels are not increasing markedly at all, but in fact "are stable."[83] Second, the stability of these levels is illustrated by the figures relating to ownership of total corporate assets by the 50 largest corporations, the very figures which the Justice Department finds disquieting. In

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80 Carstensen and Questal, *supra* note 34, at 841.

81 Speech by Ky P. Ewing, Jr., Deputy Assistant Attorney General, Antitrust Division, before the Business Week Conference on Acquisitions and Mergers (June 22, 1979).

82 *Hearings on S. 600, supra* note 4, Part 1, at 147 (statement of Alfred F. Dougherty, Jr.). *See generally id.* Part 1, at 17-19 (statement of William S. Comanor, Director, Bureau of Economics, Federal Trade Commission).

83 *Id.* Part 1, at 18 (statement of William S. Comanor).

the midst of the latest merger wave, the total share of corporate assets held by the 50 largest companies increased by only 2.3 percent, hardly a runaway escalation over the two decade period in question. Moreover, the percentage of ownership of total *nonfinancial* corporate assets held by the 50 largest *nonfinancial* corporations actually declined slightly over a 20 year period, from 24.4 percent in 1958 to 23.3 percent by 1975.[84] Similar results appear for the aggregate concentration ratios of the top 200 firms. Concentration declined from 41.1 percent in 1958 to 39.9 percent in 1972 and 39.5 percent in 1975.[85] Third, the statistics which reflect a substantial increase in the concentration of assets held by the 50 largest manufacturing firms from 46 percent to 61 percent of all manufacturing assets are misleading. Those figures appear inflated largely because they include the *nonmanufacturing* assets acquired by manufacturing firms.[86]

Thus, even assuming the relevancy of aggregate concentration figures, there is no substantial evidence that the levels of aggregate concentration are significantly on the upswing; to the contrary, those levels have been relatively stable for almost twenty years.

Absent the wave of conglomerate mergers, aggregate concentration might, of course, have fallen in the last two decades. This possibility puts the antimerger argument in a different cast and provides a much more tenuous rationale for anti-conglomerate merger legislation. Not only are the benefits of deconcentration more speculative outside of specific product markets, but respectable arguments can be mustered for the proposition that conglomerate mergers actually spur the formation and foster continued growth of new enterprises, thus increasing the diversity of the U.S. economy.

While not established empirically beyond doubt, increased

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84 *Id.*

85 *Id.* (emphasis added).

86 *See* Ehrbar, *'Bigness' Becomes The Target of the Trustbusters,* FORTUNE, March 26, 1979, at 34 ("The assets [used total in calculating concentration ratios] are the total assets of the top 200 manufacturing companies, including their nonmanufacturing and foreign assets. RCA, for instance, owns Hertz, and all of its rental cars are included. ITT and Teledyne own insurance companies, Anheuser-Busch owns amusement parks. . . . That increase in the percentage share of the 200 largest manufacturers since 1947 may reflect only the fact that manufacturers (of all sizes) have been increasing their foreign investments and nonmanufacturing diversification." *Id.* at 37).

diversity in the economic landscape is suggested by the ability of small firms to be acquired at handsome profits by larger, more established firms. For example, premiums paid by conglomerates for smaller but growing firms have been large,[87] significantly raising rewards for successful enterpreneurs. Such heightened rewards would almost inevitably, it would seem, encourage the formation and development of new ventures.

Moreover, entrepreneurs often lack management skills that become more critical once a firm reaches a certain size.[88] Without the opportunity to sell out to a large firm able to supply those requisite skills, many firms reaching this "complexity threshold" might flounder, removing a potentially significant competitor from the market.

Conglomerates thus have the potential to play a crucial role in spurring and supporting the emergence of aggressive, innovative firms. Contrary to the assertions of the critics of conglomerate mergers, the impact of such combinations is not unambiguously towards greater aggregate concentration.

2. Disappearance of Independent Decisionmakers. As a corollary to fears about aggregate concentration levels, antimerger advocates also voice concerns about the loss of business decisionmakers when a previously independent firm is acquired. The thesis is simple: "When two firms, once independent, merge, one is left."[89] The "loss" of a firm means, according to antimerger proponents, that diversity of opinion within the business community is *pro tanto* diminished — the acquired firm's views and management decisions will thereafter be dictated by the surviving company.

Despite its superficial appeal, there are two fallacies in this approach. First, there has in fact been no diminution over the years in the absolute number of independent corporate decisionmakers in the business community. On the contrary, there has been a substantial increase in the number of large corporations over the last

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87 *See, e.g.*, Dodel & Ruback, *Tender Offers and Stockholder Returns: An Empirical Analysis*, 5 J. FIN. ECON. 251, 372 (1977); Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV. 135, 140 (1967).

88 O. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR 153 n.6 (1970) [hereinafter cited as WILLIAMSON].

89 Statement of Michael Pertschuk, *supra* note 63, at 9.

twenty years. For example, in 1958, there were 9,424 corporations in the U.S. with assets over $10 million. By 1975, that figure rose to 24,915 — almost a three-fold increase in the number of business decisionmakers of that size.[90] Similarly, in 1958, there were 918,211 U.S. corporations with assets under $10 million; in 1975, 1,996,863 active corporations had assets under $10 million.[91] Moreover, a study in 1975 demonstrated that, with respect to manufacturing and mining corporations with assets over $10 million, the number of companies in that category rose from 2,100 in 1961 to 2,962 in 1971.[92] Between 1971 and 1978, the latter figure rose to 4,499.[93]

This evidence strongly suggests that over the last two decades (a period characterized by antimerger proponents as the era of the "merger wave"), the total number of both large and small corporate decisionmakers has risen sharply. Merger trends have simply not resulted in a reduction in the number of large companies. Concurrent with merger and acquisition trends, new companies continue to spring up in large numbers, and small firms grow to join the ranks of larger firms. Under these circumstances, it is misleading to point to corporate acquisition trends, without more, when the total number of companies, large and small, is markedly on the rise.

A related concern expressed by detractors of conglomerate mergers is that parent firm management will be insensitive to the needs and concerns of the community in which the acquired firm was either headquartered or had major facilities. Under this view, conglomerates may be more willing to close plants which yield profits smaller than those possible via alternative investments in the enterprise, regardless of the impact upon the affected community.[94]

Such closings have provided the basis of many critics' attacks on conglomerates. In introducing S. 600, for example, Senator Ken-

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90 *Hearings on S. 600, supra* note 4, Part 2, at 327 (statement of L. Earle Birdzell (figures based upon IRS returns)).

91 *Id.*

92 *Id.* at 326; P. STEINER, MERGERS 292 (1975).

93 *Hearings on S. 600, supra* note 4, Part 2, at 326.

94 *See infra,* text at notes 110-12, which suggests that conglomerates will not reinvest as heavily in low return subsidiaries, but will instead channel resources into growing and more profitable divisions of the corporation.

nedy cited an example of corporate "absentee ownership," with subsequent plant closings, as proof of the social costs of conglomeration.[95] Justice Douglas likewise invoked the spectre of corporate insensitivity to local concerns in the concurring opinion in *Falstaff Brewing*.[96]

The rational response to such localized dislocations, however, should not be a ban on large conglomerate mergers in hopes of keeping assets committed to what managers deem to be unproductive uses. Rather, the ability of U.S. firms to compete in international markets and to stem the flow of imported goods requires the unrestricted flow of U.S. capital and labor to their highest and best uses. Frictional problems caused by disinvestment in a stagnant industry followed by investment in a growing sector should be dealt with directly through labor relocation, retraining, and relief programs, as well as through aid to affected communities. Unless it can be demonstrated that plant closings are arbitrary and unrelated to efficiency gains,[97] they should not be invoked to support a ban on conglomerate mergers.

3. Increases in Political Power Enjoyed by Firms After a Conglomerate Merger is Effected. The major argument asserted by antimerger advocates is that large business firms enjoy excessive political power and that conglomerate acquisitions unduly increase the extent of that power. As Chairman Pertschuk of the FTC stated in his Senate testimony on S. 600:

> [T]here is striking evidence that the largest, most diversified firms may possess political advantages denied to smaller, less diversified firms. For example, a large diversified firm has the ability to mobilize resources not directly affected by a particular issue. A conglomerate composed of steel and tobacco divisions, for instance, can bring the resources of both to bear on steel issues as well as tobacco issues.[98]

Arguments over the relative political power of large firms defy definitive resolution. Empirical data on the subject is, not surpris-

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95 125 CONG. REC. S2419 (daily ed. March 8, 1979) (remarks of Sen. Kennedy).

96 410 U.S., at 543.

97 Some commentators argue that such is the case, however: "The firm may choose to locate its plants in State *X* rather than State *Y*, simply because several of its top executives have college, family, and other ties to State *X*." *Hearings on S. 600, supra* note 4, Part 1, at 207 (statement of Alfred F. Dougherty, Jr.).

98 *Id.* at Part 1 (statement of Michael Pertschuk).

ingly, sketchy and uncertain. Indeed, it is by no means clear how a firm definitively translates corporate economic resources into political power.

No final resolution of this issue is in sight. Proponents of increased merger restrictions argue strenuously that large conglomerate firms have enormous political power,[99] while opponents state that the political influence of large firms has declined in recent years:

> The political 'clout' of big business has declined steadily. Regulations that favor business are increasingly repealed . . . regulations that hurt it are increasingly imposed. . . .[100]

This judgment is, at bottom, subjective in nature, revolving around one's highly personalized views, and premised, inevitably, upon one's own experiences.[101]

But this does not mean that all judgments on this point are inconclusive. Regardless of one's conclusions as to the political power of big business, it is odd to maintain, as antimerger advocates do, that bigness itself is not the target and yet focus on increased political power obtained through one specific avenue of corporate growth (conglomerate mergers), while leaving other avenues of growth (such as internal expansion into new markets) which achieve the same result unaffected. If the political power of big business is a problem, then legislation should not logically be directed at one, highly publicized avenue for such growth while other means continue to exist.

In fact, the proposals to limit conglomerate mergers seem to draw a distinction in a way not defensible in light of the rationale offered for the legislation. There is no evidence that conglomerates as such yield greater political power than other corporations of comparable size. Nor is there any evidence that a company which makes a conglomerate acquisition enhances its political power by that means, rather than by growing or expanding internally. Thus,

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99 *See, e.g.,* Michael Pertschuk, *What's Wrong With Conglomerate Mergers, supra* n.63, at 9-18; *Hearings on S. 600, supra* note 4, Part 1, at 194-202 (statement of Alfred F. Dougherty, Jr.).

100 *Hearings on S. 600, supra* note 4, Part 2, at 11 (statement of Richard A. Posner).

101 Chairman Pertschuk pointed out this individualized approach in referring to his personal encounters while serving as a Senate staffer with "Tangible conglomerate power" — encounters which inevitably shaped the Chairman's views that "conglomerate power" is a force meriting regulation. *See* Pertschuk, *supra* note 63, at 15.

the logic of curbing corporate bigness by outlawing or restricting large conglomerate mergers is not immediately apparent, when political power can presumably be equally enhanced by internal growth. And, the various legislative proposals that have been put forward would not curb small conglomerate mergers, regardless of the augmented political power of the acquiring firm.

While the point has apparently not been exhaustively studied, it frequently happens that a conglomerate acquisition actually renders it more difficult for the post-merger corporation to take stands on specific political issues, simply because of the diversity of interests in the post-acquisition firm. Instances likewise exist where a Political Action Committee (P.A.C.) of an acquired corporation has been disbanded when the firm has been acquired by a conglomerate firm which does not have a P.A.C.[102]

In short, conglomerates whose divisions have a variety of interests, some of which may be inconsistent or at least dissimilar, may find it difficult to wield political power over a wide range of issues. Conglomerate "federalism" — the taking into account of diverse views and interests within the corporate family — works to dilute the increase in political power that an increase in size might otherwise promote.[103]

B. *Reasons Against Antimerger Legislation*

In addition to the problematic nature of the supposed ills of large corporate acquisitions, conglomerate mergers have salutary effects that should not be lightly discarded. First, it is questionable public policy to restrict broadly the free flow of capital solely on the basis of size, that is, without regard to market conditions (such as undue concentration in a specific market).[104] The free flow of capital in U.S. markets permits the maximum use of limited capital

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102 For example, Textron, Inc., a large conglomerate, has typically disbanded P.A.C.'s of acquired firms following the acquisition.

103 As corporate size increases, public visibility also increases. Enhanced exposure in the public eye tends over the long run to exercise a moderating influence on corporate decision-makers, counseling against the vigorous assertion of extreme positions. Indeed, this phenomenon of increased sensitivity to public opinion tends to cause larger firms to avoid deep political involvement or involvement with controversial public issues, unless vital corporate interests are affected.

104 Concentration levels in specific markets are, of course, at the heart of Section 7 analysis.

resources, preserves the freedom of potential sellers of companies to take advantage of their entrepreneurial success, and discourages outflows of capital investment to certain foreign countries where capital movements may be less restricted.

In addition, unrestricted capital flow has the derivative advantage of rewarding equity investors, as well as the founders or operators of a successful enterprise, since such investors typically enjoy a premium when their shares are tendered to an acquiring company in a takeover bid (including circumstances where the takeover is friendly).[105] In this respect, takeovers tend to moderate market forces which at any given point can depress stock prices of a corporation below what a rational purchaser judges the company actually to be worth.

1. Conglomerate Mergers Promote Efficiencies in the Management of Corporate Resources. While some conglomerates seek to acquire companies which already have good management, conglomerate mergers frequently have the effect of moving corporate assets from poor management to more efficient, productive management. Mergers and acquisitions are, in fact, the most effective means for moving assets from ineffective management to good management. As one commentator put it:

> The merger market is an important device for disciplining incompetent management and for moving assets out of the hands of such managers and into the hands of more efficient ones. If a firm is poorly managed, this will be reflected in a fall in the price of the stock below the level that it could be expected to reach with competent management. The gap between current and attainable price will make the firm an attractive candidate for a takeover, friendly if the managers can be induced to cooperate in the takeover, hostile if they cannot. . . . Either way, merger is the typical device by which incompetently or suboptimally managed corporate assets are reallocated to more efficient managers.[106]

Certain aspects of mergers or takeovers have been demonstrated empirically. For example, the acquiring company is typically willing to pay a substantial premium above market price for the target company's shares, thus evidencing a perception that the target

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105 *See* note 87 *supra.*

106 *Hearings on S. 600, supra* note 4, Part 2, at 15 (statement of Richard A. Posner).

company's stock is in fact undervalued. The premium enjoyed by shareholders, according to various studies, ranges from fifteen to twenty percent as a result of a merger or tender offer.[107]

Other studies suggest that the motivation to improve the profit performance of acquired companies is an important reason behind conglomerate mergers. In an early study, two commentators found that approximately 35 percent of acquiring firms believed that the management of target companies could be substantially improved upon acquisition.[108]

While the post-acquisition performance of consolidated firms is not clear-cut one way or another, the fact remains that, contrary to the suggestions of antimerger advocates,[109] substantial changes in existing management of acquired firms are often made. Studies conducted by the FTC show that, of the individuals who held the top three management positions in firms acquired by nine large conglomerates between 1960 and 1969, 42 percent either retired or resigned.[110] This represents a substantial turnover in old management and an infusion of new management blood into the acquired firms.

2. More Efficient Capital Allocation. Conglomerate mergers increase the efficiency of large corporate enterprises in other ways. First, conglomerates can act as miniature capital markets, allocating funds to their most productive use among the company's divisions, helping to achieve a higher rate of return than would be possible without conglomeration.[111]

The capital market, of course, should ideally be able to achieve the same distribution of investments. This could occur, in fact, if stockholders reinvested dividends paid to them in the appropriate companies. This phenomenon typically does not happen, however, because of, among other things, the differing tax treatment of dividends and capital gains. Because profits reinvested in the corporation result in capital gains for equity holders, companies frequently plough back earnings into their businesses instead of pay-

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107 *See supra* note 87.

108 Hale & Hale, *More on Mergers,* 5 J.L. & ECON. 119, 129 (1962).

109 *See* discussion and accompanying text at note 61 *supra.*

110 FTC Staff Report, *Conglomerate Merger Performance: An Empirical Analysis of Nine Corporations,* 42-46 (November 1972).

111 WILLIAMSON, *supra* note 88, at 142-45.

ing out net income in the form of dividends to shareholders which would be taxed at the much higher rates applied to ordinary income.

This factor works to "lock-in" corporate earnings and impede the flow of capital from low to higher profit companies. Not surprisingly, research has shown the average rate of return on ploughed back earnings is much lower than the return to new equity or debt financing.[112]

Even without this differential tax treatment, it is likely that corporate managers would have a propensity to retain earnings excessively, resulting from both an optimistic belief in their ability to generate profits and a desire to see the entity they control grow larger in size, if not in the rate of profit.[113]

At least until the capital gains-dividends tax differential is erased, conglomerates seem to offer clear investment benefits that the proposed legislation would sacrifice.

3. Policing Inefficient Management Through the Threat of Takeover. Conglomerates play another efficiency increasing role by threatening the takeover of inefficient, lax or non-profit maximizing companies.[114] This "enterprise arbitrage" occurring in what Manne refers to as the "market for corporate control"[115] is one of the few means available to police the management of large companies. Shareholder democracy has by and large proven to be an ineffective means of controlling ineffective or lethargic top management.[116] The larger the company, the easier it is for management to pursue its goals which may differ from the desire of shareholders to have the profits of the company maximized.

The more management departs from the maximization of profits, the greater are the financial rewards to someone displacing incumbent management through takeover.[117] Executives fearing

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112 W. S. Baumol, P. Heim, B. Malkiel & R. Quandt, *Earnings Retention, New Capital and the Growth of the Firm,* 52 REV. ECON. & STATISTICS 345 (1970).

113 WILLIAMSON, *supra* note 88, at 143. For theories regarding non-profit maximization by management, and their substitution of other goals, such as maximization of the size of their firms, *see* SCHERER, *supra* note 6, at 29-41.

114 R. MARRIS, THE ECONOMIC THEORY OF "MANAGERIAL" CAPITALISM (1974); WILLIAMSON, *supra* note 88, at 139-41.

115 H. Manne, *Mergers and the Market for Corporate Control,* 73 J. POL. ECON. 110 (1965).

116 A. F. CONARD, CORPORATIONS IN PERSPECTIVE 337-48 (1976).

117 The rewards can also be gained, of course, through a friendly merger or sale. The policing effect comes mainly from the threat of takeover, however.

takeover and the subsequent loss of their independence or their jobs will, at least in theory, be more motivated to improve the performance of their companies. This potential threat of takeover has been perceived by antitrust enforcers as a safeguard against mismanagement by complacent firms:

> [T]he threat of a takeover . . . currently functions as a check on inefficient corporate management. . . .[118]

Chairman Pertschuk has similarly stated (in opposing an absolute ban on large mergers and favoring a "cap and spin-off" approach) that "the opportunity for beneficial, *i.e.*, efficiency-enhancing, takeovers should be preserved."[119]

Significantly, the bills proposed by both Senator Kennedy and the FTC would place the stiffest constraints on acquisitions of larger companies. These companies are, given by their sheer size, the least subject to effective shareholder control,[120] and thus can most effectively be policed by the threat of takeover.

Even the FTC's "cap and spin-off" approach, which permits a merger when the acquiring company sells a subsidiary or division comparable in size to the acquired company, reduces the effectiveness of corporate takeovers as a check on lax management. The gains from the takeover under the FTC's proposal would have to offset the costs of two transactions instead of one. The greater the costs of takeover, the greater the amount of inefficiency incumbent management can therefore exhibit without attracting takeovers.[121]

Even if an acquiring company decides that an acquisition is justified by the potential gains, a buyer for the spun-off subsidiary must be found within a year, which is a commercially unreasonably short period.[122] If a buyer is not located or if the price offered is below the value placed on the subsidiary by the conglomerate, a takeover bid offering clear efficiency gains would either have to be

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118 *Hearings on S. 600, supra* note 4, Part 1, at 227 (statement of Alfred F. Dougherty, Jr.).

119 Michael Pertschuk, *"What's Wrong With Conglomerate Mergers?", supra* note 63, at 27.

120 Conard, *supra* note 116, at 337-48.

121 Williamson calls these costs displacement costs and argues that they measure the amount of freedom management has to non-profit maximize without risking takeover. In other words, the greater the unrealized net profit opportunities, the greater the likelihood of takeover. WILLIAMSON, *supra* note 88, at 139-41.

122 *Supra* note 37.

abandoned or the acquiring company would be forced to make a Hobbesian choice in order to comply with the antimerger regulatory framework. Though the FTC's bill will not eliminate the efficiency policing effect of corporate takeovers, the obstacles erected by the bill clearly reduce their efficacy.

4. Conglomerates Spur Innovation. As noted earlier, conglomerate mergers may spur the formation of new enterprises; at the same time, they may foster the growth of fledgling firms past the critical stage at which the entrepreneur's specialized expertise no longer outweighs the lack of other needed management skills.[123] Even in firms where the founders develop requisite executive skills, there may be no qualified successors available from within the firm's organization so that continuation of the business may, in the founders view at least, require its sale. In this way, conglomerates help and preserve a large number of competitors in the U.S. economy.

Conglomerates may also help ensure that technical innovations are successfully developed and distributed widely. While small, independent firms may be the most innovative,[124] they frequently lack the full range of resources to translate ideas into a successful product.[125]

5. The Role of Conglomerates in International Markets. Some commentators correctly suggest that the debate over conglomerate merger legislation overlooks potentially significant impacts on U.S. ability to compete in international markets. One witness in recent Senate hearings noted for example that:

> The striking fact about the testimony by the Antitrust Division and Federal Trade Commission witnesses . . . is that they paid no attention whatever to the international aspects [of S. 600]. . . . I was dismayed to find that the testimony on aggregate concentration reflected the same isolationism that has so persistently dominated discussion of concentration in particular industries. We continue to talk, for example, about four-firm concentration ratios in the automobile industry when a glance down Constitution Avenue will convince any objective observer that all the Volvos, Volkswagens, Renaults, Datsuns and Toyotas cannot be ignored for mere arithmetic convenience.[126]

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123 WILLIAMSON, *supra* note 88, at 153 n.6.
124 SCHERER, *supra* note 6, at 414-18.
125 WILLIAMSON, *supra* note 88, at 144.
126 *Hearings on S. 600, supra* note 4, Part 1, at 416 (statement of Kenneth W. Dam).

Senator Adlai Stevenson echoed these sentiments in the course of Senate hearings on S. 600. In his view, the proposed antimerger legislation would have the effect of intensifying the trend toward foreign takeovers of U.S. businesses and, more relevant to the present discussion, would hamstring U.S. companies in their efforts to compete against the "new corporate giants in the world and the Governments which stand behind them."[127]

U.S. firms should not, in our view, be subjected to additional constraints which could affect their competitiveness, absent some showing that injury to competitive markets would otherwise result — considerations to which Section 7 is already addressed. The dangers to the international competitive posture of U.S. firms in precluding or circumscribing large mergers are too acute:

> In trade policy, exchange rate policy, monetary policy and many other policy areas we are being forced to come to grips with bracing international realities. Those realities are a weak dollar, an unfavorable trade balance, a steady decline in the U.S. share of the world export market for manufactured goods and a growing number of domestic basic industries that are no longer able to ignore import pressures from more efficient competitors in other countries (including advanced developing countries). . . . It would be dangerous to take a major step in antitrust policy without considering these intimate linkages between the domestic and international economies.[128]

In this respect, conglomerate mergers frequently permit acquired firms to obtain greater access to foreign markets. Acquired companies that historically limited their marketing efforts to U.S. markets may find that expertise and assistance as to entry into non-U.S. markets is immediately available from management of the large acquiring company, which may already be engaged in international marketing. This expertise may frequently be acquired only at considerable effort and expense on a trial-and-error basis by the acquired company, without the assistance of proven managers already in the corporate fold who are experienced in international marketing.

6. Access to Sophisticated Management Techniques. Finally, conglomerate mergers provide managers with access to innovative management techniques that were employed, perhaps experimen-

127 *Id.* Part 1, at 369-70 (statement of Senator Aldai E. Stevenson).
128 *Id.* Part 1, at 417 (statement of Kenneth W. Dam).

tally, by sister divisions and which may increase management efficiency and division productivity. This conglomerate "cross-fertilization" of management techniques, marketing strategy, or production management may well result in considerable increases in efficient use of corporate resources, which would be unavailable within the acquired company's management standing alone.

Conclusion

Section 7 of the Clayton Act seems sufficient to prevent any direct harms to economic efficiency potentially flowing from conglomerate mergers. No new legislation is necessary or appropriate at this time imposing a ban or constraints on large conglomerate mergers.

A ban on all large conglomerate mergers would amount to legislative overkill; if aggregate concentration is to be addressed at all, it should be addressed in specific markets under the umbrella of Section 7 or, if Section 7 proves insufficent for the task, by enactment of new, narrowly drawn legislation which addresses evils of excessive concentration in a specific industry or market. Otherwise, this legislation, aimed at the restoration of Jeffersonian ideals, will impose substantial costs on the economy, without achieving the goals underlying the proposed ban.

COMMON CARRIER REGULATION FOR THE FUTURE

CHARLES D. FERRIS*

The telecommunications field in the 1980's promises to undergo rapid, nearly explosive changes, as new technologies and new service providers enter into the communications marketplace. Mr. Ferris, Chairman of the Federal Communications Commission, here examines some advances in the telecommunications industry since the passage of the 1934 Communications Act. In his Article, he suggests certain basic concepts that must be embraced by any new legislation, and posits changes necessary to the updating of the 1934 Act.

For many decades, most telecommunications common carrier services were provided by one monopoly — American Telephone & Telegraph (AT&T). During those years, the regulatory tools at the disposal of the Federal Communications Commission (FCC) were, by and large, adequate to the task of fulfilling the laudable statutory goals under which the Commission operates — "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide [sic], and world-wide wire and radio communication service . . . at reasonable charges."[1]

Today, however, technological advances in both the telecommunications and information processing fields have produced an environment so fluid that many of our previous assumptions underlying the Communications Act of 1934[2] are no longer appropriate. In fact, the 1934 Act has become, in some ways, a barrier to the fulfillment of its own goals.

The 1934 Act was designed to cope with change. It has done so, providing this country with the most advanced communications service in the world. Yet, even the elastic mandate that Congress afforded the Commission in 1934 is being strained today.

The development of satellite and microwave technology has fundamentally altered the basic economics of long distance communications. The computer revolution has not only created a demand

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* Chairman, Federal Communications Commission.

1 Section 1 of the 1934 Communications Act, 47 U.S.C. § 151.

2 47 U.S.C. §§ 151 *et seq.*

for new and different types of communications services, but has also changed the very nature of the services that carriers can deliver. New entrants, offering both old and new products and services, have appeared. As technological changes enabled established carriers and their customers to use the same facilities for a variety of purposes, there has been the promise of even more competition.

More changes in technology and the marketplace are certain to take place. Such developments will press our existing regulatory processes to the limits. Distinctions between "communications" and "data processing," broadcasting and common carriage, postal and communications regulation, interstate and intrastate services, and "monopoly" and "competitive" services have already eroded. Our old regulatory categories, most of which are rooted in the Communications Act, are inadequate to encompass electronic message services, enhanced switched data services, teletext and viewdata.[3]

Unfortunately, instead of encouraging new carriers and new services, the 1934 Act, as implemented through Commission rules and interpreted by the courts, has slowed the pace of entry. Under section 214 of the present Act,[4] for instance, the Commission must make affirmative findings that new entrants or new facilities would serve the public interest and convenience. The Commission cannot presume the benefit of new competition.[5]

At considerable cost in time and resources, the Commission has thus been forced to establish a record to justify open entry into

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3 New technologies like fiber optic cable, cellular mobile radio, video discs, and advanced satellites seek entry into the marketplace, and the regulatory apparatus strains to find ways to fit them into our existing categories or to devise exceptions when they do not fit.

How should we characterize the technology of direct satellite transmission of video programming into viewers' homes? Is this simply the space-born equivalent of local television stations, or of our national TV networks?

Is a cable television operator who transmits another company's program by wire a common carrier, subject to rate and access regulation? Or is it a broadcaster, with much greater discretion over rates and access to communications, but also subject to the Fairness Doctrine and other programming duties?

"New Technology and the Merging Media — A Time for Imagination," Address by Charles D. Ferris Before the Audit Bureau of Circulations Annual Meeting (Nov. 7, 1979).

4 47 U.S.C. § 214.

5 *See* F.C.C. v. R.C.A. Communications, Inc., 346 U.S. 86 (1953); Hawaiian Telephone Co. v. F.C.C., 498 F.2d 771 (D.C. Cir. 1974).

markets for private line, resale, and domestic satellite services.[6] While experience has substantiated these findings of public benefit from competition, past decisions to open entry have been delayed by extensive litigation over the Commission's findings.[7] Even after markets have been opened to competition, existing service carriers — by filing petitions to deny — can use section 214 procedures to deter and delay potential entrants.

Similar problems arise with the tariff provisions of the current Act.[8] These procedures can be used to suspend tariffs of carriers that are subject to effective competition. In addition, present tariff procedures provide competitors with advance information about the terms and conditions of new service offerings, and thereby pose a substantial deterrent to innovation.

The Commission is currently attempting to reduce regulation to the maximum degree possible under the statute. But there may be limits to the flexibility of the existing mandate. And even if the Commission attempts to deregulate existing resale services or terminal equipment services, the Commission may face prolonged litigation over its efforts.

Through relatively modest changes in regulatory requirements, however, new legislation could lessen many of the burdens on carriers and reduce litigation. By clarifying the ground rules for the provision of telecommunications services in a new competitive environment, greater certainty about the direction of regulatory policy could be provided to potential entrants and established carriers who need to plan far in advance.

While many proposals are likely to generate considerable controversy, it seems that certain basic concepts should be embraced by any new legislation in this area.

As noted, the judicial interpretation of the current statute

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6 Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *affirmed sub. nom.* Wash. Util. & Transp. Comm. v. F.C.C., 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975) [hereinafter cited as *Specialized Services*]; Resale and Shared Use of Common Carr. Services and Facilities, 60 F.C.C.2d 261 (1976), *affirmed sub. nom.* AT&T v. F.C.C., 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 875(1978) [hereinafter cited as *Resale & Shared Use*]; Establishment of Domestic Comm. Satellite Facilities by Non-Governmental Entities, First Report ("DOMSAT II"), 35 F.C.C.2d 844 (1972); Reconsideration Order ("DOMSAT III"), 38 F.C.C.2d 665 (1972).

7 *Id.*

8 47 U.S.C. §§ 201-205.

precludes a presumption that competition is per se beneficial to the public. The Commission has been forced instead to make a detailed analysis of the effects of competition, subject to extensive review, demonstrating what is in most cases obvious.[9] Any new legislation must recognize, as a starting point, that competition is to be the norm and that regulation should be restricted to markets where there are monopoly characteristics. The presumption should place upon established carriers the burden of demonstrating that competitors would cause harm to existing services to the public. It should not be enough to allege that a loss of revenue to the established carrier will result from deregulation.

Far too often, the existing Act encourages paper competition before the Commission, instead of real competition in the marketplace.[10] Any changes in the Act should remove competition from the halls of the FCC and put it into the marketplace where it belongs. Congressional action could eliminate many of the long and costly judicial proceedings that have accompanied the Commission's effort to move toward a more competitive communications marketplace.

New legislation should provide the Commission with clear discretion not to use available regulatory rules when reliance on market forces would adequately protect the public.

As the law now stands, there is a substantial question as to what discretion, if any, the Commission has to deregulate common carriers. I believe, under the 1934 Act, that the Commission appears to have discretion to forego the exercise of its common carrier jurisdiction. For example, the Commission's 1976 resale and shared use decision[11] appears to hold as a matter of policy that resellers should be fully regulated under Title II of the 1934 Act, not that the Commission must, as a matter of law, apply the full panoply of Title II regulations to resellers.

Nevertheless, a clear legislative affirmation of Commission dis-

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9 *See* note 6 *supra.*

10 For a summary of the arguments for and against open competition in the telecommunications field, *see* Loeb, *The Communications Act Policy Toward Competition: A Failure to Communicate,* 30 FED. COMM. L.J. 1 (1977).

11 *Resale and Shared Use,* note 6 *supra.*

cretion to deregulate would be a very useful change in the 1934 Act. As technology develops, there are likely to be many markets where the exercise of the entire scheme of traditional common carrier regulation will not serve the best interest of either the public or the carriers.

Giving the Commission clear-cut flexibility to decide which regulatory tools to use — or not to use — would be a great stride forward. It would represent a far more streamlined approach to regulation. And it would properly attempt to confront the problems of trying to fit new technologies and services into old regulatory molds.

> *New legislation should reassess the Commission's current inventory of regulatory tools, especially its certificating and tariffing powers, and provide the Commission with sufficient regulatory power to deal with new regulatory problems that may arise in the transition from monopoly to competitive markets.*

The domestic telecommunications industry is presently in an era of transition towards greater consumer choice. This has resulted from increased competition. The industry remains dominated, however, by a single firm with resources and market shares many times those of recent and potential market entrants.

The Commission's currently available regulatory tools were devised in an earlier technological and economic environment. A reexamination of their present applicability is wise to assure that the Commission will have the capability to adapt to the needs of tomorrow. For example, the certificating powers conferred under section 214 can and should be used much more selectively. But such selectivity need not call for abandonment of the Commission's present prior approval power under section 214 in noncompetitive markets. Certain of the Commission's tariffing powers might continue to be useful under even the more competitive structure that the future may bring.

Existing regulatory tools do need to be honed, however. The tools available to the government should be adapted to the new communications environment. Any constraints deemed necessary should be directed towards establishing thresholds for the use of these tools where marketplace forces are deficient or workable

competition cannot be achieved. The central point is that Congress should not unduly harm or limit the available tools.

Regulatory flexibility will be critical as the Commission confronts the unavoidable problems inherent in the transition from monopoly to competitive markets. Historic pricing practices, a lack of comprehensive cost information, separations, and settlement procedures, are just a few of the issues which will have to be addressed by new legislation during the transition to a workably competitive market structure.

New legislation should not deny the Commission the ability to exercise traditional regulatory authority in markets served by more than one carrier. Because of the extent of AT&T's market shares in currently competitive markets, it has been necessary to continue to exercise some degree of regulation. Indeed, the existence of competition has created some transitional regulational problems of a different nature.

The principal markets opened up to competition in recent years are those for terminal equipment and for certain intercity common carrier services. Beginning with the *Carterfone*[12] and *Specialized Common Carrier*[13] decisions, the Commission moved from sole reliance on the traditional monopoly sources of supply toward freer entry and greater competition in each of these markets.

A decade after *Carterfone* allowed competition in the terminal equipment market, however, AT&T still retains a 99 percent share of this market in Bell System areas.[14] Nine years after MCI was first authorized to compete with AT&T for private line services, AT&T still retains close to 97 percent of this market.[15] These near-monopolies have created a variety of new problems which the Commission has addressed via the tools available to it under the 1934 Act. Yet these problems will continue to require attention, since a new Act, even with an emphasis on competition, is not likely to have any immediate impact on AT&T's market power.

New regulatory problems may require new regulatory solutions. Thus, in markets for terminal equipment, the Commission has ex-

12 Carterfone, 13 F.C.C.2d 420 (1968), *recon. denied,* 14 F.C.C.2d 571 (1968).

13 *Specialized Common Carrier Services,* note 6 *supra.*

14 This statistic was culled from reports on file in the Commissioner's office in Washington, D.C.

15 *Id.*

ercised forms of regulatory authority that have little in common with traditional price and entry regulation. For example, the Commission has established a telephone equipment registration program to curb the use of incompatible terminal equipment which could harm the overall telephone network.[16]

In the specialized common carrier area, the Commission has not engaged in extensive traditional regulation. The Commission has adopted liberalized entry policies[17] and proposed a limited form of tariff review.[18] Regulation of specialized common carrier services has mainly been limited (1) to achieving carrier-to-carrier interconnection on equitable terms[19] and (2) to avoiding anti-competitive pricing of offerings by established carriers which still have at least a de facto monopoly in switched voice and record services.[20]

If competition is to thrive, indeed to survive, there must arguably be some forum, if only a temporary one, for resolution of problems such as these. Furthermore, this forum must be vested with the authority necessary to remedy such problems. The grant of this authority to the Commission should be explicit in any modification of the 1934 Act.

New legislation should also ensure that firms offering both non-competitive and competitive services can be regulated to the differing extents necessary to prevent anti-competitive cross subsidization. Deregulating these firms' competitive services may lead to insufficient control of price relationships between these and other services offered by the same firm which might still be regulated as non-competitive. If such were the case, the outcome could well be opportunities for anti-competitive conduct and the perpetuation of inefficient pricing practices. Such a result could in turn seriously

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16 Interstate and Foreign Message Toll Telephone, First Report, 56 F.C.C.2d 593 (1975); Second Report, 58 F.C.C.2d 736 (1976), *affirmed on appeal,* N. Carolina Util. Comm. v. F.C.C., 552 F.2d 1036 (4th Cir.), *cert. denied,* 434 U.S. 874 (1977) [hereinafter cited as *Interstate Telephone*].

17 *Specialized Services,* note 6 *supra.*

18 In the Matter of Policy and Rules concerning rates for competitive common carrier services and facilities authorizations therefor, *Notice of Inquiry and Proposed Rulemaking,* 44 Fed. Reg. 67, 445 (1979).

19 Bell Sys. Tariff Offerings, 46 F.C.C.2d 413 (1974), *affirmed sub. nom.* Bell Telephone Co. of Pennsylvania v. F.C.C., 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975).

20 Private Line Rate Case (Docket No. 18128), 61 F.C.C.2d 587 (1976), *recon.,* 64 F.C.C.2d 971 (1977), *further recon.,* 67 F.C.C.2d 1441 (1978).

deter new entrants and threaten even the limited amount of competition now currently enjoyed.

The traditional regulatory tools for public control of monopoly power are contained in the processes authorizing facilities and tariff review.[21] These procedures have served to assure that monopoly carriers, unrestrained by competitive forces, are nevertheless publicly accountable. These safeguards may not have been completely effective in the past; but short of the antitrust laws or individualized congressional action, they are the dominant present forms of control of the potential adverse effects of monopoly.

Any modification of the 1934 Act should sharpen — but not discard — existing tariff and certificating powers. For example, the Commission may need the authority to review and prescribe "practices" and "regulations" in carrier tariffs. In the past, the Commission has used this authority to cancel tariff limitations on resale, thereby opening these markets to competitions.[22]

Even under possibly more competitive conditions, many competitive services will be dependent on the terms and conditions of access to the local exchange network of AT&T, which may be governed by tariff. Absent any power over "practices," anti-competitive actions which hinder the development of a competitive terminal equipment market may be beyond control.[23]

New legislation therefore should not remove the power to suspend or reject tariff rates. These are useful and necessary powers for the Commission which provide a needed check on rates that could potentially have an irreparable and predatory impact on competition. Where there are serious problems apparent on the face of the tariff or in the accompanying support material, rejection can save time and money for the public and the carriers.

Most desirable is legislation which confers upon the Commission a broad set of tariff-related powers — such as the power to require supporting materials, to suspend, to reject, to make accounting orders, to set interim rates, or to make refunds. The Commission should be given sufficient discretion not to apply these regula-

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21 *See* 47 U.S.C. §§ 201-209, 214.

22 *Resale and Shared Use,* note 6 *supra; Carterfone,* note 12 *supra; Interstate Telephone,* note 16 *supra.*

23 Even with the Commission's present power over "practices," it is often a long and painful fight to weed out anti-competitive actions by AT&T, *see Carterfone,* note 12 *supra.*

tory powers with regard to services where the market provides adequate safeguards to the public. In any event, the determination whether to exercise tariff authority should be made within the context of a basic legislative presumption favoring competition.

A similar approach is called for in the realm of certification. Prior agency approval of new facilities should not be altogether removed as a regulatory tool. But the Commission should have the discretion to define cases when section 214-type prior approval is not necessary, for example, when market forces alone will provide (1) an adequate check on the rate of introduction of new facilities or (2) an adequate incentive to utilize them efficiently. Given that some services might be "non-competitive," a regulatory tool designed to deal with the incentive toward overinvestment in a "rate of return" regulated industry should be retained.

In conjunction with the authority to prescribe terms of service, a sharpened facilities review authority might help to assure the adequacy of security and privacy measures built into the carriers' facilities. Such measures are necessary to prevent unauthorized interception of consumer, business, or government communications and will become increasingly important as electronic message services, particularly electronic mail, become available.

New legislation should provide for equitable but effective treatment of AT&T.

There also must be effective but fair regulatory treatment of AT&T in its present role as provider of both monopoly and competitive services. The Commission needs more effective tools to assure the equitable provision by AT&T of monopoly services upon which competition in many markets depends. At the same time, there may be competitive markets in which even AT&T should not be regulated. In all markets, AT&T should expect neither unfair advantage nor undue burdens. And if new information services develop, the Commission should not be required, because of the 1956 Consent Decree[24] which has been outdated by new market realities, to regulate markets or services where such regulation is unnecessary and burdensome.

Nagging questions involving this consent degree have become a

24 United States v. Western Electric Co., [1956] TRADE CASES ¶71,134 (D.N.J. 1956).

significant factor in the resolution or lack of resolution of various issues before the Commission.[25] The decree presently constrains the Commission from expanding full and fair competition because all carriers may not be permitted to provide certain equipment and services on a full competitive, non-tariff, basis. Problems with it were particularly apparent when the Commission considered whether AT&T's Dataspeed 40/4 terminal might be offered under tariff.[26] The decree is thus a major obstacle to resolving the Second Computer Inquiry[27] and promises to be a factor in future proceedings.

The decree was entered into more than two decades ago, prior to the introduction of competition in telecommunications and prior to the technological revolution in computers and communications. Absent any judicial clarification, there is a compelling need for Congress to acknowledge the decree's anachronistic premises and to remove the market barriers created by the decree.

New legislation must address and clarify federal and non-federal jurisdictional responsibilities over common carrier regulations.

Another general issue which must be addressed in any proposed revision of the 1934 Act is the appropriate allocation of federal and state/local jurisdiction, particularly in light of the likely reliance on competition as a means of regulation. The technological developments that have taken place since 1934 have made it increasingly difficult to draw rigid lines between purely local and purely interstate services. The distinction in the 1934 Act between federal and state/local jurisdiction[28] thus needs to be revised. These jurisdictional issues — seemingly unrelated to the major policy issues in the telecommunications field — warrant close attention in order to ensure that emerging national telecommunications policies can be fully and effectively implemented. And they

25 *See, e.g.*, GTE Service Corp. v. F.C.C., 474 F.2d 724 (1973).

26 AT&T, 62 F.C.C.2d 21 (1977), *affirmed sub. nom.* I.B.M. v. F.C.C., 570 F.2d 452 (2d Cir. 1978).

27 Notice of Inquiry and Proposed Rulemaking, 61 F.C.C.2d 103 (released Aug. 9, 1976); Supplemental Notice and Enlargement of Proposed Rulemaking, 64 F.C.C.2d 771 (released March 8, 1977).

28 *See* 47 U.S.C. § 152.

are of special importance in the common carrier field. Serious problems could arise if new legislation endorsed regulation by the marketplace, deemphasized Commission regulation and ignored potential state regulation.

But removing regulatory restrictions will not necessarily be achieved by simply removing federal regulatory controls. If the desire is to reduce the degree to which workably competitive markets are subject to inefficient rate and entry controls, then legislation must preclude such controls from *all* potential sources. Rate and entry controls serve the interests of certain groups. If the states are free to impose such regulations, the groups who would benefit will seek them. And severe controls in even a few critical states might frustrate the development of the benefits of competition sought by the bill.

This argument for de-control, however, does not imply that non-federal authorities have no areas of legitimate regulatory concern. Nor does it deny that there are differences in the types of regulation that may or may not foster competition and diversity.

Conclusion

The areas outlined here are the basic starting points for any proposal to change the 1934 Communications Act. As those issues are raised and debated, it will be necessary to keep in mind that, while competition is a useful and effective mechanism which can be increasingly relied upon, it is not an end in itself. It is a tool, a means to preserve and protect the public interest. As many communications markets do not work perfectly, there is a need to retain some regulatory tools.

A flexible mandate is necessary to compensate for "marketplace imperfections." It is also needed to assure the fulfillment of the nation's broader expectations of its communication system — *i.e.*, that it provide for diversity of uses, outlets for communications, and the strengthening of the role of representative and participatory government.

It is very difficult to specify legislative solutions for specific industries or markets. The reason is, of course, that "deficiencies" vary from market to market and vary as technology changes. All communications markets are highly dynamic, and future "market

deficiencies" and emerging areas of public concern cannot all be foreseen and predicted.

Any revision of the Communications Act, therefore, will require the same adaptability to changing technology and market conditions that the 1934 Act originally possessed. Such flexibility is crucial if the proposed legislation is to be capable of solving the new problems of the 1980's and 1990's — and not merely problems clearly indentifiable today.

FREEING CONGRESS FROM THE SPECIAL INTEREST STATE: A PUBLIC INTEREST AGENDA FOR THE 1980's

DAVID COHEN*
AND
WENDY WOLFF**

During the 1970's significant institutional reforms, such as opening committee meetings to the public, were implemented to increase the accountability and responsiveness of Congress. In this Article, Mr. Cohen and Ms. Wolff of Common Cause, described by its members as a citizens' lobby representing the "public interest," briefly outline these reforms and argue that despite the advances achieved, Congress continues to be dominated by special interest groups and unable, or unwilling, to deal effectively with the complex problems confronting the nation.

From a public interest point of view, they outline nine general proposals for Congress to consider, designed to limit the power of special interests or lead to more effective and responsive government. Included in their list are social reforms, such as Sunset legislation that have already been advocated by others but have yet to be implemented. They further offer some new proposed reforms, such as rotation of committee assignments, which they argue should also be instituted if Congress is to deal effectively with the difficult issues facing the nation in the 1980's.

Introduction

Our political system today is widely perceived as suffering from a variety of serious problems. The symptoms are discussed endlessly in public conversations: the percentage of voter participation drops with each election, factionalism increases, the politics of self interest influence public policy, fewer citizens identify with political parties, and confidence in our political institutions plummets. The uneasiness is pervasive, even among those who are strong defenders of our political and legislative system.

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The authors are grateful for the valuable help received from their colleagues at Common Cause. In particular, Bruce Adams, director of issue development, Michael Cole, director of legislation and Georgianna Rathbun, vice president for editorial policy, made many helpful suggestions and comments on drafts of the article. Kenneth Guido, Common Cause general counsel, and Ann McBride, associate director of legislation, navigated us through the intricacies of the franking statute and ethics code, respectively.

The United States government has undergone major changes since the end of President Eisenhower's term. Special interests now play a prominent role in determining government policy on domestic issues. Those interests have in turn proliferated to such an extent that factions often concentrate on pursuing their own immediate agendas without considering the impact on the nation as a whole. The intensity of the competing and conflicting demands of legitimate interest groups, both private and public, has led to government by interest group veto, a system which significantly alters the formulation and implementation of domestic policy. This system has made Congress the pivotal institution that holds together the Special Interest State.[1]

Congress has always been pressured by interest groups. This is not a new phenomenon in American politics. What is new, however, is the increasing complexity of the problems facing the federal government in the post-Great Society era, many of them cutting across the jurisdictions of federal departments and congressional committees.[2] During the same period, single and special interest groups have grown in power, and their campaign contributions have become an important factor in congressional campaigns.[3] Neither the Senate nor the House of Representatives presently has any defense against these narrow interest pressures.

The result is that now, more than ever, special interests dominate government policy on domestic issues. They have constructed "iron triangles" in which the interest group forms a close alliance with the relevant agency officials and members of the congressional committee handling its area of concern.[4]

At the same time, the advent of the Special Interest State has changed the nature of representation. Many legislators increasingly view their responsibility as simply to mirror their congressional

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1 For a further discussion of the Special Interest State as seen by Common Cause, *see* COMMON CAUSE, THE GOVERNMENT SUBSIDY SQUEEZE (1980). *See also* H. KAUFMAN, ARE GOVERNMENT ORGANIZATIONS IMMORTAL? (1976).

2. *See, e.g.*, text accompanying note 100 *infra*.

3. *See, e.g.*, COMMON CAUSE, HOW MONEY TALKS IN CONGRESS (1979); *see* text accompanying notes 156 to 162 *infra*.

4 John W. Gardner, Common Cause Founding Chairman, has described this tripartite arrangement as the "unholy trinity." *See* Gardner, *Restructuring the House of Representatives*, 411 ANNALS 169, 171 (1974).

district in the state.[5] In tandem, they feel compelled to represent their campaign contributors, especially if the issue important to the contributor is not particularly visible and is not strongly opposed within the legislator's state or district. The mirror image approach to representation, combined with the practice of representing campaign contributors, results in too few members of Congress looking at the broader national interest and attempting to sort out contending claims, to mediate differences, and to push for solutions that meet the national interest.

The founding chairman of Common Cause, John W. Gardner, has compared today's policymaker to a person trying to win a game of checkers. Someone puts a thumb on one checker and says, "Go right ahead and play. Just don't touch this checker." Someone else puts a thumb on another checker and says, "Don't touch this one." Others do the same. Pretty soon, all thumbs, no moves! Think of the owners of the thumbs as special interests. No one of them wants to make the game unwinnable. They just do not want their particular checker touched. But collectively, they paralyze policymaking.[6]

The dominance of interest groups may thus reinforce public pessimism about government's ability to deal with basic national problems in a fair and equitable manner. It fosters the belief that politicians are dominated by narrow interests at the expense of the public good. The result is a civic skepticism that leads citizens to withdraw from politics. Voters no longer see the link between their vote and governmental action on matters that concern them.[7]

Yet the Special Interest State was not created overnight. It has grown steadily, pervading the political system so completely that it cannot easily be uprooted. A challenge for the 1980's is to enable Congress to withstand special interest pressures in formulating and

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5 The mirror example is constantly raised in conversations with legislators. *See* E. DREW, SENATOR 113-14 (1979). Former senator Edmund S. Muskie has been quoted as saying, "People are dissatisfied with Congress, I think, because Congress represents them too well." *See* Farney, *Congress, Fragmented and Fractious, Gets Less and Less Done,* Wall St. J., Dec. 14, 1979, at 1, col. 6.

6 Speech by John W. Gardner, National Conference of Bar Presidents and the National Association of Bar Executives (Aug. 6, 1979).

7 For a discussion of civic skepticism, *see* A. MCFARLAND, PUBLIC INTEREST LOBBIES: DECISION MAKING ON ENERGY (1976).

implementing national policy. The magnitude of the challenge is suggested by the following questions:

* Are special interests required to operate openly?
* Are legislators free of financial dependence on special interests for campaign funds and honoraria?
* Is the political system structured to allow maximum electoral competition?
* Is Congress able to formulate and implement a coherent national policy?

At present, the answer to each of these queries is "no."

Before these questions can be answered in the affirmative, major legislative and organizational changes will be needed. During the 1970's, the House and Senate made a number of modifications in their rules, practices, and procedures designed to make Congress a more open institution.[8]

In general, those changes have significantly altered the way decisions are made in the House and Senate. Some increased the accountability of legislators to their constituencies or their institution,[9] and some strengthened the capacity of the leadership to overcome isolated enclaves of uncontrolled power.[10] No changes, however, have yet dealt with a number of problems that are directly related to the Special Interest State, such as the way the system protects congressional incumbents[11] and the fragmentation of policymaking within the institution.[12]

This Article will discuss and evaluate the changes that were made in the 1970's and will set forth proposals for further institutional changes from a "public interest" perspective. Such changes are needed in the 1980's if Congress is to resist the pressures of the Special Interest State.

I. Congress Before the Changes of the 1970's

Rules, practices, and procedures are at the heart of the way the House and Senate work. The committee chairmen who controlled Congress from the late 1930's through the mid-1960's understood

8 *See* text accompanying notes 29 to 85 *infra.*
9 *See* text accompanying notes 36 to 74 *infra.*
10 *See* text accompanying notes 60 to 85 *infra.*
11 *See* text accompanying notes 140 to 152 *infra.*
12 *See* text accompanying notes 88 to 93 *infra.*

this fundamental point and took pains to master the rules and procedures. These leaders felt secure because they held positions of power solely through their accumulated years of seniority.[13] They represented safe districts where they were rarely, if ever, seriously challenged in their bids for re-election. As a result, many committee chairmen felt free to ignore House rules, operate in an arbitrary manner, and otherwise abuse the power of their offices.[14]

Gradually, however, a new generation of senators and representatives who wanted to shape events and gain recognition was elected. They were neither bound by tradition nor patient enough to wait for decades to achieve some influence. Members of Congress who were first elected from the mid-1950's through 1964 found that many of the rules, practices, and procedures of the House and Senate were used by congressional leaders to prevent them from influencing policy or even from dealing with matters of high public concern on which they had campaigned.[15] They saw that a minority had the power repeatedly to prevent action desired by the majority on issues like civil rights, medicare, and other uncompleted aspects of the New Deal. In each case, procedures were used by those in power to block action favored by a majority of legislators — procedures such as the two-thirds Senate vote required to close debate and end a filibuster, the power of the House Rules Committee to keep legislation from the House floor, or arbitrary behavior by House committee chairmen.[16]

Over the years, procedural frustration of the majority occurred more often in the House of Representatives than in the Senate. One reason is the greater rigidity of House rules, which, unless an exception is specifically made, forbid attaching unrelated, or "non-germane," amendments to legislation[17] and require bills

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13 The seniority system has been widely criticized, *see, e.g.,* D. PEARSON & J. ANDERSON, THE CASE AGAINST CONGRESS 263-92 (1968) [hereinafter cited as PEARSON & ANDERSON].

14 *See* COMMON CAUSE, REPORT ON HOUSE COMMITTEE CHAIRMEN (1975) [hereinafter cited as REPORT ON HOUSE COMMITTEE CHAIRMEN]. The Democratic Study Group and Congress Watch, the Ralph Nader lobbying organization, provided substantial research assistance in preparation of the report.

15 *See, e.g.,* PEARSON & ANDERSON, note 13 *supra.*

16 *See, e.g.,* PEARSON & ANDERSON, note 13 *supra; see also* G. GALLOWAY, THE HISTORY OF THE HOUSE OF REPRESENTATIVES (1976).

17 W. H. BROWN, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 96TH CONGRESS, H.R. DOC. NO. 95-403, 96th Cong., 2d Sess. 490 (1979) [hereinafter cited as HOUSE RULES].

reported from committee to be reviewed by the Rules Committee and given a "rule" defining the conditions for consideration on the floor.[18] By exercising such power, the House Rules Committee creates a potential bottleneck that does not exist in the Senate, where the Majority Leader may schedule any bills that have been reported by legislative committees for floor consideration. In the Senate, even if a bill is buried in committee, its supporters can offer it as an amendment to unrelated legislation in order to obtain a floor vote.[19] Thus, except on issues that are filibustered, even less powerful senators are able to bring matters that concern them to the Senate floor.[20]

Because incoming members of Congress were disturbed by these rigid rules, a mood conducive to change built steadily throughout the 1960's among the ranks of newer members of the House. As a result, the majority of the changes of the 1970's took place in the House.[21]

A further catalyst for change was the establishment of the Democratic Study Group (D.S.G.), an organization of generally younger liberal and moderate Democratic Representatives who

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18 *See id.* at 356-58. Fights over the House Rules Committee occurred perennially. After the 1948 election, the House adopted the twenty-one-day rule. Under this procedure, if a legislative committee's chairman decided to invoke the rule in the case of a bill reported by his committee, the Rules Committee had twenty-one days to grant that bill a rule for floor consideration. If the Rules Committee did not act within this time, the full House could vote a rule on the bill. Not only did this system encourage the Rules Committee to act, but it thwarted the Committee's power to trade the grant of a rule for legislative concessions from the bill's parent committee. In 1951, the twenty-one-day rule was repealed after a coalition of Southern Democrats and conservative Republicans gained a majority in the House.

In 1965, the twenty-one-day rule was re-enacted after the Democrats won large numbers of formerly Republican seats in the 1964 landslide. *See House Rules Changes Enhance Majority Rule,* 21 CONG. Q. ALMANAC 585 (1965). In 1967, after 47 House Democrats lost their seats, the rule was again repealed. H.R. Res., 90th Cong., 1st Sess., 113 CONG. REC. 28 (1967).

19 *See* SENATE COMM. ON RULES AND ADMINISTRATION, 96TH CONG., 1ST SESS., STANDING RULES FOR CONDUCTING BUSINESS IN THE UNITED STATES SENATE 6, 9 (Comm. Print 1979) [hereinafter cited as SENATE RULES].

20 For example, Medicare legislation was bottled up in the House Ways and Means Committee in the early 1960's and did not reach the House floor for a vote. In the Senate, however, the issue was voted on three times in the period from 1960 to 1964. Floor votes were taken in 1960 and 1962 on a health care proposal offered as an amendment by Senator Clinton P. Anderson to other legislation, although the proposal was defeated both times. In 1964, an amendment to provide for health care for the aged through Social Security offered by Senator Albert Gore was adopted by the Senate but killed in conference with the House, H.R. 11865, 88th Cong., 2d Sess. (1964). *See Medicare Program Dies in Conference,* 20 CONG. Q. ALMANAC 231 (1964).

21 *See* text accompanying notes 29 to 85 *infra.*

saw themselves as national Democrats responsive to the "Presidential party."[22] The D.S.G. was first formed in the late-1950's, because of the resentment felt by many liberal House Democrats over the inability of the House to pass progressive legislation.[23] Previously, the House Democratic Party[24] had no formal institutional procedures to set party priorities or discuss important issues. D.S.G. chairmen were legislators who understood and emphasized the institutional responsibilities and the internal workings of Congress.[25]

One successful early effort by the D.S.G. to bring about change came in 1970. As part of the Legislative Reorganization Act Amendments of that year, the House agreed that floor votes on amendments would be taken by a form of roll call known as a recorded teller vote, rather than by the long-established procedure of non-recorded teller vote.[26] Under the new system, a recorded vote

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22 The division between presidential and congressional parties is described by James MacGregor Burns. *See* J. M. BURNS, THE DEADLOCK OF DEMOCRACY: FOUR PARTY POLITICS IN AMERICA (1967).

23 *See Democratic Study Group: A Winner on House Reforms,* 31 CONG. Q. ALMANAC 1366 (1973).

24 *See* BURNS, note 22 *supra.*

25 The chairmen of the Democratic Study Group were:

Year	*Congress*	*Chairmen*	*State*
1959-60	86th	Lee Metcalf	Montana
1961-62	87th	Chet Holifield	California
1963-64	88th	John A. Blatnik	Minnesota
1965-66	89th	Frank Thompson, Jr.	New Jersey
1967-68	90th	James G. O'Hara	Michigan
1969-70	91st	Donald M. Fraser	Minnesota
1971-72	92nd	Phillip Burton	California
1973	93rd	John C. Culver	Iowa
1974	93rd	Thomas S. Foley	Washington
1975-76	94th	Bob Eckhardt	Texas
1977-78	95th	Abner J. Mikva	Illinois
1979	96th	David R. Obey	Wisconsin

Telephone interview with staff member of Democractic Study Group in Washington, D.C. (Dec. 20, 1979).

26 *See* Legislative Reorganization Act of 1970, Pub L. No. 91-510, § 120, 84 Stat. 1140 (1970). The non-recorded teller vote used by the House had its roots in the British House of Commons, which had long since abandoned the practice.

The procedure worked in this way: the House was in the Committee of the Whole considering amendments to legislation. Amendments were voted on by voice vote, followed by a division in which members stood at their seats to signify an aye or a nay vote. On important issues, the losing side would demand a teller vote. The presiding House Chairman of the Committee of the Whole would appoint as tellers the principal mover of the amendment and the principal opponent. Both would stand in the center of the center aisle and count (or tell — hence the name) first the aye votes and then the nay votes as the representatives on

would be taken on an amendment at the request of twenty representatives.[27]

In marshalling support for the recorded vote, the D.S.G. publicized the issue extensively, resulting in newspaper editorials across the country supporting the proposed changes.[28] The D.S.G. thus demonstrated that outside pressures could be mobilized to modify House procedures. Its success underlined the need for accountability for voting and laid the groundwork for adoption of far more extensive reform changes in the 1970's.

II. Changes Made in the 1970's

In the 1970's, the principal changes in the House and Senate included measures designed to improve accountability, such as open committee bill-drafting meetings,[29] personal financial disclosure,[30] and codes of official conduct.[31] In the House, changes were also made to strengthen the roles of the party caucus and party leaders, including the election of committee chairmen by the majority party caucus[32] and the selection of majority party committee members by the leadership of its Steering and Policy Committee.[33]

In order to evaluate the effect of the major institutional changes made in Congress over the last ten years, the following analysis will attempt to consider whether each change has weakened or strengthened: (1) the position of leaders in Congress and their ability to influence legislative actions; (2) the legislators' sense of

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each side filed past them. Amendments adopted by the Committee of the Whole could be put to a roll call vote after the bill had been read for amendment. Occasionally a roll call was taken, and sometimes votes would be reversed. All lobbyists — liberal, conservative, special interest, public interest — urged House members to give them a teller vote, even though they knew the same member would vote differently on a roll call vote. Often members would be absent from the proceeding to avoid taking a stand on an issue. *See First Congressional Reform Bill Enacted Since 1946,* 26 Cong. Q. Almanac 447 (1970).

27 *Id.* One-fifth of the number that constitutes a quorum can demand a roll call vote. House Rules, *supra* note 17, at 297. In the Committee of the Whole, a quorum is 100 members. *Id.* at 553. At the start of the 96th Congress, this rule was changed to increase from 20 to 25 the number required to obtain a roll call vote. *Id.* at 298.

28 *See, e.g., Lights on in Congress,* N.Y. Times, July 22, 1970, at 40, col. 1.

29 *See* text accompanying notes 35 to 42 *infra.*

30 *See* text accompanying notes 42 to 48 *infra.*

31 *See* text accompanying notes 45 to 59 *infra.*

32 *See* text accompanying notes 63 to 74 *infra.*

33 *See* text accompanying notes 75 to 77 *infra.*

responsibility to the institution; (3) Congress' ability to deal with major problems affecting the country; and (4) the legislators' accountability to the voters.

A. *Changes Affecting Accountability*

In the struggle over House and Senate rules, legislators pressing for change were aided by an outside coalition of citizen, labor, and consumer organizations, including Common Cause.[34] While some changes were effected by legislation, many were simply adopted as House or Senate rules changes.[35]

Each of the changes designed to make legislators more accountable to their constituents and their institution stemmed from a perception of public dissatisfaction with the operations of Congress. Each reform was therefore designed to allow the media and the public to pay closer attention to the way Congress conducts its business.

1. Open Meetings

Before rules changes in the 1970's were adopted, House and Senate committee hearings on non-defense matters were generally open to the public, but the bill-drafting sessions — at which most of the substantive work of the committees was conducted — were almost always closed.[36] A requirement to hold bill-drafting meet-

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34 For example, the League of Women Voters, the AFL-CIO, and Common Cause lobbied for more open committee hearings. *See Senate and House Open up Their Sessions in 1973*, 29 CONG. Q. ALMANAC 1074, 1074-77 (1973).

Common Cause's particular contribution in lobbying for congressional changes was to build citizen awareness about the needs for specific institutional changes. Activities aimed at the new Congress began during the 1972 election campaign, when Common Cause members in congressional districts across the country asked all candidates in each House and Senate race to answer written questions regarding their positions on key issues. Candidates were informed that their responses would be made public through the news media and that the winners would be held to their commitments. The issues discussed included both proposed legislation and the internal House and Senate changes that the majority party caucuses would consider at the beginning of the new Congress, such as open meetings and electing committee chairmen. Aimed at controlling the excessive power of the House Ways and Means Committee, similar activities took place in the 1974 campaign.

35 Unlike bills, which are first considered by committees and may take many months before they are voted on by Congress, rules changes to be voted on are determined by the majority party caucus, usually either before a new Congress begins or shortly thereafter.

36 *See, e.g.*, L. GILSON, MONEY AND SECRECY 22 (1972).

ings in the open was adopted first by the House in 1973 as a rules change.[37] The Senate turned down a similar proposal that year in a vote in which senators with considerable seniority opposed the provision while newer senators supported it.[38] Most senators, perhaps feeling more insulated from the voters by their six-year terms, were less responsive than representatives to support for open meetings. Over time, however, the newer senators had an impact, and many senior senators switched their positions, so that on November 5, 1975, the Senate adopted an open meetings provision.[39] Under the new rules in both bodies, meetings are presumed to be open, unless the committee members take a recorded vote to close a meeting. Such a vote can apply only for a limited period — either for a single day's meeting or for as long as the committee is considering a particular bill.[40] In the 95th Congress, House-Senate conference committee meetings were also opened.[41]

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37 H.R. Res. 259, 93rd Cong., 1st Sess., 119 CONG. REC. 6713 (1973). The issue first drew attention in the 1972 election campaign. Both Democratic and Republican candidates overwhelmingly supported the proposed change; virtually no one declared for secrecy or was undecided. Common Cause released the replies to its questionnaire, *see* note 34 *supra,* to the local press in each congressional district before the election. Then, after the election, it released the replies of the winning candidates to the national press, to show that an overwhelming majority had pledged support. The effect was to focus the attention of Washington journalists on commitments representatives had made to their constituents.

In fact, open committee meetings was one change that was proposed from outside rather than from within the Congress. In 1973, an open meetings provision was not even on the D.S.G.'s original list of proposed changes. It was added only after Common Cause publicly reported the support of a majority of House members for an open meetings requirement.

38 S. Res. 69, 93rd Cong., 1st Sess., 119 CONG. REC. 5907 (1973). The first Senate proposal on open meetings was modeled on the House rule. Those opposed to open meetings countered with a rule that said meetings are presumed to be closed unless voted open by the specific committee. The presentation of this alternative indicated that Senators opposed to open meetings realized they could not win without an alternative proposal. The Senate vote followed lines of seniority rather than ideology, with most senior Senators opposed to the open meeting rules. Of the 21 Senators voting who had 15 years of service or more, 19 voted against the proposal, while 16 of the 22 senators with 3 years or less of service voted for it. *See Senate, House Modify Secrecy Rules,* 29 CONG. Q. ALMANAC 716, 717 (1973). Some Senate committees experimented with opening their meetings prior to the Senate rules, *see* note 40 *infra* and accompanying text, and found that it worked. The most notable examples were the Senate committees on Banking, Housing, and Urban Affairs and Interior and Insular Affairs. *Id.*

39 S. Res. 9, 94th Cong., 1st Sess., 121 CONG. REC. 403 (1975). The open meetings provision was adopted by the Senate as a rules change and, like the earlier House action, took effect immediately.

40 HOUSE RULES, *supra* note 17, at 370, 396-98. In the Senate, such closed meetings or series of meetings concerning the same subject may not exceed fourteen calendar days. SENATE RULES, *supra* note 19, at 32.

41 H.R. Res. 5, 95th Cong., 1st Sess., 123 CONG. REC. 145-47 (daily ed. Jan. 4, 1977). These, too, may now only be closed by taking a recorded vote by House and Senate con-

Before the era of openness, interest group lobbyists enjoyed a special advantage in their ability to discover what was happening inside a committee through "iron triangle" connections. Having open bill drafting sessions, however, now helps to curb the influence of special interests on committees; both the public and the press can watch their legislators in action.[42]

2. Financial Disclosure and Ethics Codes

In 1977, the House and Senate acted to require senators and representatives and their spouses to make comprehensive public disclosure of personal financial holdings.[43] These actions did not come easily. Common Cause, among others, had been pressing for such requirements since the early 1970's. In 1976, however, an added impetus was provided by the quadrennial Commission on Executive, Legislative and Judicial Salaries, whose nine members were appointed by President Ford, the Congress, and the Chief Justice of the United States.[44] In reporting to President Ford its recommendations for salary increases on December 6, 1976, the Commission also proposed that a new "Code of Public Conduct" for top officials in all three branches of the government be tied to the increase. The Commission saw adoption of such a Code as "the indispensable prelude to a popular acceptance of a general increase in executive, legislative and judicial salaries. Such a reform must be sufficiently tangible to persuade a substantial majority of

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ferees separately. The House voted the additional step of requiring a vote of the whole House if the conferees are to be permitted to attend a closed conference.

42 Open committee meetings have led to open meetings in the House Democratic caucus, with recorded votes taken on all issues except the election of committee chairmen. *See* CONG. Q. SERVICE, GUIDE TO CONGRESS 230-A (2d ed. 1976). Following the example set by the Republicans, the Democratic caucus is now open most of the time. *Id.* at 227-A. When the caucus in one instance was closed, the press considered it an exceptional event which merited coverage. In 1978, before the 96th Congress began, Majority Leader Jim Wright was photographed putting up a "Keep Out" sign as a closed Democratic caucus debated whether it had a responsibility to vote on subcommittee chairmen censored or reprimanded by the House for violating the Ethics Code. In a closed meeting, the caucus voted that it had no such responsibility, although the vote was recorded and made public. *See* note 26 *infra; Democrats Soften Proposed Ethics Changes,* 36 CONG. Q. WEEKLY REP. 3399 (1978).

43 S. Res. 110, 95th Cong., 1st Sess. (1977); H.R. Res. 287, 95th Cong., 1st Sess. (1977); *see House, Senate Adopt New Code of Ethics,* 33 CONG. Q. ALMANAC 763 (1977).

44 The Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613 (1967), provides for the establishment of the commission to review top-level salaries every four years.

Americans that the post-Watergate era has truly begun. Such a majority is by no means persuaded now.'"[45]

With the support of the Speaker of the House and the Senate Majority Leader, both the House and Senate adopted new rules calling for financial disclosure requirements and strict codes of conduct.[46] The financial disclosure provision subsequently became part of the Ethics in Government Act of 1978, which applied to the executive and judicial branches of the federal government as well as to the legislature.[47] The law requires disclosure of income and gifts over $100, assets and transactions in real estate, stocks and commodities over $1,000 and liabilities over $10,000 by categories of amount.[48]

The Ethics Codes, which are embodied in House and Senate rules,[49] bar gifts from lobbyists of over $100[50] and forbid House and Senate members from accepting contributions for so-called unofficial office accounts — often referred to as slush funds — for items such as newsletters, special mailings, or entertaining.[51] Effective January 1, 1979, the Codes placed a limit on outside earned income of 15 percent of the legislator's official salary.[52] The Senate, however, in March 1979, postponed until 1983 the effective date of its earned income limit.[53]

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45 *See Commission Favors Pay Raise for Top-Level Federal Employees, Congress,* 32 CONG. Q. ALMANAC 3314 (1976).

46 *See* note 43 *supra.*

47 Pub. L. No. 95-521, 92 Stat. 1824 (1978).

48 *Id.* The categories used — less than $5,000; $5,000-$15,000; $15,000-$50,000; $50,000-$100,000; $100,000-$250,000; and, over $250,000 — are sufficient to indicate whether conflicts, or apparent conflicts of interest exist without posing an invasion of privacy problem. There is no requirement for disclosure of income tax returns, which might contain information irrelevant to the conflict question and, therefore, could involve invasion of privacy.

49 *See* SENATE RULES, note 19 *supra*; HOUSE RULES, note 17 *supra.*

50 SENATE RULES, *supra* note 19, at 51; HOUSE RULES, *supra* note 17, at 632.

51 SENATE RULES, *supra* note 19, at 57; HOUSE RULES, *supra* note 17, at 653.

52 HOUSE RULES, *supra* note 17, at 656; *see* S. Res. 110, 95th Cong., 1st Sess. (1977).

53 On March 8, 1979, the Senate, in a rushed voice vote, effectively repealed the earned income limit by voting to postpone the restriction for another four years. S. Res. 93, 96th Cong., 1st Sess., 125 CONG. REC. S2273 (daily ed. March 7, 1979). The postponement is expected to become permanent. *See Senate Suspends Income Limit by Voice Vote,* 37 CONG. Q. WEEKLY REP. 399 (1979).

A Common Cause study published in May, 1979, comparing outside earned income levels of senators with their vote on the outside earned income limit found that many senators were voting for their personal financial self-interest. The financial disclosure

The Ethics Codes also established processes for dealing with complaints regarding individuals charged with violating the Codes. These procedures make the House and Senate Ethics Committees responsible for fact-finding, judging specific cases, and recommending penalties if appropriate.[54]

Although these changes in the Ethics Codes were intended to increase the accountability of individual legislators to the voters, the application of these provisions has been uneven. In 1976, before the current Ethics Codes were adopted, the House reprimanded Representative Robert Sikes for violating House rules regarding conflicts of interest.[55] At the beginning of the subsequent session of Congress, Sikes was removed as chairman of an appropriations subcommittee by his colleagues in the party caucus.[56]

The House, however, does not always treat violations of its own rules so severely. In 1979, two legislators reprimanded by the House for rules violations in connection with the "Korean scan-

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reports indicate that over half of the Senate received more than $8,625 (15 percent of a senator's salary at that time) in outside earned income in 1978 and would have been affected by the limit. An overwhelming percentage of those whose income would have been affected by the limit voted to kill it in 1979. Of the 25 top earners of outside income in 1978, 23 voted against the limit in 1979. Seventy percent of those who voted in 1979 against the limit had more than $8,625 in outside earnings in 1978; and 76 percent of those supporting the limit had less than $8,625 in outside earnings. The bulk of senators' outside earned income in 1978 came from honoraria. In repealing the limit on outside earned income, the Senate left standing a $25,000 per year statutory ceiling on honoraria which was set in the 1976 campaign finance law. Nineteen senators earned over $24,000 in honoraria in 1978. *See* COMMON CAUSE, A COMMON CAUSE STUDY OF OUTSIDE EARNED INCOME BY UNITED STATES SENATORS (1978).

54 *See* S. Res. 110, 95th Cong., 1st Sess. (1977); H.R. Res. 383, 95th Cong., 1st Sess., 123 CONG. REC. H11881 (daily ed. March 9, 1977).

55 H.R. Res. 1421, 94th Cong., 2d Sess., 122 CONG. REC. H7924 (daily ed. July 29, 1976). *See Congress 1976: Spotlight on Ethics,* 32 CONG. Q. ALMANAC 23, 30 (1976). Common Cause filed the complaint against Representative Sikes. Even after the CBS television program "60 Minutes" exposed Representative Sikes' violations, representatives still refused to file a complaint against one of their own; although on April 6, 1976, forty-four representatives did transmit to the House Committee on Standards of Official Conduct the complaint filed by Common Cause. The complaint charged Sikes with purchasing 2,500 shares of stock in the First Navy Bank after urging state and federal officials to establish the bank at the Pensacola Naval Station in his district and with failing to report his ownership of the bank stock and 1,000 shares of stock in Fairchild Industries in the financial statement he filed with the House of Representatives.

56 *See 95th Congress Elected New Leaders,* 33 CONG. Q. ALMANAC 3, 10 (1977). The caucus was able to remove Representative Sikes as a subcommittee chairman because one caucus change made in 1974 provided that the chairmen of the House Appropriations Committee subcommittees would be voted on by the caucus under the same process used for committee chairmen. *See Order in the House,* 30 CONG. Q. ALMANAC 4 (1974).

dal" were permitted by their Democratic committee colleagues to retain their subcommittee chairmanships.[57]

In the Senate, Agriculture Committee Chairman Herman Talmadge was "denounced" on October 11, 1979, for violation of the Ethics Codes.[58] Assuming he is re-elected this year, it is not yet known whether an effort will be made to strip him of his chairmanship.[59] Thus, while adoption of the Ethics Codes was an important step toward accountability, attention is still needed to ensure strict and uniform enforcement.

B. *Strengthening Leadership*

During the 1970's, a number of changes were also made in the House to strengthen the majority party leadership. The most significant of these include: (1) choosing committee chairmen by vote of the Democratic Caucus;[60] (2) empowering the Democratic Steering and Policy Committee to make committee assignments;[61] and (3) authorizing the Speaker to appoint the Democratic members of the Rules Committee.[62]

1. Committee Chairmen

The main impetus for efforts at institutional change, particularly in the House, was concern about the lack of accountability of committee chairmen, who were free to act arbitrarily in exercising

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57 *See Congress Ends 'Koreagate' Lobbying Probe,* 34 CONG. Q. ALMANAC 803 (1978). The legislators involved were Representatives Edward R. Roybal and Charles H. Wilson. The two chairmanships in question were not among those that are voted on by the Democratic caucus.

58 *See* note 42 *supra.* S. Res. 249, 96th Cong., 1st Sess., 125 CONG. REC. S14358 (daily ed. Oct. 11, 1979).

59 On September 14, 1979, in response to the Senate Ethics Committee's report that Senator Talmadge should be "denounced" by the Senate, Common Cause issued a statement to the press that said, in part, "Regardless of the language used by the Senate Ethics Committee in the Talmadge case, the key test for the Senate will be whether Senator Talmadge is removed from his chairmanship of the Agriculture Committee." Statement of David Cohen, President of Common Cause, on Action by Senate Ethics Committee Regarding Talmadge Case (Sept. 14, 1979).

60 *See* text accompanying notes 63 to 74 *infra.* The use of the caucus as an instrument of organizing power and responsibility owes much to the ideas and advocacy of Representative Richard Bolling. His two books on the House are most important for understanding not only the historical context of House action, but the institutional and political forces at work. *See* R. BOLLING, HOUSE OUT OF ORDER (1965); R. BOLLING, POWER IN THE HOUSE (1968).

61 *See* text accompanying notes 75 to 77 *infra.*

62 *See* text accompanying notes 78 to 85 *infra.*

their powers. A 1975 report on House committee chairmen cited a number of illustrations of such arbitrary behavior. For example, in one instance, it charged that:

> [The chairman had] violated the letter and spirit of the Caucus and Committee rules by budgeting only a skeletal committee staff and by denying subcommittee chairmen the right to any staff. In order to advance legislation he favors, [he] often resorts to procedural abuses, such as cutting short debate and ruling Members out of order. As a result of the small staff and his tendency to steamroll legislation, major legislation often is not adequately considered by the committee. As Chairman, [he] has the responsibility to propose rules that conform to the Caucus Rules, but in fact the committee's own rules violate the Caucus Rules in several respects.[63]

Another chairman was reported to have violated the rules, treated members unfairly, and abused his power. According to the criticisms: "He has denied subcommittee chairmen the right to hire their own staff, he harasses and discriminates against Members who disagree with him, he creates 'special' subcommittees to evade Caucus Rules regarding subcommittee membership and jurisdictions, he used his chairmanship to oppose the Caucus policy. . . ."[64]

Previously, under the seniority system, House committee chairmen held power solely by virtue of length of service on a committee. Since many held safe seats from one-party districts, they were in effect accountable to no one. With no way of counteracting this control, many of the party's leaders could be reduced to virtual supplicants in dealing with these chairmen. Members who advocated responsive leadership and outside lobbying groups frustrated with the ability of these chairmen to bottle up legislation had a mutual interest in altering the method of choosing committee chairmen.

House Republicans took the first step in dealing with the seniority issue in 1969 by deciding that their caucus, the Republic Conference, would elect the ranking majority party member of each committee by secret ballot.[65] This seemingly simple change was ac-

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63 REPORT ON HOUSE COMMITTEE CHAIRMEN, *supra* note 14, at 3-4.

64 *Id.* at 8.

65 Letter from the staff of the House Minority Leader's office to Common Cause (Feb. 8, 1980).

tually a major breakthrough in re-asserting party leadership over ranking committee members, and an important precursor of the procedures that were later adopted by the Democratic party.

The Democratic party, however, took longer to alter its procedures, probably in part because more was at stake — the chairmanships of committees, rather than simply the ranking minority positions. An early effort to hold Democratic chairmen accountable was a proposal adopted in 1971 which required a vote of the Democratic caucus on a committee chairmanship if ten or more members requested one.[66] This approach was generally unsatisfactory, however, because the direct confrontation it involved tended to inhibit challengers. As a result, this rule change produced in 1971 only one challenge, an unsuccessful one.[67]

In early 1973, at the beginning of the Ninety-third Congress, House Democrats took another step toward reform by establishing a procedure that no longer required the approval of ten representatives to challenge a chairman. Instead, the caucus voted that each chairmanship would automatically be considered separately. The vote on each chairman would be taken by secret ballot if one-fifth of the members present requested such a vote in open session.[68] The pattern was set in the first vote, in which one-fifth of the caucus members requested a secret ballot vote on the chairmanship of the Agriculture Committee.[69] The precedent established, a secret ballot was requested for each of the remaining chairmanships.[70] Although all chairmen were re-elected that year, substantial votes against several of them indicated their colleagues' dis-

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66 *See Seniority System Challenged in Both Houses,* 27 CONG. Q. ALMANAC 17 (1971).

67 *See id.* at 17-18. The chairman who was challenged but re-elected on Feb. 3, 1971, was Representative John McMillan, the long-time chairman of the House Committee on the District of Columbia, who had blocked Home Rule legislation for the District and had not hidden his anti-black attitudes.

68 *See Seniority Rule: Change in Procedure, Not in Practice,* 33 CONG. Q. WEEKLY REP. 136-37 (1973). In raising the issue of automatic election of committee chairmen with House candidates in the 1972 election, Common Cause urged an open ballot as a means of ensuring accountability and letting the public know where a representative stood on specific chairmen. Many representatives who supported change, however, believed that a secret ballot was essential in order to allow legislators to vote their beliefs without fear of intimidation by powerful chairmen. Faced with this argument, Common Cause altered its position and agreed to a secret ballot. The validity of the argument was virtually conceded when opponents of change argued for the open ballot. *Id.* at 136.

69 *Id.* at 137.

70 *Id.*

satisfaction and foreshadowed the defeat of a number of the incumbent chairmen in 1975.[71]

After the 1974 congressional elections, an additional change was made in the caucus rules to require an automatic secret ballot vote on all chairman candidates nominated by the Democratic Steering and Policy Committee.[72] At the start of the new Congress in 1975, an overwhelming majority of House Democrats believed that certain committee chairmen had abused their power. As a result, the caucus defeated three of these chairmen.[73]

Since adoption of this procedure in 1975, the election of committee chairmen has become an accepted process in the House. Because chairmen are aware that their performance will be scrutinized and that they will be voted on by their colleagues, there are now fewer complaints of arbitrariness and challenges to chairmanships.[74]

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71 *Id.* at 136. The 1973 votes on the three chairmen ultimately deposed in 1975, *see* note 73 *infra,* were as follows:

(1) W. R. Poage, Agriculture Committee, 169 to 48;
(2) F. Edward Hebert, Armed Services, 154 to 41; and
(3) Wright Patman, Banking and Currency, 155 to 40.

See Lyons, *Seniority Survives Votes in House,* Wash. Post, Jan. 24, 1973, §A, at 4, col. 1.

72 *See Congressional Reform Made in 1975,* 31 CONG. Q. ALMANAC 26, 27 (1975).

73 *See id.* at 32. The chairmen defeated were W. R. Poage of Agriculture, F. Edward Hebert of Armed Services, and Wright Patman of Banking and Currency, *see* note 71 *supra.* First-term House Democrats invited all incumbent chairmen to meet with them and respond to questions. Both senior and junior members were delighted that, for the first time, chairmen were paying attention to caucus members.

Just prior to the caucus elections, Common Cause issued its REPORT ON HOUSE COMMITTEE CHAIRMEN, *see* note 14 *supra,* describing and evaluating committee chairmen in terms of use, or abuse, of their power, their procedural fairness, and their record of following or disregarding caucus rules.

74 In 1977, the Democratic caucus approved all the recommendations of the Steering and Policy Committee for committee chairmen, although substantial numbers of votes were cast against several. *See House Democrats Approve Leadership Nominees for Committee Chairmen,* 34 CONG. Q. WEEKLY REP. 145-46 (1977). In 1979, Representative Jamie L. Whitten "was the only member in line for a House committee chairmanship (Appropriations) who faced significant opposition. A coalition of consumer, environmental and civil rights groups had been campaigning against him, and three younger Democrats circulated a 'Dear Colleague' letter opposing Whitten." Whitten was elected by a vote of 157 to 88. No other chairman received as many as 50 negative votes. *See Committee Assignments Finished, Chairmen Picked, Congress is Ready to Work,* 37 CONG. Q. WEEKLY REP. 153 (1979).

The method of choosing committee chairmen in the Senate was influenced by the House reforms. For example, Senate Republicans in 1973 decided that the ranking minority member of each committee would be chosen by a vote of the Republican members of each committee. *See Seniority: Republicans Modify Selection Process,* 33 CONG. Q. WEEKLY REP. 57 (1973). Since 1975, Senate Democrats have taken a separate vote on a committee

2. House Democratic Steering and Policy Committee

Until the 1974 elections, committee assignments for Democratic representatives were made by the Democratic members of the powerful House Ways and Means Committee.[75] At a series of Democratic caucus meetings in December, 1974, however, the committee assignment power was transferred to the members of the Democratic Steering and Policy Committee,[76] creating an important new tool to enforce party discipline. Representatives often seek to move from their original committee assignments to positions on committees that are viewed as more powerful, such as Appropriations, Budget, and Ways and Means. With its committee assignments role, the Steering and Policy Committee thus was in a position to grant desirable committee assignments according to responsiveness to the party line.[77]

3. Rules Committee

For years, the House Rules Committee had also been an isolated enclave of power and an obstructive force in the House of Representatives, often blocking legislation that was strongly supported by the House majority leadership.[78] For example, in 1963, the

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chairman if requested by one-fifth of the Democratic caucus. *See* 31 CONG. Q. ALMANAC, *supra* note 72, at 39. In practice all committee chairmen are voted on. For example, in November 1979, Senator John L. McClellan, who chaired the Appropriations Committee, died. This caused a shift among the chairmen of three committees. Senator Russell B. Long, a senator who normally gets his way, tried to have the caucus waive the election procedure in this instance, but Senator Jennings Randolph objected, and the caucus voted overwhelmingly to follow the election procedure. *See* Germond & Witcover, *Political Notebook,* Wash. Star, Feb. 5, 1978, §A, at 3, col. 1.

75 *See* 31 CONG. Q. ALMANAC, *supra* note 72, at 26.

76 *Id.* at 127. Reform transferring the power from the Ways and Means Committee was given high priority by Common Cause. *See generally* note 34 *supra.* At a press conference on Nov. 20, 1974, less than two weeks before the caucus began, Common Cause announced that an absolute majority of House Democrats favored stripping Ways and Means of its committee assignment functions. Common Cause Press Release, Washington, D.C. 2-3 (Nov. 20, 1974) (statement of John W. Gardner).

77 This committee is made up of the members of the House leadership, twelve members elected by the caucus on a regional basis, and three others appointed at large by the Speaker. *See Leadership, Votes, Membership Changes, Rules Action,* 29 CONG. Q. ALMANAC 27, 31 (1973).

78 *See* R. BOLLING, POWER IN THE HOUSE 195-220 (1968).

House had to resort to the threat of a discharge petition in order to prod a civil rights bill out of the Rules Committee.[79]

Earlier efforts to control the Rules Committee had not succeeded in making the committee an arm of the leadership.[80] By 1974, it thus had become clear that if the Democratic leadership were to manage the scheduling of legislation and establish House floor priorities, the members of the Rules Committee would have to be responsible to the leadership.[81] In December of that year, the Democratic caucus gave the Speaker the power to name the Democratic members of the House Rules Committee.[82] Since they must rely on the Speaker for their posts, Rules Committee members are encouraged to be responsive to the party leadership, especially on matters of high priority.[83]

Except for some modifications in the rules governing fili-

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79 *See* 1 CONG. Q. SERVICE, CONGRESS AND THE NATION 1615, 1635 (1965). The discharge petition process is explained as follows:

> A bill's sponsors may also try to bypass the [Rules] Committee by the *discharge petition* procedure. Under this method, if the Rules Committee does not grant a rule to a bill within seven legislative days of a request for it by a chairman of the legislative committee that reported the bill, backers may move to force a rule from the Committee by introducing their own rule for debate, and then filing a petition to discharge that resolution from the Rules Committee. A successful petition needs the signatures of a majority of the House. Once a majority signs, a sponsor may call up the petition for floor consideration. If it is adopted by the House, the House next considers the resolution and if that is adopted, proceeds to the bill itself.

Id. at 1424.

80 *See id.* at 1426. Indeed, previously in the same year the number of seats on the Rules Committee had been expanded from 12 to 15 members specifically to ensure a continued liberal majority. *See Criticism of Congress Provokes Few Changes,* 18 CONG. Q. ALMANAC 369 (1963).

81 *See Power Flows Away from Senior Members as Congress Changes Many Procedures,* 31 CONG. Q. ALMANAC 28, 29 (1975).

82 *See id.*

83 Speaker O'Neill has not been hesitant to place pressure on the Rules Committee when he thinks it is reverting to its old habits of obstructionism. One example occurred during Rules Committee consideration of the House Code of Conduct in 1977. The Code included a proposed limit on the amount of outside income that representatives could earn, a provision that was strongly opposed by members of the House who were attorneys, many of whom were earning high fees from their private law practices. Two lawyers serving on the Rules Committee, Claude Pepper and Morgan F. Murphy, were determined to use the Rules Committee to block the limit on outside earned income. Other members present at the committee meeting reported that O'Neill reminded Murphy and Pepper that he had appointed them to the committee and that he would consider it a blow to his leadership if they did not vote to grant the rule as requested. As a result, they voted for the rule. Without the Speaker's pressure, they likely would have employed the obstructive tactics used by the

busters,[84] the majority party in the Senate has taken no analogous measures to strengthen its party leadership. The committee chairmen, therefore, move at their own pace in preparing legislation for the Senate floor. In addition, despite some changes, Senate action can still be blocked by a minority of Senators through use of the filibusters.[85] Thus, the majority party in the Senate presently lacks the power to induce coherence among its members and to ensure consideration of priority legislation.

III. AGENDA FOR THE 1980's

Even when President Carter received notably low public confidence ratings in June 1979, Congress was scoring consistently lower in public opinion polls.[86] The present lack of public confidence suggests that, despite reform efforts, troubling deficiencies continue to plague Congress.

The reforms in the 1970's discussed above[87] helped to make legislators more accountable to the voters and strengthened the House leadership against arbitrary uses of power. Yet, the ability of congressional leaders to influence final results appears to have declined in recent years. One major reason is that the changes did little to overcome fragmentation in policy-making, a major institutional weakness in both the House and Senate. To begin with, neither the caucuses nor the House Steering and Policy Committee have yet been used successfully as a means of forging a coherent party policy.[88] This lack of formal policy-setting procedure in turn

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Rules Committee in previous years. *See House, Senate Adopt New Code of Ethics,* 33 CONG. Q. ALMANAC 763, 766-67 (1977).

84 *See* text accompanying notes 127 to 138 *infra.*

85 *See, e.g., The 95th Congress,* 34 CONG. Q. ALMANAC 3, 3-4 (1978).

86 Twenty-nine percent of those surveyed in a June, 1979, Gallup Poll approved of the way President Carter was handling his job as President; only 19 percent approved of the way Congress was handling its job. *See Gallup Poll Ratings for President and Congress Sink to New Lows,* N.Y. Times, June 21, 1979, §B, at 10, col. 5.

87 *See* text accompanying notes 29 to 85 *supra.*

88 Efforts were made starting in the mid-1960's to revive the House Democratic caucus as a means of formulating party policy. From the end of the Wilson Presidency, the Democratic caucus had been a dormant institution, meeting chiefly to elect the Speaker and Majority Leader or, on the few occasions when the Democrats were in the minority, the Minority Leader. Divisions between the liberal and conservative wings of the Democratic party led Speakers to bypass the caucus as a policy-making body in order to avoid un-

makes it possible for special interests, with their close ties to particular committees, to exert far more influence over national policy than they could if the majority party had an established, cohesive national agenda.

Under the current committee systems in both the House and Senate, committee members often pay more attention to special interests then they do to party leadership. Committee jurisdictions are splintered, making it difficult for the party leadership to assert control over the numerous committees and subcommittees.[89] Legislators who remain on the same committees for decades build close relationships with related interest groups, enhancing the groups' influence in committee deliberations. In the Senate, a handful of senators can block action on major legislation merely by threatening a filibuster.[91] Furthermore, Congress habitually considers each legislative proposal discretely, making it virtually impossible to relate a program to others with similar or even conflicting goals.[92]

Another major reason for the weakness of congressional leadership is the growing power of the special interests to hamper its ability to influence, if not determine, outcomes and produce coherent and far-sighted legislation. Special interests take advantage of the fact that political competition is a given and that incum-

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necessary conflict. They found it easier to move the work of the Congress along by relying on informal arrangements than by formally fixing responsibility within the institution.

The efforts to build the caucus as a policy-making body focused originally on instituting monthly meetings. When such regular meetings were first held in 1969, the caucus was a fragile institution. Even efforts to have an agenda circulated in advance caused dissension. Once the caucus began meeting monthly, it was used as a forum for discussion. Initially, the idea was to have the caucus instruct the Democratic members of the appropriate committee to report a particular bill for action by the full House. The most notable examples of this approach were legislation to end the Vietnam War in 1972 and 1973 and to repeal the oil depletion allowance in 1974 and 1975. The controversy surrounding attempts to pass these bills created a climate for change by focusing caucus attention on the power of committee chairmen to block legislation from consideration by the full House, the need to curb the excessive power of the Ways and Means Committee, and the ability of the Rules Committee to prevent the House from voting on major amendments. IV CONG. Q. SERVICE, CONGRESS AND THE NATION 768-69 (1975).

89 There are currently more than 60 committees and 250 subcommittees in the Congress not including joint committees. *See* CONG. Q. SERVICE, COMMITTEES OF THE 96TH CONGRESS (Special Report, April 14, 1979).

90 *See* note 4 *supra.*

91 *See* note 85 *supra.*

92 See, e.g., IV CONG. Q. SERVICE, CONGRESS AND THE NATION 761 (1974); *see generally Senate Reorganizes Its Committees,* 33 CONG. Q. ALMANAC 781 (1977).

bents still depend on special interests to finance their re-election campaigns.[93]

Further, Congress spends so much of its time dealing with routine matters that it often fails to anticipate general issues and problems and is hard pressed to deal with the tough, complex issues currently facing the country.[94] Unless Congress is willing to take some far-reaching steps to reduce the number of routine matters it handles and to create a modern, responsible organization capable of grappling with and solving fundamental issues, it may increasingly become an institution in which parochial and short-term concerns predominate to the neglect of broad, long-term solutions to problems.

Changes in the 1970's successfully dealt with the principal concern of that time — to pull power away from the autocratic chairmen who controlled House and Senate committees. Equally strong action is needed now, however, to restore institutional effectiveness and vitality. These are not goals that can be permanently achieved through one particular reform, but rather, must be part of a continuing process. Since distortions of influence, power, workload, and productivity will always reappear, institutional changes in the House and Senate must include mechanisms for constant review and regular, orderly change. A strategy for the 1980's must include the adoption of organizational changes to enable Congress to deal with tough problems in a cohesive and even-handed way. To that end, it must include passage of legislation designed to weaken the hold that special interests have on Congress, the need being particularly great since these interests are devoting ever greater resources to exerting their influence.[95]

The following is a discussion of a number of proposals designed to address one or more of these problems. Some of these remedies can be adopted as House or Senate rules changes,[96] while others will require enactment of new legislation.[97] No single action will in itself afford a complete solution, but taken together, they should

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93 *See* AMERICAN ENTERPRISE INSTITUTE, PUBLIC FINANCING OF CONGRESSIONAL CAMPAIGNS 15-19 (1978).

94 *See, e.g.*, PEARSON & ANDERSON, note 13 *supra*.

95 *See* COMMON CAUSE, HOW MONEY TALKS IN CONGRESS 6 (1979).

96 One example is filibuster reform; *see* text accompanying notes 127 to 138 *infra*.

97 One example is Sunset legislation; *see* text accompanying notes 115 to 119 *infra*.

result in a more effective Congress, responsive to broader, national concerns.

A. *Committee Reorganization*

Despite changes in the 1970's, the House and Senate committee systems badly need reorganization. Both proliferation of subcommittees and their overlapping jurisdictions contributed significantly to the fragmentation of policy-making. The party leadership and the Congress as a whole hesitate to undertake any reorganization because it inevitably involves some shifts of responsibility and power — a sensitive subject to any legislative body.

While the number of Senate subcommittees declined somewhat in the 1970's, the number of House subcommittees rose dramatically.[98] The growth of subcommittees in the House stemmed initially from an effort to undercut the power of a few senior representatives. This increase in the number of subcommittees was coupled with a limitation of one subcommittee chairmanship per legislator, thus enabling more people to serve as subcommittee chairmen.[99] The result, however, has been even greater policy fragmentation. For example, in the House, jurisdiction over energy legislation is now scattered among 83 subcommittees and committees.[100]

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98 According to Congressional Quarterly Research Service, the number of House and Senate subcommittees in 1959, 1969, and 1979 were as follows:

	House	*Senate*
1959	106	80
1969	110	108
1979	158	101

Telephone discussion by Mary Fienup to Congressional Quarterly Research Service (Dec. 20, 1979).

99 Long before the changes of the 1970's, some House committees adopted their own rules creating subcommittees in an effort to stamp out the arbitrary abuse of power by committee chairmen. An example is the action taken in the 86th Congress by the House Education and Labor Committee to combat its authoritarian chairman, Representative Graham Barden. Because there was no practical way to relieve Barden of his chairmanship, the approach was to establish several subcommittees whose chairmen would have control over bills within their jurisdiction, thus removing Barden's power to assign and block bills. The House Interior and Insular Affairs Committee followed a similar practice. Conversations of David Cohen with Andrew Biemiller, Legislative Director of the AFL-CIO, and Representative James G. O'Hara, then chairman of the D.S.G. (Nov. 1968). The subcommittee system was thus created to deal with a particular problem, but as time passed and the problems changed, the system did not.

100 HOUSE SELECT COMM. ON COMMITTEES, TO ESTABLISH A STANDING COMM. ON ENERGY, H.R. REP. NO. 96-741, 96th Cong., 2d Sess. 7 (1980); *see* H.R. Res. 132, 93rd Cong., 1st Sess. (1973).

Within the House, the growing complexity of problems which cut across committee jurisdictions led to a reorganization effort. In 1973, a Select Committee on Committees under the chairmanship of Representative Richard Bolling was established to recommend changes.[101] This was a bipartisan committee — its vice-chairman was Republican Representative Dave Martin — created by the House leadership with the support of the minority party.[102] It engaged in serious and comprehensive efforts to revise committee jurisdictions.[103] Nonetheless, the Committee's recommendations were defeated on the House floor by a coalition of committee and subcommittee chairmen and ranking minority party members, all of whom felt threatened by the proposed changes.[104] Lobby groups that supported the organizational status quo played a major part in the defeat of the Bolling Plan.[105]

In early 1977, the Senate undertook a committee reorganization effort that did have limited success in reducing the number of

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101 *See Jurisdictional Overhaul Recommended for House,* 29 CONG. Q. ALMANAC 755, 755-56 (1973).

102 *See id.*

103 The Bolling Committee recommended shifting the workload away from powerful committees, especially the Ways and Means Committee, which has extensive jurisdiction over taxes, tariffs, social security, welfare, medicare, medicaid, and health insurance. It also tried to divide the House Education and Labor Committee into a Committee on Labor and a Committee on Education. *See Major House Committee Reform Rejected,* 30 CONG. Q. ALMANAC 634 (1974).

104 House members fighting change dealt the Bolling plan a lethal blow in June, 1974, by using the power of the caucus to keep the reorganization off the House floor until the proposals were substantially amended. *See id.* A much less ambitious proposal, which left committee jurisdiction largely unchanged, was passed instead. One part of the Bolling plan that was retained by the House enables complex legislation to be jointly referred to more than one committee. President Carter's 1977 welfare reform plan was simultaneously parcelled out to several committees, each of which separately examined relevant aspects of the plan. *See Carter, Congress and Welfare: A Long Road,* 33 CONG. Q. ALMANAC 471 (1971). The 1979 Energy Mobilization legislation was also considered in this manner. *See* 37 CONG. Q. WEEKLY REP. 2712 (1979).

One result of this approach is to increase the power of the Rules Committee. Using its authority to establish procedures for considering a bill, the Rules Committee can favor the portions reported by one committee over those emerging from another, thus actually shaping the final legislation in ways that are not possible where a bill is considered exclusively by a single committee.

105 *See* 30 CONG. Q. ALMANAC, *supra* note 103. Most interest groups fought the House reorganization; its only outside supporters were Common Cause, the League of Women Voters, and Americans for Democratic Action. Environmentalists, organized labor, the Chamber of Commerce, and many others bitterly opposed change and defended their familiar turf. *Id.* at 634-37. For example, organized labor, which had built a comfortable relationship with the existing Education and Labor Committee, opposed the creation of separate committees on labor and education. *Id.* at 634.

standing committees.[106] Most notably, the Senate managed to consolidate energy jurisdiction, previously scattered among a number of committees,[107] in a newly-created Senate Energy and Natural Resources Committee, responsible for energy policy as well as for public lands and parks.[108]

Where more powerful committees were concerned, however, reforms were less successful. For example, the sweeping jurisdiction of the Senate Finance Committee — including government debt, general revenue sharing, health and social security, trade tariffs and quotas, and most revenue measures[109] — was left untouched by the Senate reorganization effort.[110] And such neglect meant that the Committee would continue to wield considerable power over substantive policy where it reviewed proposed tax preferences.[111]

Thus, both Houses of Congress are still awaiting an effective overhaul of committee structures to eliminate overlap and duplication, encourage more rational consideration of important public policy decisions, and provide a more balanced allocation of power.[112] Until such overhaul occurs, special interest groups, by

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106 S. Res. 4, 95th Cong., 1st Sess., 123 CONG. REC. S7-S13 (daily ed. Jan. 4, 1977). The Temporary Select Committee System was chaired by Senator Adlai Stevenson. *See Senate Reorganizes Its Committee,* 33 CONG. Q. ALMANAC 781 (1977).

Common Cause supported the Senate effort as it had the House proposals, testifying before the committee on July 20, 1976. *Hearings on Jurisdictions, Referrals, Numbers and Sizes, and Limitations on Membership, Before the Temporary Select Comm. to Study the Senate Comm. System,* 94th Cong., 2d Sess. 5 (1976) (statement of David Cohen).

107 *See* text accompanying note 100 *supra.*

108 *See Congress Reforms Budget Procedures,* 30 CONG. Q. ALMANAC 145 (1974).

109 SENATE COMM. ON FINANCE, 95TH CONG., 1ST SESS., HISTORY OF THE COMMITTEE ON FINANCE, S. DOC. NO. 95-27 (1977).

110 *See* Parris, *The Senate Reorganizes Its Committees, 1977,* 94 POLITICAL SCI. Q. 319, 324 (1979). Five of the twelve members of the Senate Select Committee served on the Senate Finance Committee, giving the latter the best possible protection from interference with its existing jurisdiction and power. *Id.* at 324.

111 *See* note 109 *supra.*

112 Although its goals are not so ambitious as those of the earlier Bolling Committee, a new committee reorganization effort is under way in the House, with the creation in 1979 of a Select Committee on Committees chaired by Representative Jerry M. Patterson. *See House Committee Review Approved by Close Margin,* 37 CONG. Q. WEEKLY REP. 515 (1979). Common Cause testified before the Committee on Dec. 4, 1979, and advocated, among other changes, creation of a House Energy Committee to provide a single forum for the consideration of energy legislation thus replacing the fragmented way in which energy legislation is currently considered in the House. Other interest groups invited to appear at the hearing declined the invitation, but then worked behind the scenes with House members to block creation of an Energy Committee. The test of the Select Committee's success will be whether House members reduce the total number of subcommittees — and thus the

maintaining their close relationships with the relevant federal agencies and congressional committees,[113] will continue to maintain an iron grip over their particular areas of national policy.

B. *Committee Rotation*

Members of Congress who spend most of their congressional careers on the same committee or subcommittee tend to develop cozy relationships with the federal agencies and narrow interest groups they deal with.[114] One way to combat this problem in the future would be to rotate committee memberships, perhaps every six to eight years.

Not only would longstanding alliances be broken up, but also legislative oversight of executive branch programs would be enhanced. Since these programs would regularly be judged by legislators who had no role in initially establishing these programs, considerations of personal pride or political gain would not exist to undermine objective evaluations.

Rotation would similarly serve to loosen the grip that the seniority system presently exerts on Congress. Faced with a shorter and certain tenure, committee chairmen would be induced to organize the business of their committees rather than to consolidate a power base. Further, committee members would not be inclined to defer to some senior member whose apparently encompassing knowledge of the subject area might actually conceal a lack of new ideas. Merit, not length of service, would become a more important consideration in determining congressional leaders; this in turn would help to attract persons with the highest qualifications to serve in Congress.

Although critics might object that rotation would undermine the specialization necessary for Congress to operate effectively, six to eight years is ample time for a senator or representative to develop the necessary expertise and provide valuable service on a committee. Also, entrenched specialization has the drawback of often bullying legislators into uncritical acceptance of what so-called

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number each member can serve on — and whether they create a single committee to deal with energy policy.

113 *See* note 4 *supra* and accompanying text.

114 *Id.*

committee experts assert — not necessarily a creative legislative process. To be sure, such a system would necessitate the upgrading of congressional committee staffs, but this step is long overdue and necessary in any event.

C. *Sunset Legislation*

Under current legislation, government programs and tax benefits may have virtually a perpetual life. The little congressional oversight that takes place is often controlled by special interest groups that benefit from the status quo,[115] and programs are generally reviewed in a vacuum rather than viewed in relation to others in the same area.[116] A long-discussed reform, Sunset legislation, is designed to change all this.[117] Sunset is a procedure which would place all existing as well as new government agencies, programs, and tax expenditures on a schedule requiring in-depth review of each, on a periodic basis.[118] The heart of any Sunset legislation is an automatic termination procedure that will force committees and the full Congress to consider existing programs and agencies and either take action to continue or modify them or allow them to expire by inaction.

To be effective, any future Sunset legislation should include the following four key elements: (1) an automatic termination provision; (2) a process of coordinated review of similar programs; (3) special intensive education of priority programs; and (4) review of tax expenditures along with related direct spending programs.

By including such provisions, Sunset legislation would result in a number of improvements in the performance of Congress and of government in general. It would require the committees of Congress to provide evaluations and recommendations to the House and Senate concerning existing programs and agencies. It would provide a means for eliminating wasteful, duplicative, and ineffi-

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115 *Id.*

116 *See* note 92 *supra.*

117 *See* Sherman, *Sunset Implementation: A Positive Partnership to Make Government Work,* 38 PUB. AD. REV. 78 (1978); As of December 1978, Sunset laws had been enacted in 29 states. COMMON CAUSE, MAKING GOVERNMENT WORK: A COMMON CAUSE REPORT ON STATE SUNSET ACTIVITY (1978). Common Cause has been supporting Sunset legislation in the states as well as at the federal level.

118 COMMON CAUSE, MAKING GOVERNMENT WORK, *supra* note 117, at 5. *See also id.* at 28 (six-year cycle).

cient government subsidies and agencies. For the first time, Congress would be forced to coordinate total federal spending — tax expenditures as well as direct spending — in specific policy areas.[119] Overall spending priorities could more readily be set, thereby inducing prudent use of the available financial resources and providing the organizational capability for developing new initiatives. Automatic termination would prod House and Senate members into considering the utility of existing programs and induce them to make judgments about the inflationary impact of direct and indirect federal spending programs that would otherwise be buried or ignored by the congressional committee system.

Under an optimal Sunset program, the majority party in the House and Senate would require committee chairmen to monitor on a continuing basis the way in which legislation within their jurisdiction is implemented. An ideal Sunset system would also enable the majority party to take responsibility for formulating an oversight approach at the start of each Congress to guide each committee in the areas it should emphasize. Review should be a continuing process in which House and Senate leaders may propose adjustments and revisions in committee functions and domains.[120]

D. *National Party Agenda*

Officeholders and party officials should be responsible for deciding a national party agenda and should be held accountable for ensuring its consideration by Congress. Voters today have no way of holding elected officials accountable for specific legislative

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119 *Cf.* "It should be noted that Sunset does not impose zero-base budgeting but does offer a method of analysis consistent with ZBB." AMERICAN ENTERPRISE INSTITUTE, ZERO BASE BUDGETING AND SUNSET LEGISLATION 25 (1978).

120 Despite the introduction of numerous bills over the years, Congress has yet to pass a comprehensive Sunset statute, *i.e.*, one which would apply to all existing, as well as proposed, programs and agencies. Although the Senate in 1978 passed such a statute, it died because a similar House bill never got out of committee. A current bill — H.R. 5858, introduced by Representative Gillis Long, 125 CONG. REC. H10555 (daily ed. Nov. 9, 1979) — appears to be moving slowly forward in the House. This bill, however, differs radically from the traditional Sunset scheme since it would require review only of programs that each Congress decided needed review and would provide for program termination only if Congress voted to do so. *See Revised Sunset Proposal Being Pushed in House,* 37 CONG. Q. WEEKLY REP. 2532 (1979). Such an emasculated Sunset scheme would appear to change little in existing practice.

programs, and political parties do not feel compelled to deliver on campaign promises.[121] Party platforms often appear to be no more than politically expedient promises and unrealistic wish lists for America's interest groups. Innovative approaches are needed if parties are to take responsibility for their legislative records.

One approach would be for each party, after the election, to develop its own priority agenda for the next Congress. The participants in developing the agenda would be elected officials — senators, representatives, governors, and state legislative and local government leaders. State party chairpersons would also be participants, and the President would make his views known to his party. Under this system, the elected officials and party leaders would gather for two meetings, roughly a month apart. The first would consist of public hearings and panel discussions for interested citizens, interest groups, and party members; the second would be made up of public sessions at which party leaders would set legislative priorities.

Officeholders would make a public commitment to see that Congress considered the party's priorities, but would not be required to commit their final votes in advance. In the legislative committees, majority party members would be obligated to allow their party's priority legislation to be voted on by the full House and Senate; Senate members should be bound not to filibuster. The minority party, in turn, would be prompted to develop an affirmative alternative program rather than simply to react negatively to the majority program.

Such a system would not prevent political leaders from dealing with emergencies or changing conditions by binding them to an inflexible legislative agenda. Ideologically and regionally divisive issues would be less likely to be among those chosen as priority party issues and would continue to be lobbied in the traditional way. Nevertheless, this new system would at least ensure that a coherent program identified with a political party would be considered and voted on by the House and Senate in a timely manner.

No new laws are required to establish this party agenda-setting arrangement. All that is needed is for officeholders to make the

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121 For a general discussion of the decline of parties and voter disenchantment, *see* E. C. LADD, WHERE HAVE ALL THE VOTERS GONE? (1978).

commitment to do the job, and for Democratic and Republican party leaders to take the initiative in implementing the idea — perhaps through state party organizations or congressional policy committees.

E. *Multi-Year Budgeting*

Congress and the President need to consider the budget in terms of overall national needs rather than in terms of a multiplicity of parochial interests.[122] To change the budget significantly in any one year is difficult because seventy-five percent is made up of "uncontrollables" — expenditures that are mandated under existing laws.[123] Yet these uncontrollables are the inevitable result of previous decisions on programs, decisions often made without regard to their long-term costs. Under multi-year budgeting, the President and Congress would consider budget resolutions that include the next three to five years (although not in specific detail), rather than just the budget for the coming year. These multi-year budgets would encourage more responsible long-term planning because they would allow Congress and the President to see where today's vote leads the budget next year and beyond. Such a system would complement a Sunset procedure for reviewing existing programs.

In 1979, the President sent Congress a multi-year budget which set targets for future years.[124] In the spring of 1979, the Senate approved a multi-year budget resolution which set alternative targets for balancing the budget by fiscal years 1981 and 1982.[125] The

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122 The Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1301 to 1353, 1400 to 1407 (1976), seeks to remedy the two major failings of the old budget process — lack of information and failure to debate national priorities in an orderly and sustained way. The Act established the Congressional Budget Office to provide Congress with budgetary expertise and created Senate and House Budget Committees. These committees propose resolutions setting spending priorities and fiscal policies which are intended to guide the authorizing and appropriating committees in their allocation of federal funds. *See* 30 CONG. Q. ALMANAC, *supra* note 108, at 145. Although there have been difficulties with this procedure, it provided an important measure of discipline. *See Budget Committee at Center of Crucial 1979 Policy Fight,* 37 CONG. Q. WEEKLY REP. 11 (1979).

123 *See, e.g.,* HOUSE COMM. ON THE BUDGET, FIRST CONCURRENT RESOLUTION OF THE BUDGET — FISCAL 1980, H.R. REP. NO. 95, 96th Cong., 1st Sess. 181 (1979).

124 *See Fiscal 1980 Budget: 'The Policy of Restraint,'* 37 CONG. Q. WEEKLY REP. 110 (1979).

125 *See* 34 CONG. Q. ALMANAC, *supra* note 85, at 4.

House of Representatives, however, did not consider a multi-year budget resolution; therefore, the resolution is not currently part of Congress' budget procedures.[126] At a time when the public is demanding greater control of the federal budget, the House should join the Senate and the President in taking this significant step toward responsible multi-year planning and management of the federal budget.

F. *Senate Filibuster*

The filibuster presents a serious problem for the Senate. It weakens the Senate by hampering its ability to act on important national issues even after thorough debate. In recent years, the mere threat of a filibuster has had a substantial impact on the issues scheduled for floor action.[127]

Until 1975, the filibuster rule[128] permitted unlimited debate on a bill unless two-thirds of the senators present and voting voted to close the debate, an action known as invoking cloture.[129] In 1975, the rule was modified to permit debate to be closed by a vote of sixty senators.[130] No sooner had this change been adopted, however, than a new technique was invented — the post-cloture filibuster — which required the support of fewer senators than the number required to prevent cloture.[131] Even after a limit had been placed on debate, one or two senators were able to block action by such dilatory tactics as offering hundreds of minor amendments to a bill.[132] Rather than protecting the rights of the minority, the technique has become a method of outright obstructionism.

To combat this tactic, Senate rules were again modified early in 1979.[133] An absolute limit of 100 hours was set on the floor time that may elapse, once cloture is invoked, before a final vote must

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126 *See* Rule XXII, SENATE RULES, *supra* note 19, at 14.

127 *See* 31 CONG. Q. ALMANAC, *supra* note 72, at 35.

128 S. Res. 4, 94th Cong., 1st Sess., 121 CONG. REC. 12-13 (1975).

129 *See* SENATE RULES, *supra* note 19, at 28; 24 CONG. Q. ALMANAC, *supra* note 85, at 4-5; Cooper, *The Senate and the Filibuster: War of Nerves and Hardball,* 36 CONG. Q. WEEKLY REP. 2307, 2310 (1978).

130 Cooper, *The Senate and the Filibuster, supra* note 129, at 2307.

131 S. Res. 61, 96th Cong., 1st Sess., 125 CONG. REC. S1329 (daily ed. Feb. 8, 1976).

132 *See* SENATE RULES, *supra* note 19, at 15; 34 CONG. Q. ALMANAC, *supra* note 85, at 4-5.

133 *Id.*

take place on the pending legislation.[134] Under this provision, all Senate activity, including quorum calls and votes on amendments, count toward the 100-hour limit.[135]

In spite of these changes, the filibuster remains a powerful weapon to delay or prevent floor consideration of legislation on which the sixty votes necessary to invoke cloture are not available.[136] Given the heavy Senate workload, its leadership is reluctant to risk bringing up legislation on which a filibuster is threatened.[137] Thus, a small, determined minority — sometimes just a handful of senators — can block action on a bill favored by the majority of the Senate.[138]

Because of these problems, Congress should place particular emphasis on reform of the filibuster rule. Any such reform would ideally obviate minority obstruction of important issues, so that legislation would be scheduled in an orderly manner in the Senate. One approach wold be to require a descending number of senators necessary to stop a filibuster. A limit would be established so that no more than four cloture votes could be taken on any piece of legislation. For example, the first vote to end debate could require two-thirds of those present and voting; the second, sixty senators; the third, three-fifths of those present and voting; and, finally, a constitutional majority of fifty-one senators. Such a system would ensure adequate debate on major issues while testing the Senate's resolve to bring these issues to an eventual floor vote.[139]

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134 *See* 34 CONG. Q. ALMANAC, *supra* note 85, at 4.

135 Just one example is lobby disclosure legislation, which was kept off the Senate floor by the threat of a filibuster in the 95th Congress after the House had passed a comprehensive bill.

136 In the 1970's, filibusters have been used on domestic issues ranging from antitrust and labor legislation to natural gas deregulation and campaign finance legislation. From the 1930's through the 1960's, filibusters were generally undertaken only on major national legislation, particularly that dealing with questions of civil rights. During the last decade, however, filibusters have been used against many different types of bills. *See* CONG. Q. WEEKLY REP., *supra* note 129, at 2307. Apparently, determined minorities in the Senate have found more to be determined about.

137 *Advantages of Incumbency,* 37 CONG. Q. WEEKLY REP. 1351 (1979).

138 *Id.*

139 Since a vote cannot take place until 48 hours after a cloture petition is filed, this length of time is guaranteed for debate. *See* Rule XXII, SENATE RULES, *supra* note 19, at 14.

G. *Incumbency and Franking*

Incumbency continues to be a significant factor in elections, especially for House seats. Even in 1974 — the Watergate year that was notable for turnover in the House — 89 percent of the House incumbents running for re-election won.[140] In most years, the figure is over ninety percent, and in 1976 and 1978, ninety-five percent or more of the representatives who ran for re-election won.[141] Senate seats, on the other hand, have turned over more rapidly,[142] although incumbents there also enjoy a significant edge in seeking re-election.

Among other advantages, incumbents receive large amounts of campaign contributions from groups with a direct interest in the issues the legislators consider in committee.[143] Congressional and state legislative district lines are often drawn to benefit incumbents.[144] Moreover, House and Senate incumbents benefit from the perquisites of office which allow them to present themselves in a favorable way to the electorate. While many of the privileges of office were originally established to assist senators and representatives in doing their job, some have been routinely used to promote the incumbents' re-election. And of all the incumbents' political tools, none is more subject to abuse than the franking privilege, which enables legislators not only to respond to letters from constituents, but also to saturate their districts or states with postage-free mass mailings.[145] Taxpayers in 1978 paid nearly $50 million in

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140 *Advantages of Incumbency,* 37 CONG. Q. WEEKLY REP. 1351 (1979).

141 *Id.*

142 *Id.* In 1974, however, a larger percentage of incumbents was re-elected in the Senate than in the House. *Id.* One observer attributes the higher turnover rate in the Senate to the fact that votes for Senate candidates are based to a greater extent on the issues and votes for representatives are based more on the delivery of constituent services. E. Uslaner, Ain't Misbehavin: The Logic of Defensive Issue Voting Strategies in Congressional Elections (1979) (research paper for University of Maryland, College Park) (on file with HARV. J. LEGIS.). There is, however, evidence that constituent services are becoming a more important factor in Senate elections too. E. Uslaner, The Case of the Vanishing Liberal Senators: The House Did It (1979) (research paper for the University of Maryland, College Park) (on file with HARV. J. LEGIS.).

143 *See* text accompanying notes 156 to 168 *infra.*

144 *See* text accompanying notes 172 to 178 *infra.*

145 *See* text accompanying note 155 *infra.*

postage for representatives and senators[146] — up from $7.6 million in fiscal year 1966.[147]

In 1973, Common Cause filed suit in U.S. District Court, charging that the frank was being used to promote incumbents' re-elections and seeking an injunction against congressional mass mailings.[148] The suit alleged that widespread use of the frank by elected officials during periods preceding elections gave incumbents an unfair advantage and that such use was unlawful, since the franking statute limited the use of postage-free mail to "official business."[149] Shortly after the suit was filed, Congress amended the statute,[150] ostensibly to clarify the law and plug existing loopholes. These amendments, however, delineated the franking privilege in the broadest possible terms, without even attempting to restrict its potential use as a tool to promote an incumbent's re-election. Consequently, Common Cause amended its complaint in March, 1974, charging that the law itself was unconstitutional as a violation of the First Amendment right of association, the equal protection clause of the Constitution, and the article II, section 8 requirement that government funds be spent only for public purposes.[151] The suit argues that the franking statute is unconstitutional and, as part of the proposed remedy, requests an injunction barring mass mailings under the statute until it is redrafted in constitutional form.

Although the suit is still pending, depositions taken from congressional staff members have provided considerable information about the way the franking privilege is used by members of Congress. Among other things, these depositions have shown that more mail is sent during election periods than at any other time;[152]

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146 *Hearings Before the Subcomm. on Legislative Appropriations of the House Comm. on Appropriations, Legislative Branch Appropriations for 1979,* 95th Cong., 2d Sess. 165 (1978).

147 *Hearings of the Special Ad Hoc Subcomm. of the House Comm. on Post Office and Civil Service,* 93rd Cong., 1st Sess. 89 (1973).

148 Common Cause v. Bailar, No. 1887-73 (D.D.C., filed Oct. 5, 1973).

149 39 U.S.C. § 3210 (1976).

150 Pub. L. No. 93-191, § 1(a), 87 Stat. 737 (1973).

151 Common Cause's goal is to have the franking statute declared unconstitutional and to obtain an injunction barring mass mailings under the statute until it is redrafted in constitutional form.

152 The statement is based on daily volume totals supplied by the U.S. Postal Service under motions for the production of documents in connection with *Common Cause v. Bailar,* note 148 *supra.* (Graph summarizing voluminous data on file with HARV. J. LEGIS.).

that the congressional leadership advises new members on the use of the frank in ways that will increase their chances for re-elections;[153] and that direct mail consultants have designed programs for using the frank to promote re-election of incumbents.[154]

In connection with this case, evidence obtained from the U.S. Postal Service demonstrates that, not only is more franked mail sent during an election year, but also the distribution of mailings during those election years shows a strikingly political pattern. For example, in 1972, the semi-monthly volumes of congressional mailings averaged twelve million pieces of mail; but in the semi-monthly period immediately preceding the election, approximately twenty million pieces were mailed. In 1974, peaks of twenty-four million pieces sent were recorded during semi-monthly periods immediately preceding the general election and early spring and late summer primary seasons. By contrast, during 1973, a non-election year, an average of approximately nine million pieces of mail was sent during the comparable semi-monthly periods.[155]

H. *Partial Public Financing of Congressional Campaigns*

The dependence of House and Senate candidates on campaign contributions of special interests is another factor hampering electoral competition and adding to the dominance of special interests.[156] Essentially, the incumbent candidate, feeling indebted to

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153 Deposition of Richard P. Conlon on Feb. 10, 1976, at 6-8, 14-15, 30-31; deposition of Edwin John Feulner on Nov. 25, 1975, at 9-14; deposition of Harry Fox on Jan. 15, 1976, at 17-19; Common Cause v. Bailar, No. 1887-73 (D.D.C., filed Oct. 5, 1973) (copies of cited pages on file with HARV. J. LEGIS.).

154 *See, e.g.,* Angle, *Lawsuit Target: $46 Million Free Mail Out of Congress,* Wash. Star, Feb. 8, 1976, §A, at 1, col. 1; Landauer, *Lawmakers Use Mail Privileges to Help Win Elections, Common Cause Argues,* Wall St. J., June 2, 1975, at 5, col. 1. Depositions taken in connection with *Common Cause v. Bailar* include examples of such programs. *E.g.,* Deposition of Robert F. Jones on Feb. 19, 1976, Exhibit 3; deposition of Joyce P. Baker on March 26, 1976; Common Cause v. Bailar, No. 1887-73 (D.D.C., filed Oct. 5, 1973) (copies of cited exhibits on file with HARV. J. LEGIS.).

155 *See* note 152 *supra.*

156 In the past ten years, many books and articles have been written on campaign financing. *See, e.g.,* H. ALEXANDER, FINANCING THE 1976 ELECTION (1977); AMERICAN ENTERPRISE INSTITUTE, PUBLIC FINANCING OF CONGRESSIONAL CAMPAIGNS 15-21 (1978). The news media regularly cover the sources and amounts of candidates' campaign contributions. Two recent Common Cause documents provide additional data on the activities of political action committees (PACs) and their impact on legislative and political processes. COMMON CAUSE, HOW MONEY TALKS IN CONGRESS (1976); F. Wertheimer, Of Mountains: The PAC Movement in American Politics (Sept. 4, 1979) (paper submitted for the Conference on Parties, Interest Groups and Campaign Finance Laws, sponsored by the American Enterprise Institute, Washington, D.C., Sept. 4-5, 1979).

the special interests that contributed to his campaign and wanting to encourage future contributions, rewards those interests by granting them access and an opportunity to influence public policy.

Special interests have learned to use money with increasing skill and effectiveness. The number of political action committees (PACs) organized by special interests to contribute money to federal election campaigns has skyrocketed in the last few years. At the end of 1974, there were only 608 PACs;[157] by the end of 1978, they numbered 1,938.[158] The amount of money these committees contribute to candidates has been increasing just as rapidly. In 1974, PACs spent $12.5 million on House and Senate races;[159] in 1978, the amount jumped to $35 million.[160] Incumbents overwhelmingly receive most of these funds. According to Federal Election Commission figures for the 1978 campaign, in races where incumbents were running for re-election, three quarters of the special interest group money went to incumbents.[161] Behind the PAC contributions are Washington lobbyists representing special interests who seek favorable government expenditures, tax benefits, and regulations in return for their largesse. Viewing campaign contributions as investments, these special interests funnel their money to those already in office who have the power and can grant the favors.[162]

One way to rectify the present system of financing congressional general elections is to increase the role of small, individual contributions while cutting back on special interest contributions. Under a partial public financing system, a candidate for Congress would qualify for public funds by raising a threshold amount in private

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157 *Corporate Political Action Committees Are Less Oriented to Republicans than Expected,* 36 CONG. Q. WEEKLY REP. 849, 853 (1978).

158 Press Release from Federal Elections Commission (May 10, 1979) (on file with HARV. J. LEGIS.).

159 1 COMMON CAUSE, 1974 CONGRESSIONAL CAMPAIGN FINANCES viii (1974).

160 Press Release from Federal Election Commission (May 10, 1979) (on file with HARV. J. LEGIS.).

161 Press Release from Federal Election Commission (June 29, 1979) (on file with HARV. J. LEGIS.).

162 Officials of political action committees are not shy about confirming this publicity. For example, Justin Dart, Chairman of Dart Industries, has said dialogue with politicians "is a fine thing, but with a little money they hear you better." Mr. Dart represents one of the largest corporate PACs. *See* N. Ulman, *Business Lobby: Companies Organize Employees and Holders into a Political Force,* Wall St. J., Aug. 15, 1978, at 1, col. 1.

contributions to demonstrate his or her viability as a candidate. This approach is generally similar to that used to finance the presidential primaries of 1976 and 1980.[163] These private contributions then would be matched by an equal amount of public money taken from a fund established by a voluntary, one-dollar tax check-off system. Wealthy candidates who accept public financing would no longer be free to spend unlimited amounts of their own money in the campaign.[164]

Partial public financing of congressional elections[165] would improve the political system in several ways. First, it would increase the importance and number of small contributors because each small contribution would be matched by public funds. Secondly, it would reduce candidates' dependence on the contributions of special interest groups by giving them an alternative means of financing campaigns. And, third, it would enhance competition among challengers and incumbents, by increasing substantially the amount of funds available to challengers and lessening the financial advantage that incumbents now enjoy.

A comparison of the 1976 presidential campaign with that of 1972 is illustrative of the impact that partial public financing would have on the number of sources of congressional campaign contributions. In 1976, each major party candidate received $21.8 million in funds provided by millions of Americans through the voluntary, one-dollar income tax checkoff.[166] By contrast, in 1972, the more than $20 million received by President Nixon's re-election committee was donated by only a relative handful of 153 contributors.[167] The success of the presidential public financing

163 *See* AMERICAN ENTERPRISE INSTITUTE, *supra* note 93, at 26-30.

164 The current outlook for campaign financing reform is bleak:

> After six years of sporadic and unsuccessful efforts to enact public financing legislation, the death knell for [such] legislation may have been sounded by the House Administration Committee May 24, 1979, when it decisively voted 8-17 not to report a bill [H.R. 1] to provide federal funding for House general election campaigns. ... H.R. 1 had been heavily promoted by the White House, the Democratic congressional leadership, the Democractic Study Group ... and a host of outside organizations, including the public affairs lobby Common Cause. ... Hearings on a Senate version [S. 623] were indefinitely postponed.

CONG. Q., THE WASHINGTON LOBBY 67, 67, 72 (3d ed. 1979).

165 As proposed in H.R. 2, 96th Cong., 1st Sess. (1979), *reprinted in Public Financing of Congressional Elections: Hearings on H.R. 1 and Related Legislation Before the House Comm. on House Administration,* 96th Cong., 1st Sess. 2-21 (1979).

166 H. ALEXANDER, *supra* note 156, at 359.

167 (awaiting substantiation).

system should provide a strong impetus for adoption of a similar system for congressional races.[168]

I. *Lobby Disclosure*

In addition to contributing to their campaigns, many special interest groups seek to influence legislators through well financed lobbying operations. Yet, the current lobby disclosure law, enacted in 1946,[169] has so many loopholes that the public and even members of Congress do not know who is spending how much money to influence congressional decisionmaking. A 1978 Common Cause study, reviewing special interest lobbying on President Carter's proposed energy package in 1977, showed that very little of that lobbying activity was disclosed under the terms of the present law.[170] If Congress and the public are to make informed judgments on legislative issues, it is essential that they know who is seeking to influence congressional decisionmaking; they thus should have ready access to information on lobbying activities and expenditures.

An effective lobby disclosure law would emphasize disclosure of the amounts spent to influence policy-making in Congress by

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168 There is intense opposition among political action committees to any modification of the campaign finance laws governing their contributions. In 1979, when H.R. 1, the congressional public financing bill, was blocked from further consideration. *See Public Financing Loses in Committee Again,* 37 CONG. Q. WEEKLY REP. 1000 (1979), Congressman Railsback introduced a bill that would place tighter limits on the amounts that PACs could contribute to House candidates. H.R. 4970, 96th Cong., 1st Sess. (1979). Subsequently offered as an amendment to the Federal Election Commission authorization bill, S. 832, 96th Cong., 1st Sess. (1979), the bill would reduce the total amount a PAC may contribute to a single candidate in the primary and general election campaign from $10,000 to $6,000, and would, for the first time, place an overall limit of $70,000 on the amount that a House candidate may accept from all PACs. *See New Limits on PAC Contributions Advanced,* 37 CONG. Q. WEEKLY REP. 2337 (1979). Organizations with PACs that contribute large amounts to candidates, such as the American Medical Association, National Rifle Association, and countless business interests, opposed the bill so strongly that even after it had passed the House, they were encouraging a Senate filibuster of legislation (which must pass the Senate, even though it only applies to House races). On Oct. 26, 1979, Senate Minority Leader Howard H. Baker, Jr. announced that he would be in the "forefront" of a filibuster to stop the bill. *See* Ehrenhalt, *Senators to Fight House PAC Limits,* Wash. Star, Oct. 26, 1979, §A at 5, col. 3.

169 Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1976). *See* Land, *Federal Lobbying Disclosure Reform Legislation,* 17 HARV. J. LEGIS. 295 (1980) (this issue).

170 COMMON CAUSE, THE POWER PERSUADERS: A COMMON CAUSE STUDY OF WHAT THE FEDERAL LOBBY LAW DOES NOT REVEAL ABOUT SPECIAL INTEREST LOBBYING ON THE CARTER ENERGY PACKAGE (1978).

organizations with paid lobbyists. Because groups and individuals clearly have the right to petition the government for the redress of grievances and to compete in the marketplace of ideas, the right to lobby itself should not be limited. In fact, the free and robust exercise of this right is a sign of a healthy political system. Because of the substantial resources that organized interests now devote to influencing public policy, however, it is important to provide the public with basic information about these lobbying activities, including: (1) the identities of the organization's lobbyists; (2) a list of the major issues on which the organization lobbies; (3) estimates of the total amount of money spent by the organization on lobbying; (4) the amount of money spent on major grassroots lobbying campaigns; and (5) the identities of organizations which are major contributors to the lobbying organization.[171]

J. *Redistricting*

Another technique by which incumbents' seats are protected is gerrymandering. Under the present system, state legislators often determine the boundaries of congressional voting districts to protect the seats of those already in office, rather than to ensure political competition.[172] Manipulation of these boundaries for political purposes often deprives voters of their legitimate power by stifling competition, retaining partisan advantages which virtually eliminate political mavericks, and discouraging the election of representatives of racial minority groups.[173]

After the 1980 census, substantial redistricting will be needed to adjust for population shifts, both within states and between states.[174] To prevent gerrymandering in determining the new district boundaries, a three-part approach is needed that (1)

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171 For a discussion of current lobby disclosure reform efforts, *see* Land, note 169 *supra*. H.R. 4395, currently being considered, includes all of these elements in some form, the more controversial being provisions to require disclosure of expenditures for grass roots lobbying and the names of organizations contributing more than $3,000 a year to lobby groups. CONG. Q., THE WASHINGTON LOBBY 61, 66 (3d ed. 1979).

172 *See* Wells, *"Affirmative Gerrymandering" Compounds Districting Problems*, 67 NAT'L CIVIL RIGHTS REV. 10 (1978).

173 For a more detailed discussion, *see* COMMON CAUSE, TOWARD A SYSTEM OF "FAIR AND EFFECTIVE REPRESENTATION" (1977) [hereinafter cited as FAIR AND EFFECTIVE REPRESENTATION].

174 *Id.* at 1.

removes redistricting from state legislatures, (2) sets strict standards for drawing district lines, and (3) establishes a procedure for prompt judicial review to enforce the standards.

The most important standard should be that congressional districts be compact and composed of contiguous territory, enhancing voter (and candidate) convenience. To the extent possible, established local political boundaries should be honored in order to minimize voter confusion, enable constituencies to organize for political action in an effective manner, and limit the ability to gerrymander. Standards adopted should prohibit the drawing of district lines in a way that would work to the advantage or disadvantage of any political party, incumbent legislators, or other group. District lines, however, should not be drawn for the purpose of diluting the voting strength of language or racial minority groups.[175]

The responsibility for congressional reapportionment should be placed in the hands of independent state redistricting commissions.[176] These commissions would hold public hearings and consider the views of citizens, political parties, officeholders, and others in order to make the redistricting process a public matter rather than one operating behind closed doors and without public discussion.

Finally, to ensure that redistricting standards established by Congress are followed, the plan drawn by each redistricting commission should be expeditiously reviewed by the courts.[177] It is im-

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175 These standards are adopted from the strong anti-gerrymandering provisions in the Hawaii Constitution. FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 29.

176 The legislature has primary responsibility for preparing the reapportionment plan in thirty-seven states. Only nine states give primary authority to a board or commission, although others provide for advisory or back-up boards; in either case, "[m]any are dominated by legislators or other public officials and lack the necessary independence." FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 8-10. Some states already ensure the independence of their respective redistricting commissions. Michigan, Montana, and Vermont prohibit public officials from serving on the commission; Hawaii, Michigan, and Missouri prohibit commissioners from running for legislative office for a period after service on the commission in order to avoid self-dealing. *Id.* at 31.

177 For a fuller discussion of Common Cause's proposal regarding reapportionment, see Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation,"* 14 HARV. J. LEGIS. 825 (1977). *See also* FAIR AND EFFECTIVE REPRESENTATION, note 173 *supra*. Common Cause presented testimony to the Senate Committee on Governmental Affairs on the Congressional Anti-Gerrymandering Act of 1979 on June 20, 1979. *A Bill to Establish a Fair Procedure for Establishing Congressional Districts: Hearing on S. 596 Before the Senate Comm. on Governmental Affairs,* 96th Cong., 1st Sess. 37 (1979) (statement of David Cohen).

portant that all challenges to reapportionment plans be resolved and plans finalized well in advance of state legislative and congressional elections. Finality in reapportionment is a matter of such importance and sensitivity that it warrants the prompt attention of the highest court in each state. Therefore, these courts should be granted original jurisdiction over reapportionment matters, and challenges should be filed and decided upon within a specified time soon after a plan is prepared.[178]

Conclusion

The proposed legislative actions and organizational changes suggested above will inevitably engender substantial resistance from Congress and from organized interest groups outside of Congress.[179] It is reasonable to expect that in the 1980's greater, rather than fewer, resources will be devoted to influencing the legislative and political system. Lobbying by determined interest groups is a given in American politics; legislative commmittees will continue to be the first line of attack and defense for the special interest lobbies.

If the current legislative system of narrow representation is to be reformed, institutional processes must thus be built in to compensate for these factors. The legislative and organizational rules changes advocated in this article are designed to increase political competition, reduce candidates' financial dependence on special interests, strengthen the House and Senate majority leadership vis-à-vis congressional committees, and provide procedures to help political parties decide and adhere to national priorities. Together, these changes could enable Congress to act in a deliberative, orderly, and expeditious manner and deal with the complex public issues of the 1980's.

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178 FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 33-34.

179 *See, e.g.*, notes 112 and 168 *supra;* FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 33-34.

NOTE

FEDERAL LOBBYING DISCLOSURE REFORM LEGISLATION

GUY PAUL LAND*

In the wake of Watergate and recent congressional scandals, Congress has focused on lobbying disclosure reform. The proposals now before Congress are designed to provide greater accountability in the political process and to open government to increased public oversight and review. Under the proposals suggested, numerous lobbyists in the nation's capital will be required to disclose their affiliations and efforts.

In this Note, Mr. Land examines the strengths and weaknesses of disclosure requirements now before Congress. He focuses particularly on the constitutional arguments surrounding "direct" and "grass-roots" lobbying and concludes that lobbying disclosure legislation is both constitutional and necessary.

Introduction

Spurred by the exposure of government abuses during the Watergate scandals and alarmed by the growing dissatisfaction of the American people with the processes of government, Congress has turned its attention toward making the political process more accountable and more open.[1] Lobbying disclosure reform, first introduced in 1970,[2] attracted considerable discussion in the Ninety-

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1 Legislation in this area includes the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified in scattered sections of 5, 39 U.S.C.); The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C.), *as amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (codified in scattered sections of 2, 26 U.S.C.), and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (to be codified in scattered sections of 2, 18, 26 U.S.C.) [hereinafter cited as Campaign Act]; the Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (amending 5 U.S.C. § 552 (1970); the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in scattered sections of 2, 5, 18, 28, 39 U.S.C.). *See also Lobby Reform Act of 1977: Hearings on S. 1785 and S. 2026 Before the Senate Comm. on Governmental Affairs,* 95th Cong., 1st & 2d Sess. 1-2 (1977-1978) (statement of Sen. Ribicoff) [hereinafter cited as *1978 Senate Hearings*]; *id.* at 6 (joint statement of Sens. Kennedy, Clark, and Stafford).

2 The House held hearings on lobbying regulation in 1970 and 1971, and the Committee

fourth and Ninety-fifth Congresses[3] and is a key political process reform issue facing the Ninety-sixth Congress.[4] The proposals currently before Congress seek greater accountability from the numerous lobbyists who flock to the nation's capital to influence government decisions or who encourage others to affect policy determinations. Proponents of reform decry the weaknesses in the current law, while opponents of the pending reform measures question the constitutionality and practicality of the legislation.

Most parties to the debate acknowledge that lobbyists frequently perform useful functions. They recognize that in a representative democracy the right of the individual to seek to influence government decisionmaking is a fundamental constitutional safeguard.[5] Furthermore, lobbyists perform valuable services for members of Congress and the federal agencies. The task of keeping abreast of the thousands of bills introduced in Congress each session imposes a substantial burden on individual members of Congress. Lobbyists help members of Congress assess the impact

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on Standards of Official Conduct reported out a Lobbying Activities Disclosure Act in 1971, but no measure ever received the approval of the full House in the Ninety-first or Ninety-second Congress. *See Lobbying: Hearings on H.R. 5259 Before the House Comm. on Standards of Official Conduct,* 92d Cong., 1st Sess. (1971); *Regulation of Lobbying: Hearings on H.R. 1031 Before the House Comm. on Standards of Official Conduct,* 91st Cong., 2d Sess. (1970).

3 *See, e.g., 1978 Senate Hearings, supra* note 1; *Lobbying and Related Activities: Hearings on H.R. 1180, H.R. 5578, and H.R. 5795 Before the Subcomm. on Ad. Law and Governmental Relations of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. (1977) [hereinafter cited as *1977 House Hearings*]; *Lobbying Reform Legislation: Hearings on S. 774, S. 815, S. 2068, S. 2167, and S. 2477 Before the Senate Comm. on Government Operations,* 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Senate Hearings*]; *Public Disclosure of Lobbying Act: Hearings on H.R. 15 Before the Subcomm. on Ad. Law and Government Relations of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 House Hearings*]; *Lobbying — Efforts to Influence Governmental Actions: Hearings Before the House Comm. on Standards of Official Conduct,* 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Standards of Official Conduct Hearings*]. *See also* H.R. REP. No. 95-1003, 95th Cong., 2d Sess. (1978) [hereinafter cited as H.R. REP. No. 95-1003]; S. REP. No. 94-763, 94th Cong., 2d Sess. (1976) [hereinafter cited as S. REP. No. 94-763]; H.R. REP. No. 94-1474 (part 1), 94th Cong., 2d Sess. (1976) [hereinafter cited as H.R. REP. No. 94-1474].

4 *See* H.R. REP. No. 96-590, 96th Cong., 1st Sess. (1979) [hereinafter cited as H.R. REP. No. 96-590]. For a brief discussion of the difficulties confronting the Ninety-sixth Congress, *see Players on Lobby Disclosure Bill Lining up for Rematch,* 37 CONG. Q. WEEKLY REP. 188 (1979).

5 *E.g., 1975 Senate Hearings, supra* note 3, at 18 (joint statement of Sens. Stafford and Kennedy); *id.* at 321 (statement of Rep. Railsback); *1977 House Hearings, supra* note 3, at 159 (statement on behalf of A.C.L.U.).

of particular proposals on the member's own constituents. By researching complex new areas of proposed legislation, issuing condensed legislative summaries, providing specialized information, and advising legislators and administrators on the meaning and impact of legislation, lobbyists supply an important information service to government decisionmakers.[6]

Yet lobbyists also create possible "dangers to the public interest and to the integrity of the law-making process."[7] Relying upon the information and expertise which well-funded lobbyists can command, legislators may receive and consider only one side of a complex issue. Because the official lacks adequate resources for independent investigation, the lobbyist's recommendations, which are the product of detailed examination, may become conclusive and may replace a full-scale, neutral investigation. In addition, legislators may be swayed by the weight of a lobbying effort rather than by the weight of the argument. With readily available resources to stimulate letter-writing campaigns, lobbyists may cause a congressman to be showered with messages on a piece of legislation. These letters, when combined with active work by professional lobbyists in Washington, may persuade the congressman not to examine the merits of the issue for himself.[8]

Another danger arises when lobbying goes beyond the mere exchange of information and expression of opinion. Interested

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6 *See, e.g., 1975 Senate Hearings, supra* note 3, at 392 (testimony of Richard D. Godown, Gen. Counsel, Nat'l Ass'n Mfrs.); *id.* at 18 (joint statement of Sens. Stafford and Kennedy); *id.* at 106 (statement on behalf of Common Cause); *1975 Standards of Official Conduct Hearings, supra* note 3, at 159-60 (testimony of Rep. Bennett); *id.* at 165 (testimony of Rep. Koch). *See also A Model New York Lobbying Statute,* 4 COLUM. J.L. & SOC. PROBLEMS 69 (1968).

For further discussion of lobbying, *see generally* E. LANE, LOBBYING AND THE LAW (1963); CONG. Q. SERVICE, THE WASHINGTON LOBBY (1971); Smith, *Regulating National and State Legislative Lobbying,* 43 U. DET. L.J. 663 (1966); H. EASTMAN, LOBBYING: A CONSTITUTIONALLY PROTECTED RIGHT (1977).

The representative role of the lobbyist assumes great importance in most models of interest group politics and has received considerable attention from political scientists. *See, e.g.,* D. TRUMAN, THE GOVERNMENTAL PROCESS (2d ed. 1971); V. O. KEY, POLITICS, PARTIES AND PRESSURE GROUPS (1964); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1963). For a strong critique of the interest group model, *see* T. LOWI, THE END OF LIBERALISM (1969).

7 *1977 House Hearings, supra* note 3, at 134 (statement on behalf of Common Cause).

8 *See, e.g., id; 1975 Senate Hearings, supra* note 3, at 107 (statement on behalf of Common Cause); *1975 Standards of Official Conduct Hearings, supra* note 3, at 204-06 (statement of Rep. Winn); *1978 Senate Hearings, supra* note 1, at 1 (statement of Sen. Ribicoff).

groups may acquire inordinate levels of influence on major public issues through the skillful manipulation of expertise, inside information, secret contacts, and personal pressures. Members of Congress and the executive branch may lose sight of the public interest amid the continuous barrage of requests from special interests seeking special treatment through privileged contacts.[9] This surreptitious "influence peddling" on behalf of rich and powerful interests also fuels a public cynicism about the responsiveness of government.[10] The American people have become suspicious of wealthy individuals and powerful interest groups that seem to have acquired special access to Congress and federal agencies and to have usurped some control over the government from the hands of the ordinary citizen.

Proposed lobbying disclosure reform must recognize the importance of the lobbyist's role in providing information and assessing the interests of a representative's constituency. The legislation must be intended neither to discourage legitimate lobbying activities nor to limit their scope. It must, however, confront the inherent dangers which lobbying poses to the political process and seek to minimize these risks by providing for broad disclosure of significant lobbying activities and of the financial base for the lobbying effort.

Lobbying efforts usually fall into one of two categories. The first, "direct" lobbying, consists of direct contacts, either in person or through some other form of communication, by an interested party with a government official. The second, so-called "lobbying solicitation" or "grass-roots" lobbying, typically takes the form of a solicitation from an interested organization that encourages a third party to communicate with a decisionmaker. Each type of lobbying presents its own set of dangers, necessitating a different legislative approach. To be comprehensive, however, lobbying reform legislation must address the issues raised by both types.

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9 *See, e.g., 1975 Senate Hearings, supra* note 3, at 19 (joint statement of Sens. Stafford and Kennedy). *See also* Note, *Public Disclosure of Lobbyists' Activities,* 38 FORDHAM L. REV. 524 (1970).

10 *See, e.g., 1975 Senate Hearings, supra* note 3, at 19 (joint statement of Sens. Stafford and Kennedy); *1975 Standards of Official Conduct Hearings, supra* note 3, at 304 (statement of Rep. Winn).

This Note will discuss the major decisions facing Congress in drafting and considering lobbying disclosure legislation. Part I will examine the major weaknesses in the current federal lobbying regulation laws under the Federal Regulation of Lobbying Act of 1946. Part II will consider the constitutional and policy issues raised by the proposed reforms of disclosure of direct lobbying activities. Part III will address the unique problems created by the proposed disclosure of lobbying solicitation. Finally, Part IV will examine the disclosure and enforcement provisions of the latest proposals.

I. The Statutory Background

A. *The Federal Regulation of Lobbying Act of 1946*

Lobbying of Congress is currently subject to the Federal Regulation of Lobbying Act,[11] passed as Title III of the Legislative Reorganization Act of 1946.[12] The only federal statute purporting to regulate lobbyists, the Act applies to any person who "directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid" or to influence the passage or defeat of any legislation before the Congress.[13] Each person qualifying under the Act must register and file quarterly reports with the Secretary of the Senate and the Clerk of the House. These reports must state the amount of money received and expended by the lobbyist during the preceding quarter, the recipients and purposes of those funds, the lobbyist's publications, and the legislation for which lobbying occurred.[14] These provisions do not apply to persons who appear before a committee of Congress to state a position on legislation or to public officials acting in their official capacities.[15]

Soon after its passage, the Act was upheld by the Supreme Court in *United States v. Harriss,*[16] despite a resolute constitutional challenge. In order to validate the statute, the Court found

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11 2 U.S.C. §§ 261-270 (1976).
12 Act of Aug. 2, 1946, ch. 753, 60 Stat. 812.
13 2 U.S.C. § 266 (1976).
14 *Id.* § 267.
15 *Id.*
16 347 U.S. 612 (1954).

it necessary to construe the Act narrowly. The Court limited the operation of the statute in three ways. First, the Court stated that in order to qualify as a lobbyist under the law, a person must have solicited, collected, or received contributions for the purpose of influencing legislation.[17] *Harriss* thus exempts from coverage those lobbyists who spend their own money and do not collect contributions.[18] Second, the Court stated that the Act applies only to those individuals and contributions whose "principal purpose" is to influence legislation.[19] Citing the legislative history of the Act, the Court held that the reporting requirements do not apply to "those contributions and persons having only an 'incidental' purpose of influencing legislation."[20] Third, the Court construed the language of the Act to refer to " 'lobbying in its commonly accepted sense' — to direct communications with members of Congress on pending or proposed federal legislation."[21] Under the common interpretation of this portion of *Harriss,* the statute does not cover lobbying solicitation.[22]

B. *Weaknesses in the Current Law*

The present Act, by its construction in *Harriss,* fails in three ways to remove the dangers to the political system posed by lobbying. First, its coverage of direct lobbying activities is inadequate.

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17 *Id.* at 619-20.

18 *See 1977 House Hearings, supra* note 3, at 187 (statement of Deputy Att'y Gen. Flaherty).

19 347 U.S. at 621-23.

20 *Id.* at 622.

21 *Id.* at 620 (quoting United States v. Rumely, 345 U.S. 41, 47 (1953)).

22 Since *Harriss,* lobbyists and those charged with the enforcement of the Act have consistently read the quoted language as a prohibition on the regulation of lobbying solicitation. *See, e.g., 1977 House Hearings, supra* note 3, at 261-62 (statement on behalf of A.C.L.U.). Upon closer scrutiny, however, the issue does not appear to be so straightforward. Indeed, in the sentences immediately following that quoted in the text accompanying note 21 *supra,* the Court asserts:

> The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressure, exerted by the lobbyists themselves or through their hirelings or *through an artificially stimulated letter campaign.* It is likewise clear that Congress would have intended the Act to operate on this narrower basis even if a broader application to organizations seeking to propagandize the general public were not permissible.

347 U.S. at 620-21 (footnotes omitted) (emphasis added). In a footnote, the Court cites the Senate and House reports accompanying the bill as authority for the proposition that Congress sought to reach lobbyists who "initiate propaganda from all over the country in the form of letters and telegrams." *Id.* at 621 n.10. In fact, the challengers in *Harriss* were

Second, by common interpretation it leaves untouched all forms of lobbying solicitation. Third, the disclosure and enforcement provisions of the Act are weak and ineffective.

The primary weakness in the law's treatment of direct lobbying lies in the Court's interpretation in *Harriss* that the Act applies only to persons whose "principal purpose" is lobbying.[23] Many trade associations, labor unions, professional organizations, consumer groups, and Washington lawyers can thus avoid registering under the Act, because lobbying is not their principal purpose.[24] Much of the effective lobbying, however, is done by precisely these groups. The American Telephone and Telegraph Company (AT&T), for example, reportedly spent over $1 million in one quarter of 1976 in lobbying for a communications bill which would have enhanced AT&T's dominance in the field. Yet none of these lobbying expenses was reported under the present lobbying act, presumably because lobbying is not AT&T's principal purpose.[25]

The Act's second shortcoming is that the common construction of *Harriss* leaves the whole range of lobbying solicitation untouched.[26] Thus, even if an organization attempts to influence

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charged with, *inter alia,* failing to report expenditures on a campaign to induce various interested groups and individuals to communicate by letter with members of Congress. *Id.* at 615. At no point does the Court explicitly rule unconstitutional the disclosure of expenditures for letter-writing campaigns. Rather, the distinction the Court seems to draw is one between campaigns designed to produce "direct pressure" and those whose object is "to propagandize the general public." *Id.* at 621.

Justice Douglas, in his dissent, also recognizes that the majority makes this distinction, although he views the statute as unconstitutionally vague and feels that the majority's distinction cannot be found in the statute itself. *Id.* at 628-33. Douglas provides examples which demonstrate the distinction drawn by the majority: "a manufacturers' association which runs ads in newspapers for a sales tax" is not covered, while a "business, labor, farm, religion, social, racial or other group which raises money to contact people with the request that they write their Congressman to get a law repealed or modified" is covered. *Id.* at 630. Thus Douglas also interprets the majority opinion to uphold the coverage of letter-writing campaigns, the classic form of lobbying solicitation. However, because of the almost unanimous view to the contrary, this Note will proceed on the assumption that the 1946 Act does not reach lobbying solicitation.

23 347 U.S. at 621-63. *See* text accompanying notes 37 to 39 *infra.*

24 *See, e.g., 1978 Senate Hearings, supra* note 1, at 7-8 (joint statement of Sens. Kennedy, Clark and Stafford).

25 123 CONG. REC. S11109 (daily ed. June 29, 1977) (joint statement of Sens. Kennedy, Clark, and Stafford). Likewise, the El Paso Natural Gas Company reportedly paid a Washington, D.C., law firm $353,113 to lobby for a bill concerning divestiture of a pipeline firm. El Paso did not file a lobby report with the Congress for this period, and the law firm reported receiving only $6,227 as compensation for lobbying expenses from El Paso. *1977 House Hearings, supra* note 3, at 127-28 (statement on behalf of Common Cause).

26 *See* note 22 *supra.*

legislation by conducting an expensive media or mailing campaign to urge others to contact congressmen, its activities fall outside the Act's reporting requirements. Congressmen acknowledge the widespread use of letter-writing campaigns and congressional observers report that lobbying solicitation, the "growth area of lobbying,"[27] is fast becoming the most important method for influencing legislation.[28] According to a number of congressmen, such grass-roots efforts now frequently overpower more traditional direct contacts in their effectiveness in shaping legislation.[29]

In 1974, for example, the American Trial Lawyers Association reportedly created an elaborate lobbying system to thwart no-fault automobile insurance by arranging for Western Union mailgrams opposing the legislation to be sent automatically to key representatives. Association members needed only to call Western Union offices around the country and to give the names of friends and associates. For each name given, ten messages were sent to Capitol Hill. The Association reportedly also arranged for Western Union's sales force to encourage local trial lawyers' associations and other interested groups to use the mailgram service. The result was a deluge of messages to key congressional offices protesting no-fault insurance, all seemingly sent individually by concerned constituents. Despite the sizable expenditure and considerable influence of this activity, the Association's conduct stands beyond the scope of the present law.[30]

A probable reason for the considerable increase in the use of lobbying solicitation lies in the very fact that these efforts are not covered by current legislation. A growing emphasis on the

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27 Mohr, *Business Using Grass-Roots Lobby,* N.Y. Times, April 17, 1978, at A1, col. 4.

28 *See, id.;* Mohr, *Growth of Grass-Roots Lobbying Draws Congressional Attention,* N.Y. Times, April 21, 1978, at D5, col. 1. Representative Railsback gives an example of one organization's preference for lobbying solicitations: "Very seldom have I had somebody from the National Rifle Association come by and lobby me, but boy, if I haven't got a pile of mail from people in my home district all very similar in language. In other words, [it] has probably been motivated by an indirect mail campaign." *1977 House Hearings, supra* note 3, at 87.

29 *See* Mohr, *supra* note 27.

30 *1975 Senate Hearings, supra* note 3, 44-45 (statement on behalf of Common Cause). Other examples of large scale lobbying solicitations are plentiful. In 1977, Mobil Oil ran an advertisement about President's Carter's energy package "in nearly every Congressional district" which urged readers to "write your Congressman and Senators now, while there's still time. . . . Write on your own stationery, or on the coupons below." Mobil Oil does not register as a lobbying organization. COMMON CAUSE, THE POWER PERSUADERS 29-30 (1978).

disclosure of direct lobbying has subjected the efforts of prominent interest groups to increased public exposure. At the same time, limitations on campaign contributions[31] threaten to curtail the influence of these groups. The growth of lobbying solicitation may reflect the desire of well-financed interest groups to continue to have a major impact upon decisionmaking without being subject to the possibly counterproductive effects produced by disclosure and publicity. As one area of the political process is made more open and accountable through disclosure, interest groups have turned their energy to exploiting the remaining areas where secrecy prevents public observation and accountability. The failure of the current registration Act to cover lobbying solicitations affords these groups ample opportunity to influence government decisions without public scrutiny and thereby perpetuates the evils of undisclosed lobbying.

In addition to failing to cover major areas of lobbying activities, the present Act's third inadequacy is its weak enforcement of the disclosure requirements in those areas that are covered.[32] The Act assigns the major responsibility for its enforcement to the Clerk of the House of Representatives and the Secretary of the Senate. Lobbyists must register and file quarterly reports with the Clerk and Secretary, who in turn print this information in the Congressional Record.[33] But neither the Clerk nor the Secretary has been authorized to investigate potential violations of the Act's registration, recordkeeping, or reporting provisions. The Clerk and Secretary lack any specific power or responsibility to ask the

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31 The Campaign Act, *supra* note 1, limits political contributions by groups or individuals to candidates for federal office to $1000 and limits contributions by a political committee to $5000 to any single candidate, 2 U.S.C. § 441a (a). The Act imposes an overall annual limitation of $25,000 by an individual contributor. *Id.* This Act also requires detailed disclosure of political contributions. 2 U.S.C. § 434.

32 *See 1977 House Hearings, supra* note 3, at 187 (statement of Deputy Att'y Gen. Flaherty); 123 CONG. REC. S11109 (daily ed. June 29, 1977) (joint statement of Sens. Kennedy, Clark, and Stafford).

33 2 U.S.C. § 267 (1976). *See 1975 Standards of Official Conduct Hearings, supra* note 3, at 177 (statement of Deputy Comptroller General Keller), at 206-08 (statement of Edmund Henshaw, Clerk of the House of Representatives). While the Act imposes recordkeeping requirements on lobbyists, the Clerk has no right of access to these records. General Accounting Office, The Federal Regulation of Lobbying Act — Difficulties in Enforcement and Administration (Apr. 2, 1975), *reprinted in 1975 Senate Hearings, supra* note 3, at 185 [hereinafter cited as GAO Report].

Justice Department to institute enforcement proceedings against violators.

In its application to lobbying activities, its disclosure requirements, and its enforcement procedures, then, the current Act fails to cover substantial lobbying activity. It allows that activity, with its often deleterious effects upon the process of government, to continue unrecorded and undisclosed. A comprehensive and effective reform of the present law must, therefore, extend the application of the disclosure requirements and must strengthen the hand of those charged with enforcement.

II. Lobbying Reform Legislation: Direct Lobbying

A. *Scope of the Legislation*

Since 1975, House and Senate proponents of lobbying reform have struggled to enact legislation that would greatly expand the scope of the requirements of the 1946 Act.[34] The proposed legislation would expand the applicability of lobbying disclosure in two ways. First, the proposals would eliminate the principal purpose

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34 In 1976, both the House and the Senate passed lobbying disclosure bills, but time pressures and disagreements prevented the enactment of legislation. *See Time Runs Out for Lobby Revision Bill,* 34 Cong. Q. Weekly Rep. 2683 (1976). For a general discussion of the legislative developments during the Ninety-fourth Congress, *see Bill Revising Lobby Law Ordered,* 34 Cong. Q. Weekly Rep. 715-16 (1976); *House Judiciary Slowly Finishing its Version of Lobby Registration Bill,* 34 Cong. Q. Weekly Rep. 2119-20 (1976); *Lobbying Revision Bill,* 34 Cong. Q. Weekly Rep. 2501 (1976); *O'Neill Sees No Problem Clearing Lobbying Bill Before Congress Adjourns,* 34 Cong. Q. Weekly Rep. 2675 (1976).

The version passed by the Senate, S. 2477, 94th Cong., 2d Sess., 122 Cong. Rec. S9365 (daily ed. June 15, 1976) (text as passed by the Senate) [hereinafter cited as S. 2477], was introduced by Senators Kennedy and Stafford, and provided registration and reporting requirements for organizations that in any quarter made at least 13 lobbying contacts or spent at least $250 on direct lobbying or $5000 on lobbying solicitation. In contrast, H.R. 15, 94th Cong., 2d Sess. (1976), *reprinted in* H. Rep. No. 94-1474, *supra* note 3, at 1 (text as reported out by the Judiciary Committee) [hereinafter cited as H.R. 15], the Railsback-Kastenmeier bill passed by the House in modified form, applied to organizations which in any quarter spent $1250 to retain outside lobbyists or employed one person who spent at least 20% of his time in lobbying activities.

Early in the first session of the Ninety-fifth Congress, supporters of disclosure reform in both Houses introduced bills similar to those passed in 1976. Peter Rodino, Chairman of the House Judiciary Committee, reintroduced H.R. 15 as H.R. 1180, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings, supra* note 3, at 2 (text as introduced by Rep. Rodino) [hereinafter cited as H.R. 1180]. After several rounds of hearings and mark-up sessions, H.R. 1180 was submitted to the full House as H.R. 8494, 95th Cong., 2d Sess. (1978), *reprinted in* H. Rep. No. 95-1003, *supra* note 3, at 1 (text as reported out by Judiciary Committee) [hereinafter cited as H.R. 8494]. H.R. 8494 retained most of the elements of the Railsback-Kastenmeier proposal, but it did not extend to lobbying solicita-

test and would impose disclosure requirements upon any organization that exceeded certain thresholds of direct lobbying activity.[35] Second, the proposals would set relatively low thresholds.[36]

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tion. A series of amendments on the floor further weakened the bill by raising the threshold level and enlarging the exemptions. The bill as amended won full House approval in April 1978. 124 CONG. REC. H3269, 95th Cong., 2d Sess. (daily ed. April 26, 1978).

In addition to H.R. 1180 and H.R. 8494, several other lobbying reform bills were introduced in the House in the Ninety-fifth Congress, but none of these was voted out of committee. Of importance to the discussion in this Note are the following: H.R. 5795, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings, supra* note 3, at 27 (text as introduced by Reps. Railsback and Kastenmeier) [hereinafter cited as H.R. 5795]; H.R. 5578, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings, supra* note 3, at 51 (text as introduced by Rep. Edwards) [hereinafter cited as H.R. 5578]; H.R. 6202, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings, supra* note 3, at 511 (text as introduced by Rep. Kindness) [hereinafter cited as H.R. 6202].

In the Senate, Senators Kennedy and Stafford made several significant changes in S. 2477 before reintroducing it as S. 1785, 95th Cong., 1st Sess. (1977), 123 CONG. REC. S11109 (daily ed. June 29, 1977) (text as introduced by Sens. Kennedy and Stafford) [hereinafter cited as S. 1785]. In addition, Senators Mathias and Muskie sponsored S. 2026, 95th Cong., 1st Sess. (1977), *reprinted in 1978 Senate Hearings, supra* note 1, at 363 (text as introduced by Sens. Mathias and Muskie) [hereinafter cited as S. 2026]. The Governmental Affairs Committee held hearings in both sessions but was unable to report out a clean bill. For a discussion of the history of the proposals during the Ninety-fifth Congress, *see Committee Approves Lobby Disclosure Bill,* 36 CONG. Q. WEEKLY REP. 530-31 (1978); *Outlook Dim for Lobby Bill Tougher than the One House Is To Consider,* 36 CONG. Q. WEEKLY REP. 620 (1978); *Lobby Disclosure Bill Near Death,* 36 CONG. Q. WEEKLY REP. 1918 (1978).

Action continues to be stronger in the House than in the Senate in the Ninety-sixth Congress. Congressman Rodino has introduced H.R. 81, 96th Cong., 1st Sess. (1979), which is identical to the committee version of H.R. 8494. After additional hearings and mark-up, a clean bill, H.R. 4395, 96th Cong., 1st Sess. (1979), *reprinted in* H.R. REP. NO. 96-590, *supra* note 4, at 1-10 (text as reported out by Judiciary Committee) [hereinafter cited as H.R. 4395], was reported out by the House Judiciary Committee. H.R. 4395 adopts thresholds similar to H.R. 81 and does not extend to lobbying solicitation. Floor action is currently pending, 37 CONG. Q. WEEKLY REP. 2883 (1979). The Senate has been slower to act, preferring to let the House take the lead. Senator Lawton Chiles has introduced S. 1564, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S10466 (daily ed. July 24, 1979) (text as introduced by Sen. Chiles) [hereinafter cited as S. 1564], which is procedurally similar to H.R. 4395 but which sets significantly lower expenditure levels for triggering the disclosure requirements. After a series of hearings before the Government Operations Committee, Chiles introduced a new bill, S.2160, 96th Cong., 1st Sess. (1979). *See Players on Lobbying Disclosure Bill Lining Up for Rematch,* 37 CONG. Q. WEEKLY REP. 188 (1979); *Favorable Action on Lobby Disclosure Appears to be More Likely This Session,* 37 CONG. Q. WEEKLY REP. 818 (1979); *House Subcommittee Votes Lobby Disclosure Measure,* 37 CONG. Q. WEEKLY REP. 1134 (1979).

35 *See, e.g.,* S. 1564 § 4; H.R. 4395 § 3.

36 For example, H.R. 4395 applies to organizations that either (1) spend more than $5,000 per quarter in retaining a lobbyist and in preparing lobbying communications or (2) employ at least one individual who spends at least part of 13 days per quarter in making lobbying communications and spends more than $5,000 on lobbying communications. H.R. 4395 § 3(a). H.R. 8494 had used $2500 rather than $5000 as the expenditure minimum. H.R. 8494 § 3(a). S. 1564 sets considerably lower thresholds, requiring registration and reporting by any organization which spends in excess of $500 per quarter on lobbying activities. S. 1564 § 4(a). Otherwise, the criteria for the appreciation of S. 1564, set forth in § 4(a), parallel those of § 3(a) of H.R. 4395.

1. Status Test vs. Activity Test

The first problem confronting the drafters of new lobbying legislation is to determine which lobbying organizations and activities will be covered by the legislation. As a preliminary matter, this determination should be clearly and concisely set forth so that lobbyists, would-be lobbyists, regulators, and the courts can readily determine when the legislation applies.

One possible formulation of the term "lobbyist" embodies a status test. A status test determines the applicability of the statute to an organization in terms of one or more characteristics which tend to be constant and easily ascertainable. The principal purpose test of the 1946 Act[37] is an example of a status test.

A clearly formulated status test has the advantage of simplicity and can thus be applied with certainty; an organization can determine with relative ease whether it meets the criteria for being classified a lobbyist under a statute employing a status test. The disadvantage of a status test is that the legislative intent behind a statute incorporating such a test can easily be thwarted. The same specific characteristics typically set out in a status test which facilitate its application also serve as a guide to those who wish to evade the reach of the statute. By careful restructuring, an organization that conducts significant lobbying activities can avoid qualifying as a lobbyist. Under the 1946 Act, for example, an organization can avoid complying with the disclosure requirements by ensuring that lobbying is not its principal purpose.[38] The desire to discard the principal purpose test and to compel all significant lobbyists to disclose their activities has justifiably led reformers to reject a status definition in favor of a new approach.[39]

In contrast to existing law, the reform proposals uniformly adopt an activity test. Under this test, an organization which does

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37 For a discussion of the principal purpose test, *see* text accompanying notes 23 to 25 *supra*.

38 The Supreme Court in United States v. Harriss, 347 U.S. 612 (1954), defined "principal" purpose as a "substantial" purpose, *id.* at 622, so that presumably an organization could qualify as a lobbyist if it did a significant amount of lobbying, even if its primary purpose was not lobbying. The Court gave no guidelines, however, as to what makes a purpose "substantial" as opposed to "principal," and lobbyists have generally understood the Act to require that lobbying be the organization's primary purpose.

39 *See* S. REP. No. 94-763, *supra* note 3, at 11; H.R. REP. No. 95-1003, *supra* note 3, at 13.

more than a threshold amount of lobbying in any reporting period qualifies as a lobbyist and must register and report its activities.[40] In identifying those lobbying activities that are to be covered by the legislation, current proposals rely on the concept of a "lobbying communication" as the core element in triggering application of the disclosure requirements. A lobbying communication is defined broadly as "an oral or written communication directed to a member, officer or employee of the Congress to influence an issue before the Congress . . . ."[41] In other words, a lobbying communication is any form of communication with Congress that may be viewed reasonably as an attempt to affect the disposition of any pending or proposed matter.[42] As the core of the current proposals, the lobbying communication concept is far more inclusive than the principal purpose test, and it works a considerable expansion of the applicability of the disclosure requirements.

2. Thresholds

The effectiveness of an activity test rests in large part upon the selection of an appropriate threshold activity at which to invoke

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40 *See, e.g.*, S. 1564 § 4; H.R. 4395 § 3.

41 S. 2026 § 3(8). Essentially the same definition is found in the other bills. *See, e.g.*, H.R. 4395 § 2(9) ("an oral or written communication directed to a Federal officer or employee to influence the content or disposition of any bill, resolution, or treaty which has been transmitted to or introduced in either House of Congress, any report of a committee of Congress, any nomination submitted to the House of Representatives or the Senate, or any hearing or investigation being conducted by the Congress or any committee or subcommittee thereof ..."); S. 1564 § 3(8). H.R. 15 contained no definition, although lobbying communication was as central a concept in the application of this bill as in the other bills. H.R. 15 § 3.

42 Lobbying communications should cover person-to-person contacts, telephone conversations, letters, or other communications of some substance. *See, e.g.*, S. REP. 94-76, *supra* note 3, at 21: "Either brief encounters or social communications which do not involve a discussion of an issue before Congress are not included. On the other hand, a conversation is a lobbying communication no matter how brief, if it seeks to influence an issue before Congress. The term is intended to include conversations that in time and in content constitute a single logical whole."

Although some bills, *e.g.*, S. 2477 § 3(e) and H.R. 6202 § 2(8), define lobbying communication as a "communication ... intended to influence an issue," proof of "actual subjective intent" should not be required. Rather, the definition should turn on a reasonable conclusion about the objective appearance of the communication. S. REP. No. 94-763, *supra* note 3, at 20. *See* S. 2026 § 3(6), H.R. 5578 § 3(7), and S. 2477 § 15(11) for the definition of "to influence." For the definition of "issue before the Congress," *see, e.g.*, H.R. 5795 § 2(8); S. 2477 § 15(12). H.R. 4395 and S. 1564 describe with greater particularity the relevant object of the communication, requiring that the matter be formally before the Congress. H.R. 4395 § 2(9); S. 1564 § 3(8).

the statute's disclosure and reporting requirements. Although the proposals contain various kinds of thresholds for determining when an organization qualifies as a lobbyist, all of the proposals use an expenditure threshold for organizations that retain outside lobbyists.[43] When an organization spends greater than a certain amount — from $500 to $5000 in the current proposals[44] — in retaining an outside lobbyist in preparing the lobbyist's communications, it must register and report.[45]

For lobbying activities by an organization's own employees, the proposals offer three different threshold measures: number of lobbying contacts,[46] number of employees spending a specified amount of time lobbying,[47] and a combination of employees'-time-spent and expenditures.[48] Differences in the kinds of thresholds adopted by the House and by the Senate in 1976 were partly responsible for the failure of the conference committee to work out an acceptable version of reform legislation.[49] All of the major proposals discussed in the Ninety-fifth and Ninety-sixth Congresses, however, contain more than one type of threshold measure.[50]

With general agreement in Congress on the nature of the threshold requirements, the major obstacle to effective thresholds has been overcome. Congressional debate over the level at which thresholds are to be set,[51] though important for the reasons

43 *See, e.g.*, H.R. 4395 § 3(a)(1) ($5000); S. 1564 § 4(a)(1) ($500); H.R. 8494 § 3(a)(1) ($2500); H.R. 5795 § 3(a)(1) ($1250); S. 1785 § 4(a)(1) ($1250); S. 2026 § 4(a)(1) ($2500).

44 *See* note 43 *supra*.

45 *See* H.R. 4395 §§ 3-6; S. 1564 §§ 4-7.

46 *See, e.g.*, H.R. 6202 § 3(a)(2) (12 contacts); S. 2477 § 3(a)(2) (12 contacts); S. 1785 §§ 4(a), 6(a) (15 contacts — short-form threshold only).

47 *See, e.g.*, S. 1785 § 4(b)(2) (one employee who lobbies 24 hours or 2 employees who lobby 12 hours each); H.R. 5795 § 3(a)(2) (one employee who lobbies 30 hours or two employees who lobby 15 hours each).

48 H.R. 4395 § 3(a)(2) ($5000 and one employee who lobbies on 13 days or two employees who lobby on seven days per quarter); S. 1564 § 4(a)(2) ($500 and one employee who lobbies on 13 days or two employees who lobbying on seven days); H.R. 5578 § 4(a)(2) ($2500) and one employee who lobbies 20% of his time); S. 2026 § 4(b) ($2500 and one employee who lobbies eight hours per week).

49 S. 2477 used a contacts threshold, § 3(a)(2); H.R. 15 used an expenditures and employees'-time-spent threshold, § 3(a)(1), (2). Rep. Railsback rejects the contacts measure "because I think that contacts alone do not necessarily mean that people who would be affected by lobbying reform legislation [with a contacts threshold] are professionals." *1977 House Hearings, supra* note 3, at 80.

50 *See, e.g.*, H.R. 4395 § 3(a); S. 1566 § 4(a); S. 1785 § 4(b); H.R. 8494 § 3(a).

51 *See, e.g., Committee Approves Lobby Disclosure Bill*, 36 CONG. Q. WEEKLY REP. 530 (1978) (major debate in the Judiciary Committee was over thresholds).

discussed below, has thus been more extensive than the practical consequences of that decision justify. The quibbling over the threshold level stands less as a discussion of vital constitutional and policy issues than as an effort to delay or impede the enactment of *any* threshold level or of any reform legislation at all.[52]

Two goals underlie the search for an appropriate threshold under the activity test. First, the threshold level should be drawn so as to require registration and reporting from only those lobbying organizations which the drafters intend to subject to the disclosure provisions. The goal is to set thresholds low enough to include significant lobbyists within the scope of the statute, yet high enough to exclude groups that cannot have a substantial impact on congressional decisionmaking and for whom the disclosure and reporting requirements might impose severe hardship.[53]

Second, the threshold should minimize the amount of unnecessary recordkeeping. An inherent feature of an activity test is that some organizations may not be able to determine until the last day of any reporting period whether they will spend sufficient time or money on lobbying to cross the threshold level. Large lobbying organizations can easily estimate that they will cross the activity theshold by the end of the reporting period. Those organizations will keep the necessary records in anticipation of compelled disclosure. A small lobbying organization, on the other hand, may not be able to estimate accurately whether it will cross the activity threshold. Despite a substantial likelihood that such an organization will not break the threshold level, the practical effect of a threshold that is drawn too low will be to force small lobbying organizations to maintain the records required for disclosure even when they were not required to do so. Thus, in adopting an activity test to avoid the practical problems of the principal purpose test, the reform proposals may create their own uncertainty and

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52 Although S. 1564 used an unusually low threshold ($500), S. 2160 adopts a level similar to that in the House, indicating that a general consensus seems to have been reached. *See* note 89 *supra.*

53 *See 1977 House Hearings, supra* note 3, at 128-30 (statement on behalf of Common Cause); *1978 Senate Hearings, supra* note 3, at 11 (statement of Ass't Att'y Gen. Wald). Many congressmen have concluded that the way to strike a proper balance is to devise thresholds that effectively cover "professionals." *See, e.g., 1977 House Hearings, supra* note 3, at 80 (testimony of Rep. Railsback).

may lead some groups to maintain records unnecessarily. Such results might prove highly unpopular and might ultimately undermine congressional support for a disclosure statute.

A solution to the problem of unnecessary recordkeeping is provided by the two-tier reporting system, which employs two activity thresholds and was contained in a 1977 Senate proposal. The lower threshold is drawn to include small groups engaged in minor lobbying. Breaking this low level invokes short-form filing requirements. The higher threshold level is drawn to include only those organizations engaged in a substantial lobbying effort. Surpassing this higher level invokes long-form filing requirements.[54]

In theory, the two-tier system offers an effective solution. While it covers virtually all lobbyists who could exert any significant influence on congressional decisions, it minimizes the problems created when small groups are forced to comply with extensive disclosure requirements. To be sure, the system does not fully eliminate the problem of unnecessary recordkeeping; organizations which have passed the lower threshold may need to maintain more complete records as they approach the higher threshold. On the other hand, only those organizations with adequate resources to comply with the long-form recordkeeping requirements will, in theory, surpass the lower threshold. At the same time, the better two-tier system would employ a lower threshold than would normally be employed in the absence of the two-tier system; the higher threshold would be set somewhat higher than it would be if only one threshold were employed.[55] When the two tiers are close

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54 This is the scheme employed in the Kennedy-Stafford proposal, S. 1785. Any organization that makes over 15 lobbying contacts in a quarter, § 4(a), is required to file abbreviated reports pursuant to § 6 unless the organization exceeds the expenditure and time-spent-lobbying threshold, § 4(b), in which case full reports must be filed pursuant to § 7. The Chiles proposal currently before the Senate, S. 1564, has, unfortunately, abandoned the two-tier technique.

55 The thresholds in the Kennedy-Stafford bill, S. 1785, did not adequately reflect the proposition that the lower threshold level should serve as a fine-tuning mechanism that eliminates undue pressures on organizations with inadequate resources to maintain the detailed records of the second tier. In the Kennedy-Stafford bill, the short-form threshold is higher than the single threshold adopted by the Senate in 1976, and the long-form threshold is lower than the single threshold considered by the House in 1978. *Compare* S. 1785 § 4(a) (15 contacts) *with* S. 2477 § 3(a)(2) (12 contacts); *compare* S. 1785 § 4(b)(2) (one employee who lobbies 24 hours or two employees who lobby 12 hours each) *with* H.R. 4395 § 3(a)(2) ($5000 and one employee who lobbies 13 days or two employees who lobby seven days each).

together the advantage gained by the use of the two-tier system is reduced.

Thus, a two-tier system represents the most effective activity test of those which have been proposed. It would appear to overcome the weaknesses of the principal purpose test and cover the major lobbying efforts which influence congressional decisions. By employing distinct lower and higher thresholds it will eliminate most of the objections to the recordkeeping and reporting requirements, while furthering the statute's broader objective of providing for disclosure of all significant lobbying activity.[56]

B. *Constitutional Constraints*

1. The Constitutional Problem

In responding to the weaknesses of current federal lobbying legislation, the reform proposals of the Ninety-sixth Congress would extend disclosure beyond the limits of the 1946 Act and its interpretation in *United States v. Harriss.*[57] Since the *Harriss* court read the 1946 Act narrowly to avoid holding it unconstitutional,[58] the proposed bills extending the Act could encounter constitutional challenge.

Two separate aspects of the new legislation may impose burdens on the exercise of the First Amendment rights of free speech, petition, and association. The disclosure provisions themselves provide the first burdens. By requiring that contributors' names and amounts be disclosed,[59] the proposals would open up to public view heretofore private associations. The possibility of such disclosure could inhibit a person from associating with an organization that advocates an unpopular cause. Similarly, by requiring that the subject matter of lobbying communications be revealed,[60] the current bills may inhibit the free flow of ideas on

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56 Under the two-tier system, the "raise-the-threshold" solution to the unnecessary recordkeeping problem entails less of a sacrifice of regulatory effectiveness than does a single-threshold system. Lobbyists who fall just under the higher threshold in the two-tier system still must file the short form. In contrast, lobbyists who fall just under the raised threshold in a single-threshold system do not report at all.

57 347 U.S. 612 (1947); *see* notes 16 to 22 and accompanying text *supra.*

58 347 U.S. at 623-26.

59 *See, e.g.,* H.R. 5795 § 4(b)(3). The current House version, H.R. 4395, has abandoned this disclosure requirement, § 6.

60 *See, e.g.,* H.R. 4395 § 6(b)(6).

public issues, especially those which are sensitive, and may cause concerned individuals to refrain from expressing their views to their elected representatives.

The second possible infringement of First Amendment rights results from the recordkeeping and reporting obligations imposed by the bills. For an organization that is small or poorly funded, these duties may place a severe strain on the group's ability to pursue its interests in the political arena. Unable to comply with the legislation's requirements without considerable hardship, such an organization may simply forego its right to contact government officials.[61]

An examination of the constitutional issues raised by disclosure of direct lobbying must rest in large part upon two authorities: the 1954 Supreme Court decision in *Harriss,* which upheld the current disclosure provisions, and the 1976 decision of the Court in *Buckley v. Valeo,*[62] which considered the constitutionality of the Federal Election Campaign Act of 1971, as amended up to 1974.[63] Since the reporting and disclosure requirements of the Federal Election Campaign Act are similar to those of the proposed lobbying disclosure legislation, and since the two acts touch identical First Amendment rights in serving similar government interests, a constitutional discussion must rely heavily upon the *Buckley* decision.[64]

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61 In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Court stated that the free speech protections of the First Amendment extended to business corporations and other artificial entities even where the speech does not pertain directly to the corporation's business interests. *Id.* at 778-86. To the extent that recordkeeping burdens prohibit an organization from lobbying, those impositions also infringe individual association for the purpose of expressing viewpoints to decisionmakers.

62 424 U.S. 1 (1976) (per curiam).

63 Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C.), *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.) [hereinafter cited as 1974 Campaign Act]. The Act was amended again in 1976 and 1980. *See* Campaign Act, *supra* note 1.

64 The basic lobbying disclosure requirement itself was sustained in *Harriss* but the principal purpose test imposed by the Court, *see* text accompanying note 19 *supra,* probably means that *Harriss* is not controlling in the expanded areas of disclosure. This Note assumes that a court, in judging the constitutionality of the proposed legislation, would rely upon *Buckley.* It is not inconceivable, however, that a court would conclude that the governmental interests which justify disclosure in a political campaign have a different weight than those which justify a lobbying disclosure law. In view of the Court's recognition of the importance of disclosing lobbying, *see, e.g.,* United States v. Harriss, 347 U.S. at 625, it is more likely that a court would stress the similarities rather than the differences between the governmental interests in regulating the two areas.

While *Harriss* and *Buckley* are the most direct precedents, the Supreme Court has recognized generally that the compelled disclosure of information about an organization's participants may seriously infringe a right of association protected by the First Amendment.[65] Observing that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[66] the Court has found a vital connection between the ability to associate and the effective expression of ideas. Accordingly, the Court has held that the First Amendment protects the right of association.[67] At the same time, the Court has noted that compelled disclosure of information about the participants of a group or association may subject unpopular groups or causes and their supporters to ostracism and recrimination.[68] Thus compelled disclosure may itself be a restriction on freedom of association and, concomitantly, of free speech and petition.

Yet the Court has recognized that there exist some government interests sufficient to justify those intrusions upon rights of association and speech.[69] Nevertheless, it is only when a govern-

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65 Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (upholding temporary injunction which restrained enforcement of a statute requiring certain non-profit organizations to file membership lists); Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating Arkansas statute which compelled teachers to disclose all of their organizational affiliations within the preceding five years); Talley v. California, 362 U.S. 60 (1960) (reversing conviction based on ordinance banning the distribution of hand bills that did not carry the name and address of the author, printer, and sponsor); Bates v. City of Little Rock, 361 U.S. 516 (1960) (overturning conviction under municipal ordinance which required organizations operating within the municipality to file financial statements showing the names of all their contributors as an incident of a license tax on persons engaging in business within municipal limits); NAACP v. Alabama, 357 U.S. 449 (1958) (reversing civil contempt judgment against the NAACP for refusing to disclose its membership list); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1953) (rejecting effort of Florida legislature to obtain local NAACP membership lists in connection with investigation of Communist activities).

66 NAACP v. Alabama, 357 U.S. 449, 460 (1958).

67 Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) ("freedom of association is a 'basic constitutional freedom' ... that is 'closely allied to freedom of speech and [is] a right which, like free speech, lies at the foundation of a free society' "); *see also* Elrod v. Burns, 427 U.S. 347 (1976); Cousins v. Wigoda, 419 U.S. 477 (1975); Kusper v. Pontikes, 414 U.S. 51 (1973); NAACP v. Button, 371 U.S. 415 (1963).

68 In *Buckley,* the Court asserted that public disclosure of contributors "may ... expose contributors to harassment or retaliation." 424 U.S. at 68. The Court has not drawn a distinction between disclosure of membership lists and disclosure of contributors. *Id.* at 66.

69 *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

Professor Tribe's analysis of the Supreme Court decisions in the First Amendment area

ment interest is compelling that the Supreme Court has upheld such an infringement.[70] In addition, the Court has established requirements to govern the means chosen to further the government interest: (1) a substantial relation must exist between the government interest asserted and the means chosen to further that interest;[71] (2) there must be no less restrictive alternative means of

employs a "two track" model. In track one, government action is directly aimed at the "communicative impact" of free speech. The Court, in considering track one infringements, will hold the regulation unconstitutional "unless the government shows that the message being suppressed poses a 'clear and present danger,' constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 582 (1977). Government action in track two is aimed at the "noncommunicative impact" of an act and thus only indirectly infringes protected communication. In this track, the Court strikes a balance between the values of freedom of expression and the government's interests in regulating the activity, with the Court upholding the regulation "so long as it does not unduly constrict the flow of information and ideas." *Id.* Lobbying disclosure legislation, of course, presents the possibility of an indirect infringement of First Amendment rights.

Tribe's two-track analysis provides a useful tool in analyzing the distinctions between direct and indirect infringements. Unfortunately, the Supreme Court has not employed the technique with the clarity that Tribe suggests. Tribe notes that in track one, the Court will require the showing of a compelling state interest and will insist that there be a close nexus between ends and means through a statute which is narrowly drawn. Yet the Court has often adopted a similar tests in the context of track two infringements. *See, e.g.,* Nixon v. Administrator of Gen'l Services, 433 U.S. 425 (1977); Elrod v. Burns, 427 U.S. 347 (1976); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Shelton v. Tucker, 364 U.S. 479 (1960). At the same time, the balancing test Tribe stresses in the track two context emerges, at least implicitly, in the Court's track one decisions. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). Indeed, balancing is the test employed by the Court in either track. In cases of indirect infringement, the Court goes through much of the analysis for direct restraint but ultimately balances the state's asserted interest against the degree of infringement. The real difference between direct and indirect cases rests in the relative weight which, implicitly at least, the Court assigns to the First Amendment right and to the government interest. *See, e.g.,* Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467-68 (the First Amendment claim "is clearly outweighed by the important governmental interests promoted by the Act"); Elrod v. Burns, 427 U.S. 347, 362 (1976) (the "gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights").

70 *See, e.g.,* Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467 (1977) ("compelling public need"); Elrod v. Burns, 427 U.S. 347, 362 (1976) (interest advanced must be "paramount" and of "vital importance"); Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) (infringement cannot be justified by "mere showing of some legitimate governmental interest"); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (state may prevail "only upon showing a subordinating interest which is compelling"); *see also* Sweezey v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring).

71 *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 546 (1963); Shelton v. Tucker, 364 U.S. 474, 485 (1960); Bates v. City of Litte Rock, 361 U.S. 516, 525 (1960); NAACP v. Alabama, 357 U.S. 449, 464-65 (1958). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789-90 (1978) (no showing of significant corporate influence over state referenda to justify means of protecting electoral process).

furthering the government's interest,[72] or, alternatively, the reach of the means must not be overbroad.[73]

2. The Government Interest in Lobbying Reform

The decisions in *Harriss* and *Buckley* illustrate the analysis which the Court has employed in considering cases of First Amendment infringement. In those decisions, the Court rejected constitutional challenges to disclosure requirements where the asserted government interests involved the protection of the political process. Upholding the current lobbying disclosure law through a narrow reading of the Act, the *Harriss* Court validated the strong government interest in helping elected representatives evaluate the pressures to which they are subjected.[74] It found this "vital national interest"[75] sufficient to offset any possible indirect

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72 *See, e.g.,* Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 185 (1979); Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467 (1977); Elrod v. Burns, 427 U.S. 347, 363 (1976): NAACP v. Button, 371 U.S. 415, 433 (1963); Shelton v. Tucker, 364 U.S. 479, 493 (1960); *see also* Kusper v. Pontikes, 414 U.S. 51, 59 (1973) and Dunn v. Blumstein, 405 U.S. 330, 353 (1972), involving a similar standard in a case of direct infringement.

73 *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 68-74 (1976) (per curiam). There is no clear distinction between least restrictive means and overbreadth analyses. Frequently, the Court seems to be discussing the same consideration while using different language. *But see* discussion in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 710-24 (1977). Professor Tribe cogently explains the overbreadth doctrine as follows: "overbreadth analysis ordinarily compares the *statutory* line defining burdened and unburdened conduct with the *judicial* line specifying activities protected and unprotected by the first amendment; if the statutory line includes conduct which the judicial line protects, the statute is overbroad." *Id.* at 710. Yet such an examination is, in effect, a consideration of whether the statute is drafted in the least restrictive way. *See id.* at 712; Broadrick v. Oklahoma, 413 U.S. 601 (1973). *See also* Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969); Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970). Furthermore, several recent decisions indicate that the Court is reducing the importance of the overbreadth analysis, *see, e.g.,* Buckley v. Valeo, 424 U.S. 1 and Broadrick v. Oklahoma, 413 U.S. 601, while retaining some vitality in the least restrictive means test, *see, e.g.,* Nixon v. Administrator of Gen'l Services, 433 U.S. 425 (1977) (dicta); Kusper v. Pontikes, 414 U.S. 51 (1973).

74 347 U.S. at 625-26. The Court stated:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.

Id. at 625.

75 *Id.* at 626.

First Amendment infringement resulting from the statute. In *Buckley,* the Court examined the constitutionality of Federal Election Campaign Act requirements which compelled disclosure of the names and addresses of contributors to political parties.[76] The Court acknowledged that these requirements could burden the right of association, but it held that the infringement was outweighed by three government interests that the requirements furthered:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office . . . .
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . .
>
> Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations . . . .[77]

New lobbying disclosure legislation furthers similar government interests and advances related interests which the Court has recognized in other contexts. First, the reporting and disclosure provisions foster a strong government interest in enabling representatives to make more rational decisions in the public interest. Helping legislators separate private pressure from the public interest is, as *Harriss* noted, necessary for "full realization of the American ideal of government by elected representatives."[78] Similarly, *Harriss*'s acceptance of the government's interest in disclosing "who is being hired, who is putting up the money, and how much,"[79] parallels *Buckley*'s emphasis on the electorate's need to know "where political campaign money comes from and how it is spent."[80] In essence, lobbying disclosure serves both functions. While it helps legislators decide issues, it also facilitates the public's evaluation of its representatives, enabling the public to

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76 424 U.S. at 60-68.
77 *Id.* at 66-68.
78 347 U.S. at 625.
79 *Id.*
80 424 U.S. at 66.

examine political decisions in light of the efforts made to influence those decisions.

Second, lobbying disclosure advances a strong government interest in avoiding corruption or the appearance of corruption in the processes of government.[81] Lobbying disclosure, like the campaign contribution disclosure, may "discourage those who would use money for improper purposes."[82] At the same time, the exposure provided by the legislation would tend to remove even the appearance of impropriety in efforts to affect government decisions.

A third interest, preserving the individual citizen's confidence in government, also emerges from the reporting and disclosure requirements. In a challenge to the Hatch Act's prohibition against active involvement by federal employees in political campaigns,[83] the Supreme Court noted the importance of public confidence in the system of representative government and found this a sufficiently important government interest to help offset the First Amendment infringement inherent in the Hatch Act's limitations.[84]

Finally, the lobbying reform legislation furthers a more general, often recognized, interest in protecting the effective functioning of government processes. In a sense, this interest is simply a composite of the others, raised to a higher level of generality. Maintaining public confidence, preserving the processes of government from corruption, enabling the electorate better to evaluate the performances of their representatives, and assisting those representatives in sorting out the myriad pressures to which they are subject — each a legitimate interest in its own right — combine in this much more fundamental object of government concern. In a variety of contexts the Court has validated the legitimacy of this

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81 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973); United States v. Harriss, 347 U.S. 612 (1954); Burroughs & Cannon v. United States, 290 U.S. 534 (1934).

82 Buckley v. Valeo, 424 U.S. at 67.

83 5 U.S.C. § 7324(a) (1976).

84 United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978) (dicta).

justification for government encroachment on First Amendment rights.[85]

85 The power of Congress or the states to protect the integrity of governmental processes has been recognized in a variety of contexts. In Burroughs & Cannon v. United States, 290 U.S. 534 (1934) (upholding Federal Corrupt Practices Act), the Court cited the vital character of the election of the President to the political system and upheld Congress' power to regulate such an election. There the Court asserted that Congress possessed the "power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or corruption." *Id.* at 545. Likewise, in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961), the Court acknowledged the existence of a compelling interest in protecting the "free functioning of our national institutions." *Id.* at 97.

In United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947), the Court upheld the Hatch Act's restrictions on the political activities of government employees, stating that Congress has the power to "protect a democratic society against the supposed evil of political partisanship by classified employees of government." *Id.* at 96. Moreover, "[t]o declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system." *Id.* at 99. The Court "unhesitatingly" affirmed *Mitchell* in United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973). In Elrod v. Burns, 427 U.S. 347 (1976), the Court, while rejecting the state's claim that patronage dismissals are crucial to the health of the two-party system, acknowledged that "[p]reservation of the democratic process is certainly an interest protection of which may in some instance justify limitations of First Amendment freedoms." *Id.* at 368. *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 (1978) (dicta); Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467 (1977), *quoting* Communist Party v. Subversive Activities Control Bd., 367 U.S. at 97; Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam); United States v. Harriss, 347 U.S. 612, 625-26 (1954).

On the other hand, the Court has been reluctant to find a sufficiently important state interest in areas relating to other political matters. Cousins v. Wigoda, 419 U.S. 477, 487-91 (1975) (rejecting state action to protect electoral process where that action conflicted with right of political association as expressed in procedures of the national Democratic party for the selection of convention delegates); Kusper v. Pontikes, 414 U.S. 51, 56-61 (1973) (rejecting, on least drastic means grounds, state interest in preventing political "raiding" by means of an election statute which prohibited a person from voting in the primary of a political party if he had voted in the primary of any other party within the preceding 23 months); Williams v. Rhodes, 393 U.S. 23, 31-33 (1968) (finding no compelling state interest in election law which requires a new party to obtain petitions signed by qualified electors totalling 15 percent of the number of ballots cast in the preceding gubernatorial election); NAACP v. Button, 371 U.S. 415, 438-44 (1963) (state interest in regulating traditionally illegal practices of barratry, maintenance, and champerty does not justify statute which prevented organizations from soliciting where, in the context of NAACP objectives, litigation is a form of protected political expression).

In a number of cases involving interrelated equal protection and First Amendment challenges to state election laws, the Court has acknowledged a strong state interest in protecting the integrity of the political system. *See, e.g.,* Storer v. Brown, 415 U.S. 724 (1974) (upholding state restrictions on rights of independent candidates to be on the ballot as a means of maintaining the integrity of various routes to the ballot); American Party of Texas v. White, 415 U.S. 767 (1974) (disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot positions for its candidates for the same offices is permissible means of furthering state interest in insuring integrity of the nominating process); Rosario v. Rockefeller, 410 U.S. 752 (1973) (state has interest in preventing interparty "raiding" to preserve the integrity of the electoral process); Tennessee v. Fortson, 403 U.S. 431 (1971) (state has interest in regulating the number of candidates on the ballot and in protecting its political processes from frivolous or fraudulent

3. The Means Available to Proponents of Lobbying Reform

The Court's First Amendment decisions have required more than the mere existence of a strong government interest to offset the infringement of protected rights. Rather, they have required that the means selected to further those interests bear a "substantial relation"[86] to the interest and that the means selected be the least restrictive method of carrying out the government's asserted justification.[87] Thus in *Bates v. Little Rock,*[88] for example, the Court accepted the state's asserted interest in imposing occupational license taxes, but the Court found that the state's means, a requirement that NAACP membership lists be disclosed, lacked any substantial relation to the state's legitimate goal. Similarly, in *Kusper v. Pontikes,*[89] the Court acknowledged a legitimate state interest in preventing "raiding" of one political party by another, but found that the device the state employed to prevent raiding was not the least "drastic" means of doing so.[90]

Once again, the analysis adopted by the Court in *Buckley* is closely analogous to that which the Court should employ for lobbying. In *Buckley,* the Court found a "substantial relation" between the government interest and the information required to be disclosed.[91] Because of the close similarity between the interests and disclosures at issue in *Buckley* and those present in lobbying legislation, the reasoning and conclusions of the Court in *Buckley* have compelling force in the lobbying context.

By its very nature, the means employed by the proposed statutes — disclosure — diminish the danger of secret influence; such exposure makes it easier for legislators and decisionmakers to resist undue or unethical pressure directed toward potential government

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candidates). *But see* Labin v. White, 415 U.S. 709 (1974) (invalidating use of qualifying fee, without more, as means of pursuing legitimate interest in controlling the length of the ballot); Bullock v. Carter, 405 U.S. 134 (1972) (rejecting large filing fees as necessary for protecting integrity of political process); Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating state one-year residence requirement as unnecessary to achieve compelling state interest in preventing fraud in election process).

86 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

87 *See* note 73 and accompanying text *supra.*

88 361 U.S. 516, 524-25 (1960).

89 414 U.S. 51 (1973).

90 *Id.* at 61 (*Kusper* examined a *direct* infringement on first amendment rights).

91 424 U.S. at 64. The Court concluded that the disclosure requirements "directly serve substantial government interests." *Id.* at 68.

action.[92] Armed with the information disclosure provides, the legislator becomes better able to weigh the varying views designed to influence his decision and to act more rationally in the public interest.[93] Once these influences are exposed, the public also can weigh the pressures upon decisionmakers in light of the public's own standards of performance. Bringing these formerly secret influences to light affords the public an opportunity to appreciate more fully the constraints under which their officials work.[94] In this way, the disclosures permit the public to observe the forces that help shape the political process and offer the possibility that the public will regain some confidence in that process.[95]

Disclosure of lobbying activities is also the least restrictive means for pursuing the government's compelling interests in this area. It is important to note that the lobbying proposals in no way seek to limit or restrict lobbying — a much more drastic method of pursuing the government's goals.[96] Indeed, it seems that the technique of disclosure is the only way, short of direct limitation of lobbying activities, that lobbying can be protected yet opened to public view. Similar reasoning appears to have guided the *Buckley* Court, which noted in passing that the campaign contribution disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[97]

As a corollary to the "least restrictive means" inquiry, the

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92 *See 1977 House Hearings, supra* note 3, at 135 (statement of Common Cause).

93 *See* United States v. Harriss, 347 U.S. at 625.

94 *See, e.g.,* Fritz v. Gordon, 83 Wash. 2d 275, 517 P.2d 911 (1974) (upholding stringent state lobbying disclosure law). The Washington Supreme Court noted that disclosure provisions "may provide the electorate with a heretofore unavailable perspective regarding the role that money and financial influence play in government decision making." *Id.* at 310, 517 P.2d at 931.

95 *See, e.g., 1977 House Hearings, supra* note 3, at 284-85 (statement of Public Citizens Congress Watch); *id.* at 135 (statement of Common Cause); *1975 Standards of Official Conduct Hearings, supra* note 3, at 204-05 (statement of Rep. Winn).

96 None of the proposals imposes any limits on the amount of lobbying a lobbyist may do. The legislation thus differs from the California Political Reform Act of 1974 (passed by voter initiative June 4, 1974), CAL. GOV. CODE § 81000 *et seq.* (West 1976), which totally prohibited lobbyists from making campaign contributions to state candidates or elected officials. The California Supreme Court found this portion of the statute in violation of the first amendment right of association. The Court stated that the state means was not "closely drawn" to avoid unnecessary infringement. The Court did, however, uphold the statute's registration and reporting requirements. A petition for certiorari in the U.S. Supreme Court has been filed on the issue of contribution prohibition. California Fair Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 598 P.2d 46, 127 Cal. Rptr. 855 (1979), *petition for cert. filed,* 48 U.S.L.W. 3465 (Jan. 22, 1980).

97 424 U.S. at 68.

Court frequently subjects the state's technique to an overbreadth analysis.[98] This analysis seeks to ascertain whether the statute is sufficiently narrowly drawn to avoid undue restraints on the exercise of protected rights. The state's method, though in furtherance of a legitimate state end, may nevertheless reach too broadly, covering in its sweep the infringement of rights that are insufficiently related to the state's goal.[99]

The lobbying reform legislation employs a number of devices to restrict its sweep and limit its infringement of protected rights. The use of the two-tier threshold for triggering the reporting and disclosure requirements is a good example. As noted earlier,[100] the recordkeeping and reporting provisions could bring substantial harm to small organizations. Yet because these groups are small and their lobbying efforts are, presumably, likewise small, their impact on public decisions would also be limited. Consequently, the information gained from them would not go far in advancing the state's legitimate interest in disclosure. Should these groups be covered, the costs of infringement would probably not be outweighed by the benefits to be gained from the required recordkeeping and disclosure.

The *Buckley* Court rejected a somewhat similar overbreadth attack on campaign contribution disclosure requirements. There, the challengers asserted that the disclosure provisions were unconstitutionally overbroad in their application to minor parties and individuals "because the governmental interest in [the disclosed] information is minimal and the danger of significant infringement on First Amendment rights is greatly increased.[101] The Court, however, held that on the record before it "the substantial public interest in disclosure identified by the legislative history of the Act outweighs the harm generally alleged."[102]

The campaign law considered in *Buckley* required political committees to keep records for every contribution in excess of $10.[103] Furthermore, each individual or group that made contributions or

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98 *See* note 73 and accompanying text *supra.*

99 *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

100 *See* notes 53 to 61 and accompanying text *supra.*

101 424 U.S. at 69.

102 *Id.* at 72.

103. 1974 Campaign Act, *supra* note 63, § 302(b). The minimum level for recordkeeping is currently $50. 2 U.S.C. § 432 (b) (1976), *as amended by* 1974 Campaign Act, *supra* note 63.

expenditures over $100 in a calendar year was required to file a statement with the Federal Election Commission.[104] In challenging these provisions on overbreadth grounds, appellants asserted that the thresholds were set so low that only insignificant information would be disclosed and the amounts reported would be too low to have a corrupting influence.[105]

The Court found these assertions unpersuasive. It required only that the threshold levels established by Congress be rational to pass overbreadth scrutiny. Hesistant to encroach on the legislative power, the Court declined to interfere with the judgment of Congress in this complex legislative area.[106]

Given extensive congressional deliberations thus far in the area of lobbying reform, whatever threshold for triggering lobbying disclosure ultimately emerges in the final bill will almost certainly be demonstrably rational. Thus, any overbreadth challenge to that threshold is likely to fail.

The definition of lobbying communication also offers the possibility of an overbreadth challenge. If Congress were to require disclosure of all lobbying communications, the legislation could apply to areas of communication in which the government's interest in disclosure is not sufficiently strong to justify the infringement of First Amendment rights. Consequently, the various bills have fashioned a number of exemptions to strengthen the disclosure provisions against constitutional challenge and, as a matter of policy, to encourage communications which Congress feels are vital to its representative functions.

One exemption is common to all of the proposals: The statute would not apply to "a communication by an individual, acting solely on his own behalf, for redress of his personal grievances or to express his own personal opinion."[107] The constitutional problems raised by mandatory disclosure are potentially the greatest when disclosure extends to a private individual making a lobbying

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104 1974 Campaign Act, *supra* note 63, § 305. The minimum level for reporting was raised to $250 in 1980. Campaign Act, *supra* note 1, § 304(c) (to be codified as 2 U.S.C. § 434(c)).

105 424 U.S. at 82-83.

106 *Id. See also Buckley's* treatment of the overbreadth challenge to campaign contribution ceilings, *id.* at 29-30 (Congress' failure to engage in fine-tuning).

107 *See, e.g.*, H.R. 5578 § 3(9)(A); H.R. 4395 § 2(9(c).

communication on his own behalf. Both the danger of recrimination for the advocacy of private beliefs and the burdens of reporting and recordkeeping have their greatest "chilling" effect in the context of individual private lobbying. By exempting these communications, the statute significantly narrows its intrusion upon constitutional rights.[108] Moreover, this exemption leaves untouched the goals of lobbying disclosure, since the influence of a single individual acting solely on his own behalf is not, except in special circumstances, likely to be substantial.

Other exemptions narrowing the scope of the statute include contacts by organizations composed purely of volunteers;[109] communications made by the media as a part of regular press coverage;[110] political activities by national and state political parties[111] (which are already subject to disclosure under the Federal Election Campaign Act);[112] inquiries to congressmen that merely seek information and deal only with the existence or status of any issue;[113] communications between an organization and the elected representatives from the state in which the organization has its

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108 Of course, because of the interrelation of the rights of association and expression, coverage of groups may still infringe upon individual free speech, but such infringement is considerably more remote than in legislation that would cover individual lobbying per se. Extending the coverage to organizations still raises problems of First Amendment rights of association and the organizations' own First Amendment rights. *See* note 61 *supra.*

109 Most of the older proposals protected an organization composed purely of volunteers from being required to comply with the disclosure provisions by restricting the definition of an organization to a group "which has paid officers, directors or employees." *See, e.g.,* H.R. 5795 § 2(12); S. 1785 § 3(i); S. 2026 § 3(10)(a). *But see* S. 1564 § 3(9); H.R. 4395 § 2(10).

110 *See, e.g.,* H.R. 4395 § 2(9)(b). Communications which are paid advertisements in newspapers, periodicals, or radio and television broadcasts are not exempted, *id.; see* H. REP. No. 96-590, *supra* note 4, at 25.

111 *See, e.g.,* H.R. 8494 § 3(b); S. 1785 § 3(g)(3). H.R. 4395 expresses a broader exemption: "This Act shall not apply to practices or activities regulated by the Federal Election Campaign Act of 1971." H.R. 4395 § 3(b)(1). *See also id.* § 2(10)(A); S. 1564 § 3(9)(A). The exemptions dealing with political activities serve two functions. First, they prevent duplication of disclosure by organizations covered by the Federal Election Campaign Act. Second, they avoid a large-scale overhauling of the nature of the relationship between a political party and its members in Congress.

112 Campaign Act, *supra* note 1, §§ 302-304 (to be codified as 2 U.S.C. §§ 432-434).

113 *See, e.g.,* H.R. 4395 § 2(9)(D); S. 1564 § 3(8)(D). Although disclosure of lobbying communications from a congressman's home district is necessary to give the public a completely accurate picture of influence, a principal fear among drafters is that disclosure requirements would choke their lines of communications with constituents. *See* 122 CONG. REC. S9349 (daily ed. June 15, 1976) (remarks of Sens. Ribicoff and Percy). *But see id.* at S9349-50 (remarks of Sen. Hathaway).

principal place of business (the "home state" exemption);[114] communications made at the request of Congress or its representatives;[115] communications by employees of the executive branch, a federal agency, or corporation when those individuals are acting in their official capacities;[116] or communications by officials of state and local governments acting in their official capacities.[117] These exemptions exclude from the reach of the statute a number of forms of lobbying which most directly touch First Amendment rights. Together they restrict the sweep of the statute, narrowing its coverage and limiting its potential infringement on protected rights. At the same time, they do so without significantly impairing the underlying objectives of lobbying disclosure.

Lobbying disclosure legislation thus in all likelihood stands as a constitutionally permissible means of advancing the compelling state interests in the proper functioning of the government. The particular details of the statute's reach and operation raise policy issues, not constitutional ones.

III. Lobbying Solicitation

The rapid growth in the use of lobbying solicitation to influence legislation creates another set of difficulties for lobbying disclosure reform. Legislation that covers only the activities of direct lobbying — where the lobbying organization or individual directly contacts government officials — leaves untouched these important grass-roots and letter-writing lobbying campaigns. Expanding the reporting and disclosure provisions, however, raises significant constitutional and policy issues which are absent in a discussion of direct lobbying.

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114 At least one version of the legislation would exempt organizations having their principal place of business in a Standard Metropolitan Statistical Area within which a congressional district partially falls. *See* S. 1785 § 4(d). The principal versions currently before the House and the Senate extend the exemptions to any congressman from the state in which the organization has its principal place of business. H.R. 4395 § 2(9)(B); S. 1564 § 3(8)(D).

115 *See, e.g.*, H.R. 4395 § 2(9)(A). This exemption is necessary to protect the "informational gathering process of the Federal Government." H.R. Rep. No. 94-1475, *supra* note 3, at 22.

116 *See, e.g.*, H.R. 4395 § 2(10)(A); S. 1785 § 3(g)(1).

117 *See, e.g.*, H.R. 4395 § 2(10)(A); S. 1564 § 3(9)(A). Most of the proposals explicitly exclude from the exemption employees of a national association of state or local officials. *See, e.g.*, H.R. 4395 § 2(10)(A).

A. *Constitutional Issues*

Broadly drawn legislation covering solicitation efforts may adversely affect rights of association and free speech and the free discussion of ideas.[118] Advocates of unpopular issues or members of unpopular groups may be reluctant to press their case before the public if their identity must be disclosed. Rather than subjecting themselves to possible recrimination resulting from such exposure, they may simply forego their right to speak on public issues and abandon their efforts to persuade the public.

While the initial considerations in solicitation legislation parallel those in direct lobbying,[119] the wide sweep of a solicitation statute — encompassing contacts with members of the public as well as with government officials — presents much closer constitutional questions under the least restrictive means and overbreadth analyses. Language in *United States v. Harriss*[120] supports the constitutionality of requiring disclosure of lobbying solicitation, but the popular interpretation of *Harriss* has not gone this far.[121] The analogy with *Buckley v. Valeo,*[122] which was useful in the area of direct lobbying, is less helpful here, as *Buckley* did not address disclosure requirements in a context similar to solicitation. Consequently, the constitutional issues here require further elaboration.

As discussed in the context of direct lobbying, the Supreme Court requires existence of a compelling government interest whenever it examines the constitutionality of government interference with First Amendment rights.[123] In addition, the Court has established requirements to govern the means chosen to further the government interest: (1) a substantive relation between the government interest asserted and the means chosen;[124] and (2) no less restrictive alternative means for achieving the desired governmental goal.[125] Alternatively, the means must not have an impermissibly broad sweep in its operation.[126] The government interests

118 *See* notes 57 to 61 and accompanying text *supra.*
119 *See* notes 57 to 117 and accompanying text *supra.*
120 347 U.S. 612 (1954).
121 *See* note 22 *supra.*
122 424 U.S. 1 (1976) (per curiam).
123 *See* note 76 *supra.*
124 *See* note 71 *supra.*
125 *See* note 72 *supra.*
126 *See* note 73 *supra.*

asserted in lobbying solicitation provisions are essentially the same as those advanced by provisions affecting direct lobbying.[127] Preserving the integrity and effective functioning of the governmental process, protecting that process from corruption or the appearance of corruption, reinforcing public confidence in the workings of government, and facilitating rational legislative decisionmaking are government interests that are as compelling in the context of lobbying solicitation as they are in the area of direct lobbying.

Similarly, disclosure of lobbying solicitation activities bears a substantial relationship to these government ends. The disclosure of the identity and depth of interest of an organization employing a mass letter-writing campaign, for example, helps both legislators and the electorate evaluate the lobbying pressures and judge the ultimate government decision against the background of the broader public interest. Knowing who is behind a grass-roots drive may result in a fuller discussion among the public of the particular issue itself. Better informed about the orchestrators of a grass-roots effort — through revelation of their identity and their degree of influence, which may be expressed in their expenditures — the public can better weigh the merits and consequences (including the potential beneficiaries) of public issues. Like direct lobbying disclosure, exposure of lobbying solicitation reveals to the public the range and degree of interests seeking to affect government decisions. At the same time, the light of exposure reduces the possibility for improper, undisclosed pressures on decisionmakers and diminishes the opportunity for public cynicism about the integrity of government decisions.

In lobbying solicitation, as in direct lobbying, disclosure seems the least restrictive technique for furthering strong government interests. It is considerably less restrictive than, for example, expressly limiting the amount of solicitation a group can do. But is the coverage of *all* lobbying solicitations the most narrow method? Here the analysis in effect merges the Court's insistence on the least restrictive alternative and its inquiry into the statute's possible overbreadth. Can the state further its interest with another

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127 *See* notes 78 and 80 and accompanying text *supra.*

statute which does not infringe as heavily upon First Amendment rights?

In *United States v. Rumely,*[128] the Supreme Court construed narrowly a resolution authorizing a congressional committee to conduct an investigation of lobbying activities. Limiting the definition of lobbying to its "commonly accepted sense," the Court held that the resolution applied only to "representations made directly to the Congress, its members or its committees" and rejected committee efforts to secure information from an organization which sold books on political topics.[129] In the words of the Court, "the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."[130]

Likewise, in *Harriss* the Court recognized the possibility of constitutional limits on disclosure of solicitation efforts. But in language that has frequently been misinterpreted,[131] the Court asserted that disclosure of certain solicitation efforts could be sustained against constitutional attack even though less narrowly drawn requirements would have to fall.[132]

Faced with the government's almost limitless definition of lobbying, the Court in *Harriss* and *Rumely* refrained from defining the constitutional limits of disclosure of lobbying solicitation. Yet the two cases do not stand for the proposition that Congress may not legislate in this area. Rather, they leave open the possibility that measures which are narrowly drawn and refrain from touching the full range of political discussion may fall within constitutional bounds. It is within this limited range that the disclosure of lobbying solicitation must come.

To meet the Court's demand for a narrowly drawn statute, the legislation must apply only to those solicitation efforts which expressly ask the recipient to contact a government official.[133] A

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128 345 U.S. 41 (1953).
129 *Id.* at 47.
130 *Id.* at 46.
131 *See* note 22 *supra.*
132 347 U.S. at 620-23.
133 The proposals typically define lobbying solicitation as "any oral or written com-

statute would sweep too broadly if it included in its definition of lobbying solicitation any communication which consists of political discussion and which only indirectly and remotely could spur a recipient to write his congressman.[134]

Drafting the statute this narrowly, though it inevitably leaves untouched some activity directed implicitly at generating additional pressure on Congress, does not undercut the primary thrust of the disclosure provisions. In the example given in the preceding paragraph, the individual recipient contacts the legislator on his own initiative; he has been neither instructed to do so nor given the form and substance of the communication. To be sure, the information supplied by the organization has perhaps created a climate conducive to the individual's action, but any form of publicity about a political issue could be said to do this. Indeed, all political publicity is designed to stimulate popular response with an eye toward translating that response into government action. Drawing the line between explicit and implicit solicitation preserves the complete integrity of both general political discussion and broader attempts to influence public opinion, while it brings within its purview those efforts which explicitly stimulate contacts with officials and subjects to disclosure the major forms of artificially generated letter-writing campaigns.

Such a distinction sufficiently narrows the reach of the statute to bring it within constitutional limits. It follows the language of *Harriss*. It also follows a similar distinction drawn by the Court in *Buckley*. There the Court considered provisions of the Federal Election Campaign Act[135] which applied the Act to "[e]very person . . . who makes contributions or expenditures" and which defined "contributions" and "expenditures" as the use of money or other valuable assets "for the purpose of . . . influencing" the

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munication urging, requesting, or requiring another person to make a lobbying communication." *See, e.g.*, H.R. 5795 § 2(11).

134 In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court proclaimed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. Any lobbying statute which reached general political discussion would inevitably run afoul of this principle and would probably not survive a constitutional challenge.

135 1974 Campaign Act, *supra* note 63, at § 301(e)-(f) and § 305 (current version at Campaign Act, *supra* note 1, § 301(8)-(9) and § 304(c) (to be codified at 2 U.S.C. §§ 431(8)-(9) and 434(c)).

nomination or election of candidates for federal office.[136] Acknowledging the statute's goal of promoting full disclosure,[137] the Court nevertheless emphasized the necessity of construing "expenditure" narrowly to prevent an impermissibly broad definition.[138] The Court construed the term "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[139] The Court went on to note that this reading "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate."[140] The Court's distinction between express advocacy and that which is only implied parallels the distinction between implicit and explicit lobbying solicitations.

Distinguishing between those solicitation efforts which expressly request contacts with government officials and those which only indirectly lead to such contacts adequately serves the goals underlying lobbying disclosure reform. At the same time, such a demarcation satisfactorily minimizes the constitutional uncertainty faced by that reform legislation.

B. *Policy Issues*

The principal policy issue in the debate over lobbying solicitation has been whether the disclosure legislation should cover it at all.[141] In grass-roots lobbying, the organizations whose interests the solicitations promote have at best indirect contact with congressmen. Frequently, their efforts may generate little or no response. At the same time, the resulting lobbying communications may vary somewhat from the suggestions made by the soliciting organization. In addition, the letter-writing campaigns generated by lobbying solicitation may demonstrate the deeply felt

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136 424 U.S. at 77.
137 *Id.* at 78.
138 *Id.* at 80.
139 *Id.*
140 *Id.*
141 *See, e.g., Players on Lobby Disclosure Bill Lining up for Rematch,* note 34 *supra.* In the Ninety-fifth Congress, the House Judiciary Committee's version of H.R. 8494 did not cover lobbying solicitation, but this coverage was added on the floor of the full House prior to passage. The current committee version, H.R. 4395, does not include lobbying solicitation. However, S. 1564 does cover solicitations in § 6(b)(8).

views of the authors rather than a superficial expression of concern prompted by repeated urgings from the soliciting organization.

Nevertheless, in light of one business leader's assertion that lobbying solicitation is the "only lobbying that counts,"[142] any comprehensive congressional lobby reform legislation must include coverage of lobbying solicitation. Although direct lobbying continues to be important, congressional observers note a major increase in the use of grass-roots lobbying.[143] Indeed, in many legislative areas, lobbying solicitation appears to have supplanted direct lobbying as the most effective way of influencing legislation. Employing a variety of techniques — persuading community leaders to contact their congressman, generating mass mailing campaigns, creating "lobby teams" — organizations of nearly every description have shifted many of their efforts away from direct lobbying and to solicitation programs. Through sophisticated computer analyses, organizations are able to "target" those individuals and congressional districts that are most likely to respond favorably to the solicitation effort. Aided with substantial funding, often from well-financed political action committees, lobbying organizations skillfully coordinate selected direct lobbying with carefully orchestrated solicitation efforts. The result is a major impact on government decisions.[144]

Because of their importance in shaping government actions, solicitation campaigns must be subject to the general disclosure requirements of lobbying legislation. Legislators should know whether a lobbying solicitation effort lies behind an apparently spontaneous manifestation of constituent concern. Armed with information about the interests behind a letter-writing campaign, legislators can better evaluate the flood of letters that crosses their desks. Indeed it is in this area that disclosure of lobbying solicitation may be more useful than disclosure of direct lobbying. In

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142 *See* Mohr, *Grass-Roots Lobby Aids Business,* N.Y. Times, Apr. 17, 1978, at A1, col. 4 (quoting Richard L. Lesher, Pres. of Chamber of Commerce of U.S.).

143 *See id.* at col. 3. According to one congressman, Representative Benjamin Rosenthal, "There has been an enormous increase in indirect lobbying." *Id.* at D7, col. 1. House Speaker Thomas P. O'Neill, Jr., has likewise observed a shift in the importance of grass-roots lobbying. *Id.* at col. 2.

144 For discussions of lobbying solicitation, *see generally* Mohr, *Grass-Roots Lobby Aids Business,* N.Y. Times, Apr. 17, 1978, at A1, col. 3; Mohr, *Growth of Grass-Roots Lobbying Draws Congressional Attention,* N.Y. Times, Apr. 21, 1978, at D5, col. 2.

direct lobbying, the legislator usually knows on whose behalf a lobbyist is working. Disclosure there merely helps him balance the lobbying organization's interest against the public interest. In solicitation campaigns, on the other hand, the legislator may be unaware of who is behind the campaign; he is thus unable to take into account the biases and resources of the organization orchestrating the lobbying effort.

Equally important is the public's need to know the sources of the solicitation effort. First, the public should have the right to know what groups are seeking to affect public policy through grass-roots appeals. Because government decisions ultimately involve public allocational decisions, the public is entitled to know who is trying to shape these decisions, to what end, and with how much vigor.

Second, information of this sort may be necessary for other interested citizens to mount effective campaigns urging contrary decisions. In this respect, lobbying solicitation disclosure facilitates the free and active discussion of significant public issues. Informing the public about the forces seeking to marshal the public's support allows the public better to make its decision whether to join the campaign.

Thus disclosure of lobbying solicitation helps protect the functioning of the representative process, informs the public of major efforts to shape public decisions, and fosters the vigorous discussion of public issues. These salutary effects of disclosure are far superior to continued secrecy under the current system.

In drafting lobbying solicitation legislation, the same goals of proper threshold levels,[145] meaningful disclosure provisions,[146] and adequate enforcement procedures[147] set out in direct lobbying legislation should extend to disclosure of lobbying solicitation. Since the object of the legislation is to provide information on all significant lobbying activity, disclosure of the lobbyist's efforts must include a statement concerning the use of lobbying solicitation. Here the thresholds are more appropriately geared to the size of the solicitation effort, that is, to the number of persons the

145 *See* notes 43 to 56 and accompanying text *supra.*
146 *See* notes 152 to 168 and accompanying text *infra.*
147 *See* notes 178 to 190 and accompanying text *infra.*

solicitation is calculated to reach.[148] Five hundred people, the figure used in most of the proposals,[149] seems an adequate standard. Disclosure can be accomplished in part through a description of the means employed for those solicitation efforts calculated to reach more than 500 people.[150] To help weigh the impact of the organization's effort, particularly in letter-writing campaigns, a sample of the solicitation should be filed with the report.[151] This would provide congressmen with an easy way to examine the spontaneity of letters and telegrams received by their offices. Since the organization will presumably already have both information on the means employed and the sample solicitation itself, the addition of provisions covering lobbying solicitation creates fuller disclosure without creating substantial recordkeeping costs.

IV. Disclosure and Enforcement

A. *The Disclosure Provisions*

The disclosure provisions of the legislation lie at the center of lobbying reform. Only through broad disclosure provisions can the legislation achieve its goal of increasing the accountability of the legislative process and of opening to public scrutiny those pressures affecting government decisions. Yet the more rigid and extensive the disclosure requirements become, the more complex and expensive become the requisite bookkeeping and the burden on lobbying organizations.[152]

To be effective, the legislation must require disclosure of four kinds of information. First, the reported information must inform

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148 The proposals generally combine an expenditure threshold with the circulation one. Thus, S. 1785, for example, covers organizations that spend $5,000 or more in lobbying solicitations that are calculated to reach 500 persons. S. 1785 § 4(b)(3).

149 *See, e.g.*, S. 1785 § 7(b)(5). Part of the effectiveness of grass-roots lobbying lies in its ability to get influential members of a congressman's district to contact the official. None of the proposals attempts to deal expressly with this form of solicitation. Although a thorough disclosure measure would ideally include these as well, the practical limitations of keeping track of these individual solicitations necessitates their exclusion from the legislation. To the extent that the solicitation forms a part of a broader campaign of contacting influential people, however, it should be included.

150 *See, e.g.*, S. 1785 § 7(b)(5)(A).

151 *See, e.g.*, H.R. 5795 § 6(b)(7).

152 *See 1977 House Hearings, supra* note 3, at 361 (statement on behalf of National Wildlife Federation); *id.* at 286-87 (statement on behalf of Public Citizens Congress Watch); *1975 Senate Hearings, supra* note 3, at 221 (statement on behalf of AFL-CIO).

the public and legislators of the identity of lobbying organizations and of their individual lobbying agents. Second, it must outline the issues upon which the lobbyist is working. Third, it must indicate the degree of interest, as expressed through its lobbying activities, that the organization has in particular issues. Finally, it must reveal, through a disclosure of contributors, the persons on whose behalf the lobbyist is acting. Within each of these areas, the legislation must strike an appropriate balance between the benefits of full publicity and the burdens of reporting.

To achieve these broad disclosure goals, all versions of the legislation establish registration and reporting guidelines.[153] Each proposal requires full identification of the lobbying organization, its principal place of business, the nature of its business or activities, and the names of its executive officers and directors.[154]

Although these provisions give a general description of the lobbyist without creating extensive recordkeeping problems, they alone do not supply enough information. So that congressmen may know which lobbyists are connected with which lobbying organizations, the legislation must also require an identification of any person employed or retained by the organization as lobbyists.[155] For the same reason, lobbying organizations should be required to disclose the identity of individuals who lobby for the organization on a volunteer basis.[156] To be sure, this may require additional recordkeeping;[157] but, because of the significant lobbying efforts made by "professional volunteers" on behalf of organizations,[158] the failure to disclose the identity of these lobbyists would create a major loophole in an otherwise comprehensive lobbying statute.

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153 *See, e.g.*, S. 1785 §§ 4-8; H.R. 8494 § 406; S. 1564 §§ 5-6; H.R. 4395 §§ 4-6.

154 *See, e.g.*, S. 1564 § 3(7). As a part of the organization identification, some proposals require a description of the methods used by the organization to arrive at its position on any issue for which it lobbied. *See, e.g.*, H.R. 5795 § 4(b)(1).

155 *See, e.g.*, H.R. 4395 § 4(b)(2).

156 Only volunteers contributing their efforts to an organization with paid employees would be covered, as purely voluntary organizations are exempted from the legislation.

157 The responsibility for reporting the information rests with the organization, not with the individual volunteers. *See, e.g.*, H.R. 4395 § 6(b).

158 "Professional volunteers" exert substantial effort to influence legislation through extensive lobbying without receiving any compensation for their efforts. *1977 House Hearings, supra* note 3, at 263 (statement on behalf of Chamber of Commerce). Throughout the debates, Ralph Nader has been cited as the prime example of an unpaid lobbyist. *See, e.g., Outlook Dim for Lobby Bill Tougher than the One House Is To Consider,* 36 CONG. Q. WEEKLY REP. 620 (1978).

Beyond requiring disclosure of a lobbying organization's identity and that of its agents, disclosure provisions must demand a reporting of the issues upon which it has lobbied.[159] Still, desire for disclosure of all issues upon which an organization lobbied must be balanced by a concern for the recordkeeping difficulties such disclosure would entail. A lobbyist working on a complex of legislative issues could conceivably be required to list hundreds of issues.[160] This difficulty can be avoided in two ways. First, the statute could set a ceiling on the number of issues reported, so that the organization would need to report only a limited number of its most active concerns.[161] Setting an arbitrary ceiling, however, would allow large organizations that vigorously lobby on many diverse issues to escape reporting their efforts in areas in which their activity could have a major impact.

A second, more acceptable, solution calls for a listing and description of general areas, rather than specific issues, on which the organization has lobbied.[162] This plan would set no ceiling on the number of issues reported, but would reduce the need for extensive recordkeeping by simplifying the listing of specific issues.[163]

An evaluation of the organization's lobbying activity also requires disclosure of the degree of effort the organization has made to influence congressional decisions. This can usually be accomplished through the reporting of expenditures.[164] At a

159 *See, e.g.*, S. 1564 § 6(b)(6); H.R. 4395 § 6(b)(6).

160 *1977 House Hearings, supra* note 3, at 263 (statement on behalf of Chamber of Commerce). A person working on tax reform, for example, might be required to list separately investment tax credit, pension fund deduction, charitable contributions, and depletion allowance.

161 H.R. 4395 § 6(b)(6) limits the organization's description of issues requirements to the fifteen issues on which it spent the greatest proportion of its efforts. *See* H.R. 8494 § 6(b)(6) (requiring description of issues upon which the organization spent "significant amount of its efforts"). S. 1564 § 6(b)(6) calls for a description of the twenty issues which the organization estimates accounted for the most significant amount of its lobbying efforts. However, this provision is apparently intended to identify the organization and not to limit the reporting requirements since the following section requires a description of each issue which was the subject of one or more lobbying contacts. *Id.* at § 6(b)(8)(A)(i).

162 No proposal has adopted this approach for primary issue disclosure, although it is employed for issues of secondary importance in S. 1785 § 6(b)(4).

163 Information about the organization's activities in the abstract, however, is not very useful to legislators who are confronted by individual lobbyists acting under the organization's authority. Each organization should also report the general issues worked on by each individual who lobbied for the organization.

164 The proposals include an itemized listing of each expenditure in excess of $35 made

minimum, the legislation must require disclosure of the total expenditures on lobbying activities.[165] It should also call for a breakdown of expenditures according to the listed general areas on which the organization lobbied.[166] Finally, it should include the expenditures of the organization for individual lobbyists.[167] Taken together, these disclosures of expenditures would reveal the amount of interest and effort the organization devoted to the particular issues for which it lobbied and would provide a means for gauging the impact of lobbying groups upon final government decisions.

Finally, an effective statute must require the disclosure of the names of contributors to the organization so that legislators and the public may know the real interests behind lobbying efforts. It is indeed distressing to note that the current major lobbying bills before Congress, H.R. 4395 and S. 1564, each lack contributor disclosure provisions. However, a number of previous proposals have included such provisions[168] and their approach deserves discussion.

One problem of contributor disclosure provisions is that they may force lobbying organizations to report huge numbers of relatively minor contributions. The cost of such reporting and recordkeeping could be quite burdensome. A method of eliminating this difficulty would be the use of a minimum contribution level necessary to trigger the disclosure requirements.

Such an approach would exclude ordinary dues from coverage, thereby avoiding complete membership disclosure, and would provide information about the contributors whose interests in the organization exceed the interests of contributors paying only a nominal membership fee. Since the purpose of lobbying legislation is to secure information on significant lobbyists, there is little in-

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to or for the benefit of any federal officer or employee and a disclosure of any expenditure for a dinner or reception for federal officers or employees where the cost exceeded $500. *See, e.g.*, S. 1564 § 6(b)(2)-(3).

165 *See, e.g.*, H.R. 8494 § 6(b)(2).

166 Only one of the current major proposals calls for a disclosure of expenditures by issue. *See* § 1564 § 6(b)(8)(A)(i). Such breakdown, however, is only to indicate that more than $500 was spent on the issue. The actual amount spent in excess of $500 need not be reported. *Id.*

167 *See, e.g.*, S. 1785 § 7(b)(2)(B).

168 *See, e.g.*, S. 1785 § 5(c)(2); H.R. 1180 § 6(b)(8); H.R. 5795 § 4(b)(3).

terest in knowing about small contributors. Thus, a simple figure, like the $3000 figure adopted in several versions of proposed legislation,[169] should be sufficient both to avoid full membership disclosure and to supply necessary information on significant contributions.[170]

To provide a degree of privacy for the individual contributors and for the internal operations of the organization, the disclosure of contributors should be organized by category of amount contributed, rather than by listings of specific amounts. These categories, however, must be sufficiently narrow at both high and low levels to give useful information about contributors. Although several proposals have established meaningful categories at the lower levels,[171] none of the proposals adequately covers larger contributions. Thus, one proposal,[172] by lumping all contributions of more than $50,000 into one category, fails to distinguish between contributions of $60,000 and contributions of $600,000, even though the difference in impact between those two would be considerable.[173]

The disclosure of contributors to an organization may inevitably include a listing of people whose contributions were in no way intended to relate to lobbying. This would result, in part, from the abandonment of the principal purpose test. Contributors may not view an organization with many purposes, only one of which is lobbying, as a registered lobbyist. The organization's lobbying report would list the contributor even though he did not know that the organization was a lobbyist or that his contribution would be disclosed. Such disclosure would create an erroneous impression

169 *See, e.g.*, H.R. 5795 § 4(b)(3).

170 The committee version of S. 2477 used a percent-of-income formula for establishing individual contribution minimums. This provision required an organization to identify each organization contributing 1 percent or more of the total received by the lobbyist. The bill required disclosure of individual contributors if they contributed $1,000 or more and such contribution constituted 5 percent or more of the total income received by the lobbyists during the period. S. 2477 § 4(a)(3) (text as reported out by Judiciary Committee), *reprinted in* S. REP. NO. 94-763, *supra* note 3, at 59. This method seems likely to allow large organizations to escape reporting significant contributions.

171 *See, e.g.*, S. 1985 § 5(c)(2), establishing the following: Category A — $3,000 to $10,000; Category B — $10,001 to $25,000; Category C — $25,001 to $50,000; Category D — $50,001 to $100,000; Category E — $100,001 to $250,000; Category F — over $250,000. H.R. 5795 § 4(b)(3) adopts the following categories: $4,000 to $9,999; $10,000 to $24,999; $25,000 to $49,999; $50,000 and over.

172 H.R. 5795 § 4(b)(3).

173 The schedule established in S. 1785 seems good as far as it goes. The categories above $250,000 should be $250,000 apart.

that the contributor supports the lobbying effort, when in fact he did not even know about it.[174]

The possibility that donations to multi-purpose organizations might subject one's gift to publicity could retard contributions to organizations and ultimately curtail the ability to raise funds.[175] Of course, contributions specifically earmarked for uses other than lobbying would not be subject to the reporting guidelines, but contributions applied to a general operating fund would be disclosed just as contributions specifically given to support lobbying.

The adoption of a two-tier reporting threshold would minimize this problem.[176] Lower tier organizations, which do only small amounts of lobbying and whose contributors might be unaware of their lobbying activity, would not be required to disclose their contributions, while contributors to groups with more active lobbying, whose individual disclosure would be required, could reasonably be charged with knowledge of the lobbying.[177]

B. *The Enforcement Provisions*

Because the General Accounting Office has been so critical of the enforcement of the current law,[178] reform legislation must establish effective enforcement provisions. Most draft proposals adequately deal with the problem of enforcement by giving the Comptroller General and/or the Attorney General extensive powers to monitor and to investigate compliance with the act and to impose certain administrative penalties for non-willful violations.[179] Under one proposal, the Comptroller General is empowered to subpoena information necessary for accomplishing his work under the act,[180] administer oaths,[181] hold investigatory hear-

174 *1977 House Hearings, supra* note 3, at 262 (statement on behalf of Chamber of Commerce).

175 *1977 House Hearings, supra* note 3, at 146 (statement on behalf of American Civil Liberties Union).

176 *See* text accompanying notes 54 to 56 *supra.*

177 This provides yet another reason for setting the higher threshold considerably farther from the lower threshold than is now done in S. 1785.

178 GAO Report, *supra* note 33. *See* text accompanying notes 32 and 33 *supra.*

179 *See, e.g.,* S. 1785 §§ 10-16; H.R. 8494 §§ 7-8; S. 1654 §§ 8-9.

180 S. 1785 § 10(a).

181 *Id.* at § 10(c).

ings,[182] issue regulations,[183] and publish "advisory opinions"[184] interpreting substantive provisions of the act. If, after an investigation, the Comptroller General has reason to believe there has been a violation, he can attempt to obtain voluntary compliance through informal conference,[185] or he may refer such violations to the Attorney General,[186] who can seek mandatory injunctive and other appropriate relief.[187] If the Attorney General fails to bring a civil or criminal enforcement action within sixty days of the Comptroller General's referral,[188] the Comptroller General may himself institute a civil action.[189]

Armed with these broad investigatory and prosecutorial powers, both the Comptroller General and Attorney General should be able to monitor organizations subject to the act. By requiring businesses to keep all records maintained in the ordinary course of business, the provisions would also expedite the detection of violations and the imposition of appropriate sanctions against violators.[190] These provisions should go far towards curing the failings of the 1946 Act.

Conclusion

A comprehensive lobbying statute, requiring disclosure of lobbying efforts in the context of both direct lobbying and lobbying solicitation, should be an integral part of Congress' effort to achieve greater accountability and openness in government. Serving twin interests of rational decisionmaking and public evaluation of the influences which affect congressional decisions, such legislation offers the possibility of a political system which functions more responsibly toward the public interest. Perhaps more importantly, lobbying disclosure legislation can also play a role in restoring public confidence needed for the democratic process to thrive or long endure.

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182 *Id.* at § 10(d).
183 *Id.* at § 11(a)(8).
184 *Id.* at § 13(a). A brief discussion of the problems of advisory opinions may be found in *1977 House Hearings, supra* note 3, at 118, 125-26 (statement of Deputy Comptroller of the Currency Keller).
185 S. 1785 § 14(b)(1).
186 *Id.* at § 14(b)(2).
187 *Id.* at § 14(c).
188 *Id.* at § 14(e).
189 *See, e.g.*, S. 1785 § 9(b).
190 Under the most recent proposals, violators are subject to civil penalties of up to

Although the issues in drafting an effective lobbying statute are complex and difficult, Congress has weighed the competing considerations adequately. More than five years of vigorous debate and numerous drafting sessions have explored all the avenues of lobbying reform. Further delay is neither necessary nor wise. Other pressing problems face the Congress — an energy program, economic woes, foreign policy crises. Confronted with such headline issues, Congress may be tempted once again to shelve lobbying legislation. Yet the very importance of these headline matters makes the need for effective new lobbying legislation all the more urgent.

$100,000 for willful violations of the Act. H.R. 4395 § 8(a); S. 1564 § 9(a). The Justice Department has recommended two levels of criminal penalties, one consisting of "heavy fines for malfeasant organizational defendants" and another providing for the imprisonment of those individual officers, employees, or agents of any organizational defendants who "willfully cause the submission of intentionally false or fraudulent reports." *1977 House Hearings, supra* note 3, at 193 (statement of Deputy Attorney General Flaherty).

STATUTORY COMMENT
CONGRESSIONAL PAY RAISE MECHANISMS

BARRY NAGLER*

The issue of congressional pay raises has plagued members of Congress term after term. Faced with a rising cost of living, many members have sought increased salaries in the face of substantial pressure from constituents to keep their salaries low. In this Comment, Mr. Nagler examines current congressional pay raise mechanisms and suggests several reforms towards a comprehensive vision of congressional compensation.

Introduction

For eleven days in October of last year, thousands of government workers faced the prospect of payless paydays.[1] Funding for most federal agencies terminated with the close of the 1979 fiscal year on September 30. Seeking money to continue operations, these agencies had the misfortune to be caught in the crossfire surrounding the most recent skirmish in the recurrent congressional pay raise dispute. Much-needed appropriations legislation[2] was held hostage for almost two weeks by Senate conferees looking for leverage in their fight against a controversial 12.9 percent legislative salary increase.[3]

It was not until October 12 that Congress finally agreed upon a 5.5 percent compromise pay raise package and cleared the way for passage of temporary appropriations legislation. Departmental payrolls were met and a crisis was averted.[4] However, the latest bitter debate over congressional compensation highlighted the continued volatility of the salary issue. More importantly, public attention was drawn to the frightening potential side effects of an imperfect legislative pay raise mechanism.

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1 37 CONG. Q. 2260 (1979).

2 H.R.J. Res. 412, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H8878 (daily ed. Oct. 9, 1979).

3 Also at issue was Senate insistence upon liberalized rules regarding federally funded abortions, 37 CONG. Q. 2252 (1979).

4 For example, one official of the Office of Management and the Budget reported that if the salary deadlock had continued until Oct. 17, 1979, 2.3 million federal paychecks would have been cut or skipped entirely, *see* note 1 *supra*.

The problem of congressional salaries is not a new one. In fact, the Founding Fathers debated the issue in 1789. James Madison's proposal for deferral of all congressional pay increases was considered and rejected as a possible addition to the Bill of Rights.[5] Fortunately, subsequent efforts to pass reform legislation have been more successful. These more recent enactments will be examined in Part I of this Comment. Part II will identify several serious flaws in the legislative status quo and will demonstrate the inadequacy of our present congressional pay raise mechanism. Part III suggests criteria for an alternative system of determining legislative salaries and presents specific recommendations for reform.

I. LEGISLATIVE HISTORY

Prior to 1967, members of Congress possessed the seemingly enviable power to determine their own compensation. In practice, however, this exclusive responsibility for salary increases proved to be both dangerous and awkward because of the distinct conflict of interest involved, and risky due to the intense anti-pay sentiments of constituents. Legislators felt pressured to take the politically safe route and salary levels lagged behind those available in the private sector.[6] Facing a constantly increasing cost of living, members of Congress sought a means to boost congressional pay without incurring the wrath of constituents. The first legislative response to this challenge was the Federal Salary Act of 1967.[7]

This Act established a commission of nine private citizens, with three appointed by the President, and two each by the Chief Justice of the United States Supreme Court, the Speaker of the House and the President of the Senate.[8] The "Quadrennial Com-

5 Madison's proposed amendment read as follows: "No law, varying the compensation for services of the Senators and Representatives, shall take effect until an election of Representatives, shall have intervened." The deferral measure was approved by only seven of the ten states necessary for ratification, *see Presidential Pay Recommendations: Hearings Before the Ad Hoc Subcomm. on Presidential Pay Recommendations of the House Comm. on Post Office and Civil Service,* 95th Cong., 1st Sess. 208 (1977) [hereinafter cited as *Presidential Pay Recommendations Hearings*].

6 *See* REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES 4, Apps. D-G (1968) [hereinafter cited as 1968 REPORT].

7 Federal Salary Act of 1967, §§ 225(a) *et seq.,* Pub. L. No. 90-206, 81 Stat. 642 (1968), 2 U.S.C. §§ 351 *et seq.* (1976).

8 *Id.* at § 352(1).

mission" was authorized to meet every four years,[9] and to make non-binding recommendations directly to the President on pay levels for congressmen, federal judges and top executive branch officials.[10] The Chief Executive was then empowered to accept, reject or modify those suggested guidelines in whatever way he deemed appropriate.[11] Under this procedure, the modified pay proposal would then automatically take effect unless vetoed by either House of Congress within thirty days.[12]

The new procedure was an example of masterful political pragmatism. Pay raise recommendations were cloaked in a mantle of expertise and impartiality. The apparent shift in responsibility allowed members of Congress to avoid potentially embarrassing roll-call votes; their role in future salary disputes could be that of the passive onlooker. Congress had "passed the buck"; at the same time Congress had delegated no real power over legislative salaries to anyone but itself.[13]

In spite of these changes, results under the new Salary Act were mixed. Meeting in 1968, the first Quadrennial Commission recommended a 67 percent raise for congressmen, from $30,000 to $50,000 per annum.[14] After President Johnson pared the proposed pay hike down to $12,500,[15] an eager Congress soundly defeated efforts to block the increases and paychecks quickly rose by 42 percent. Five years later, the second Quadrennial Commission called for an additional 25 percent increment in House and Senate

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9 *Id.* at § 352(3).

10 *Id.* at § 356. Any references to congressman or congressmen are used generally to indicate both men and women.

11 *Id.* at § 358.

12 A congressional "veto" could take the form of a resolution specifically disapproving all or part of the President's recommendation, *id.* at § 359(1) (B), or of an enacted statute establishing a rate of pay for any one person or group of officials different from that proposed in the recommendations. *Id.* at § 359(1) (A).

13 Congress retained the right to set its own salary under this Act, with the Quadrennial Commission merely providing an alternative method for increasing congressional remuneration. *See* S. REP. No. 801, 90th Cong., 1st Sess. (1967). Nonetheless, opponents of the 1967 Act insisted on characterizing the new procedure as an unacceptable delegation of power to the executive branch, *see, e.g.,* 113 CONG. REC. 28641, 28643 (1967) (remarks of Rep. Gross and Rep. Pool).

14 *See* 1968 REPORT, *supra* note 6, at 12.

15 For the President's recommendations, *see* 34 Fed. Reg. 2241 (1969), *reprinted in* 2 U.S.C. § 358, App. at 197 (1976), in conformance with 2 U.S.C. § 361; the recommendations became effective thirty days after transmittal of the budget.

salaries.[16] This time, however, pay raise opponents prevailed. A disapproval resolution passed the Senate in March of 1974.[17]

By 1975, Congress had gone six years without a pay raise. During those same six years, the cost of living jumped 47.5 percent.[18] Shrinking purchasing power for congressional paychecks again stimulated legislative action and the Executive Salary Cost-of-Living Adjustment Act of 1975[19] was Congress' response to this pay gap. The Act had the basic effect of qualifying congressmen for the same annual cost-of-living pay increase enjoyed by lower echelon civil servants under the Federal Pay Comparability Act of 1970.[20] The drafters were hoping that a yearly review of salaries would minimize losses to inflation and obviate the need for drastic and unpopular "catch-up" pay hikes.[21]

Under the new statute, annual salary adjustments would first be recommended by the chairman of the Civil Service Commission and the director of the Office of Management and the Budget (OMB).[22] The President could then exercise his option to modify the proposals as he saw fit,[23] after which the new rates would take effect automatically.[24] Unlike salary increases under the quadrennial mechanism, these raises would be *truly* automatic, and not open to veto or disapproval by the legislative branch.[25]

The magical solution seemed to have been found. By legislating

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16 *See* REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES (1973) [hereinafter cited as 1973 REPORT]. The Commission's recommendations for congressional compensation were modified by President Nixon to provide for a 7.5% per annum increase over three years (22.5% cumulative increase).

17 30 CONG. Q. 637 (1974).

18 S. REP. No. 94-33, 94th Cong., 1st Sess. 5 (1975).

19 The Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, §§ 201 *et seq.*, 89 Stat. 419 (1975) (amending 5 U.S.C. §§ 5305 *et seq.* (1970)).

20 Federal Pay Comparability Act of 1970, §§ 3(a) *et seq.*, Pub. L. No. 91-656, 84 Stat. 1946, 5 U.S.C. §§ 5301 *et seq.* (1976).

21 *See, e.g.*, HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 94TH CONG., 1ST SESS., EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES 1, 40 (Comm. Print No. 94-3) (1975); [hereinafter cited as 1975 House Comm. Print]; S. REP. No. 94-333, *supra* note 18, at 4, 5.

22 5 U.S.C. § 5305(a) (1) (1976).

23 Modifications may be made "because of national emergency or economic conditions affecting the general welfare," 5 U.S.C. § 5305(c) (1).

24 5 U.S.C. § 5305(a)(2).

25 One qualification is necessary here: if the President chose to modify the proposed pay scale under § 5305(c)(1) of the statute, Congress would then have the power to disapprove the alternate plan within a thirty-day period, 5 U.S.C. § 5305(c)(2). In such a case, however, the President would then simply implement the original recommendations of OMB and the Civil Service Commission, 5 U.S.C. § 5305(m).

itself out of the pay raise picture, Congress had apparently resolved its conflict of interest problem and sidestepped the need for potentially damaging roll-call votes. Members of Congress could now expect regular yearly upward adjustments in their salaries without cost to their political image.

The first such adjustment, a five percent cost-of-living increase, took effect in October of 1975.[26] The next year, executive, judicial and legislative rates of pay were again adjusted by approximately five percent.[27] However, by this time, anti-pay raise sentiments had begun to intensify. Bowing to pressure from constituents, Congress actually voted to bar use of public monies to fund the 1976 Salary Adjustment Act increases.[28] By taking the appropriations route, pay raise opponents had thus discovered a rather ingenious means of pushing legislators back into the process. The net effect was a successful subversion of the 1975 Salary Act's basic objective. Despite its sponsors' best efforts, the Executive Salary Cost-of-Living Adjustment Act had not proved to be so "automatic" as expected.

1977 marked the emergence of a full-scale anti-pay raise backlash. A 29 percent quadrennial pay hike for congressmen[29] was allowed to take effect only after that increase was tied to passage of a strong code of ethics. The annual congressional cost-of-living adjustment was blocked, in order to prevent congressmen from receiving two pay raises in one year.[30] Finally, Congress passed the Federal Salary Act Amendments of 1977,[31] establishing new procedures whereby any future quadrennial salary increases would have to be directly approved by a roll-call vote of both Houses.

With this last enactment, Congress has come full circle. Prior to

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26 Exec. Order No. 11883, 40 Fed. Reg. 47091 (1975).

27 Exec. Order No. 11941, 41 Fed. Reg. 43889 (1976).

28 1976 Salary Adjustment Act, Pub. L. No. 94-440, 90 Stat. 1439 (1976). According to the Comptroller General, the refusal to fund cost-of-living increases for executive, legislative and judicial personnel did not affect the legal rates of pay for these officials. So, although Exec. Order No. 11941, *supra* note 27, was not able to effect an actual change in take-home salary, it did alter the statutory compensation schedule. H.R. REP. No. 95-717, 95th Cong., 1st Sess. 3 (Part 1) (1977). If the raises had been funded, congressional salaries would have increased from $44,600 to $46,800.

29 *See* 2 U.S.C. § 358, App. at 196 (1976). *See also* REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES 53 (1976) [hereinafter cited as 1976 REPORT].

30 Pub. L. No. 95-66, 91 Stat. 270 (1977).

31 Federal Salary Act Amendments of 1977, Pub. L. No. 95-19, § 401(a)(b), 91 Stat. 45, 46 (amending 2 U.S.C. §§ 359, 360 (1970)).

1967, legislators determined their own salaries and were held accountable for that determination. Now, by requiring a roll-call vote on quadrennial recommendations and a yearly test on appropriations for cost-of-living raises, Congress is once again moving towards taking responsibility for setting its own pay levels.

II. DEFECTS OF THE PRESENT SYSTEM

Notwithstanding the increased accountability of congressmen under the current pay raise mechanism, the present procedure still has its faults. One criticism is that the system is simply not functioning as originally intended. The Executive Salary Adjustment Act was supposed to put an end to congressional interference by providing for automatic executive, legislative and judicial cost-of-living increases. Instead, Congress' strategy of blocking appropriations for these raises has prevented all but two of the adjustments from taking effect.[32]

Additional problems are posed by the present system's inefficiency. Despite laws such as the Federal Salary Act of 1967 and the Executive Salary Cost-of-Living Adjustment Act, intended to take primary responsibility for legislative salaries out of Congress' hands, the House and Senate have debated the pay question at least once every year since 1975. The process is, for this reason, far too time-consuming; the same issue reappears, the same speeches are made and the same statistics are cited, all at the cost of Congress' time and attention. The duplication of effort is further aggravated every four years, when legislators are eligible for two raises and both the quadrennial and yearly increases must be discussed.[33] While congressional compensation does present an important issue, there are arguably more pressing problems toward which legislative resources could be better applied.

Such a shift in priorities would be difficult though, given the

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32 *See* notes 26 to 28 *supra*. In 1978, President Carter adjusted congressional salaries by approximately 5.5%; Exec. Order No. 12087, 43 Fed. Reg. 46823 (1978). However, Congress once again refused to vote the money necessary to fund the increases, 36 CONG. Q. 1306 (1978). Last year, members were eligible for a 12.9% cost-of-living hike (the 5.5% deferred the previous year, 7% for 1979, plus interest). Only a 5.5% adjustment was funded, *see* notes 1 to 3 *supra*.

33 In addition to wasting time, the repeated consideration of pay questions also presents the danger of recurrent legislative deadlock, *see* notes 1 to 3 *supra*.

degree to which the pay raise question has become politicized. The merits of the dispute have, over time, progressively given way to demagogic rhetoric.[34] Experience during the past twelve years demonstrates that congressmen have, more often than not, chosen the path of least political resistance.

Unfortunately, playing politics with the pay raise issue has had implications beyond congressmen's pocketbooks. Under the current statutory scheme, Congress has traditionally linked its salary to that of federal judges and top executive branch personnel. Therefore, when congressmen choose to forego an increase, the compensation of all officials remains frozen. Regrettably, such freezes have usually occurred with little or no independent consideration of the need for executive and judicial pay raises.

In addition, the above-described legislative-judicial pay linkage has resulted in violations of constitutional requirements. According to Article III, federal judges' compensation "... shall not be diminished during their continuance in office."[35] Despite this clear rule, Congress last year effectively reduced judicial salaries by 7.4 percent.[36] Not surprisingly, suit was quickly filed by the Administrative Office of the United States Courts, challenging the constitutionality of this reduction.[37] Thus, recent congressional pay raise policies have caused delay and legal confusion.

III. Framework and Suggestions for Reform

A. *Objectives of an Alternative Pay Raise Plan*

If anything should be clear from the preceding discussion, it is the need for considerable improvement of present pay procedures. Before this Comment suggests any reform measures, however, the goals and desired characteristics of an ideal pay system should first be clarified.

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34 For instance, during a single one-month period, no less than fifteen anti-pay raise resolutions were introduced in the House of Representatives — of the fifteen, many were virtually identical to each other and most stood no chance of passage, *see Presidential Pay Recommendations Hearings, supra* note 5, at 3, 151 (1977).

35 U.S. Const. art. III, § 1.

36 Despite statutes mandating a 12.9% increase in legal salary rates, legislators elected to fund only a 5.5% cost-of-living adjustment, *see* notes 1 to 3 *supra.*

37 66 A.B.A.J. 8 (1980). *See also Presidential Pay Recommendations Hearings,* note 5 *supra,* at 13.

Any alternative arrangement should place a premium on smoothness of operation and economical usage of legislative resources. The process of considering salary increases should minimize duplication of effort and expenditure of time. Ideally, politicking and demagoguery should be eliminated as much as possible. With these goals in mind, a more perfect system would then be one in which review would occur relatively infrequently.

A second criterion for success in drafting a pay raise alternative would have to be the cultivation of congressional accountability. Making legislators more answerable to constituents will safeguard against raids on the public treasury and at the same time advance democratic ideals in an important policy area. At minimum, then, we would expect that senators and representatives be obligated to cast roll-call votes whenever salary-related questions arise. In this connection, the recent amendments to the Federal Salary Act[38] represent a significant step forward.

Finally, any worthwhile pay determination plan should have as its objective the setting of fair and competitive salaries. To insure equity and successful recruitment of qualified personnel, a reformed system should aim to produce legislative compensation levels comparable to those earned in private positions of similar responsibility and importance.[39] Given the difficulty of analogizing to the private sector,[40] a substitute goal could be maintenance of salary rates at amounts sufficient to attract persons of exceptional qualification and ability to public service. At the very least, pay raises should be able to protect congressmen against substantial inflation-related real income losses.

Admittedly, the goals cited above must necessarily conflict to some degree. For instance, if we deem accountability to be of overriding importance and mandate roll-call votes for all salary questions, then legislators will most probably be deterred from casting pro-pay raise votes and congressional remuneration may fall below levels necessary for optimal recruitment results. Nonetheless, some alterations in the status quo may still yield real gains in our areas of concern with little or no attendant cost.

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38 *See* note 31 *supra.*

39 *See* 5 U.S.C. § 5301 (1976). For a summary of the principles of compensation utilized by the Quadrennial Commission, *see* 1976 REPORT, *supra* note 29, at 3, 32-36.

40 *Id.* at 3, 32.

B. *Specific Proposals for Improvement*

1. *Preserve the Commission on Executive, Legislative and Judicial Salaries.* As explained earlier, the most significant innovation in the determination of congressional salaries over the past twelve years has been the concept of outside input into the pay raise decisionmaking process. Therefore, any fundamental examination of this process must begin by questioning the usefulness of such institutions as the Quadrennial Commission. Critics have attacked the Commission as wasteful and unnecessary,[41] and as an intolerable abdication of congressional power.[42] They point out that eliminating the Commission would foster accountability and force members of Congress to take full responsibility for pro-pay raises stands.[43]

The best defense of the quadrennial review concept has come from members of the Pennsylvania State Compensation Commission:

> The absence of any agency for insuring continual review of the salaries of top level officials has meant that such salaries remain frozen, once fixed, for lengthy periods. The consequences of this, heightened during a period of severe inflationary pressures, are a steady erosion of actual income and a marked deterioration in the morale of public officials. Finally a point is reached where the accumulated pressures for a salary adjustment can no longer be contained....
>
> When this point is reached, an effort is made to increase salaries, but that effort, because so long delayed, then requires salary adjustments of such a magnitude that they are seen as exorbitant by many citizens and public opposition is therefore intensified. Eventually, after a political battle that poisons the atmosphere of State government, new salaries are legislated — and then the same predictable cycle begins again.[44]

Of course the identical problem exists on the national level. During this century, from 1900 until the passage of the Federal Salary Act in 1967, congressional salaries have been adjusted only five

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41 S. REP. No. 93-292, 93rd Cong., 1st Sess. 30 (1973) (minority views).
42 *Id.* at 29. *See also* S. REP. No. 801, *supra* note 13, at 3.
43 *See* note 40 *supra,* at 29.
44 65 PA. CONS. STAT. ANN. App. § 409 (1979) (Commonwealth Compensation Commission Report of June 1972).

times.[45] The average increase on these occasions has been greater than 43 percent.[46] The magnitude and infrequency of past legislative pay raises demonstrate the need for some institutional arrangement to ensure periodic review of congressional compensation.

Entrusting such review to an outside agency also appears to be a good idea. Since Congress' pay situation presents "the great granddaddy conflict of interest of all time,"[47] image is one area in which legislators surely need help. The existence of an outside commission, taking Congress out of at least the initial stages of pay raise decisionmaking, would be good public relations. The resulting gain in enhanced credibility and public support could make Congress a more effective institution.

Involvement of a Quadrennial-type Commission could also promote efficiency and economy. The Commission's recommendations are widely perceived as the product of extensive study and careful research, providing an acceptable starting point and structure for congressional debate.[48] In this way, irrelevant issues and

45 The history of congressional salary adjustments until 1969 is as follows:

Year	Amount	Statutory authority
1856.....	$3,000	Act of Aug. 16, 1856, 11 Stat. 48.
1857.....	4,250	Act of June 23, 1857, 11 Stat. 367.
1866.....	5,000	Act of July 28, 1866, 11 Stat. 323.
1873.....	7,500	Act of Mar. 3, 1876, 17 Stat. 486.
1874.....	5,000	Act of Jan. 20, 1874, 18 Stat. apart 384.
Mar. 4, 1907	7,500	Sec. 4, Public Law 59-129, Feb. 26, 1907, 43 Stat. 993
Mar. 4, 1925	10,000	Sec. 4, Public Law 68-621, Mar. 4, 1925, 43 Stat. 1301.
Jan. 3, 1947	12,500	Sec. 601(a), Public Law 79-601, act of Aug. 2, 1946, 60 Stat. 850.
Mar. 1, 1955	22,500	Sec. 4(a), Public Law 84-9, act of Mar. 3, 1955, 69 Stat. 11.
Jan. 3, 1965	30,000	Sec. 261, Public Law 88-426, act of Aug. 14, 1964, 78 Stat. 415.
Mar. 1, 1969	42,500	Recommendations of President under sec. 225, Public Law 90-200, Dec. 16, 1967, 81 Stat. 612.

1975 House Comm. Print, *supra* note 21, at 11. *See also* SUBCOMM. ON PRESIDENTIAL PAY RECOMMENDATIONS OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 95th CONG., 1ST SESS. 9 (Comm. Print No. 95-4) (1977) [hereinafter cited as 1977 SUBCOMM. ON PRES. PAY RECOMMENDATIONS].

46 *See Hearings on S. 1989 Before the House Comm. on Post Office and Civil Service,* 93rd Cong., 1st Sess. 44 (1973) (statement of David McAfee, Staff Director, Commission on Executive, Legislative and Judicial Salaries) [hereinafter cited as *1973 House Hearings*].

47 35 CONG. Q. 137 (1977) (statement of Senate Minority Leader Howard Baker).

48 *See* 1977 SUBCOMM. ON PRES. PAY RECOMMENDATIONS, *supra* note 45, at 9.

inflammatory remarks are less likely to intrude, expediting decisionmaking.

Continuation of the Quadrennial Commission also provides safeguards against further inflation. In practice, the Commission's guidelines have consistently operated as a ceiling; final salary rates have never exceeded its initial recommendations,[49] although Congress has not been reluctant to reject these recommended increases.[50] The overall result has been realistic limits for congressional compensation.

2. *Amend the Executive Salary Adjustment Act.* Given its numerous advantages, the Quadrennial Commission concept should be retained. However, some changes in the legislative status quo still seem to be both necessary and desirable. For example, under our present pay determination system, yearly cost-of-living increases under the Executive Salary Adjustment Act are duplicated by Quadrennial Commission recommendations. Since the rate of inflation is always factored into quadrennial salary determinations, it is difficult to see why annual adjustments are needed at all. Yearly reviews seem even less attractive given Congress' continued rehashing of familiar pro- and anti-pay raise arguments. One obvious reform, then, would seem to be the complete exclusion of congressmen from the adjustment process.

This change would necessitate exempting Congress from coverage under the Executive Salary Cost-of-Living Adjustment Act. Such an exclusion would remove congressional incentives to use the appropriations process to block "automatic" yearly pay raises. One immediate dividend of reform would therefore be an end to Congress' disregard for the intent of the Executive Salary Adjustment Act. Another would be solutions to problems surrounding unfunded judicial salary increases and their constitutional ramifications.

Although Congress has technically been free under the Executive Salary Cost-of-Living Adjustment Act to defer funding for congressional cost-of-living raises while maintaining it for federal judges and top governmental employees, these latter groups have

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49 *Id.*

50 The second Quadrennial Commission's recommendations were disapproved by Congress in March of 1974, *see* notes 16 and 17 *supra.*

invariably been affected by legislators' pervasive anti-pay raise fever. Removing Congress from the coverage of the Executive Salary Adjustment Act would protect judges and civil servants from the fallout of the legislature's pay raise timidity.

Some legislators have, nonetheless, argued against an end to the traditional relationship between salary determinations for the three branches.[51] They contend that pay linkage is necessary to prevent severe horizontal inequities in compensation levels.[52] However, a contrary view seems to be demanded.[53] According to statistics of the third Quadrennial Commission, "... relative financial burden falls most heavily on the members of the Judicial and Executive branches while the opportunity cost of serving in the Congress appears to be significantly less."[54] Fairness, then, would seem to dictate the separate consideration of executive and judicial salaries under the Executive Salary Adjustment Act.

3. *Biennial Review.* One potential objection to the above-described scheme could be that a four-year lapse between pay raise determinations might result in excessive hardship for congressmen. Perhaps more importantly, abolishing the yearly adjustment would make each individual raise larger, and would increase the risk of intensified constituent anti-pay raise pressure. To avoid these problems, the Commission on Executive, Legislative and Judicial Salaries should consider congressional compensation on a biennial basis.[55] This approach has worked well on the state

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51 *See, e.g.,* H.R. REP. No. 93-392, 93rd Cong., 1st Sess. 25 (1973) (separate views of Hon. Edward J. Derwinski).

52 "[T]he Third Assistant Secretary of the Treasury and the most junior judge in the courts would be paid salaries much larger than the chairman of the Ways and Means Committee...," *Presidential Pay Recommendations Hearings, supra* note 5, at 337 (statement of Rep. Morris Udall).

53 66 A.B.A.J. 8 (1980). *See also* 1976 REPORT, *supra* note 29, at 4, 34.

54 Commission data show that members of Congress actually enjoyed a slight *increase* in salary upon taking office, while executive personnel suffered a 23% pay cut and judges' compensation fell by a third. After leaving public service, congressmen could be expected to collect a 34% increase in salary. However, executive and judicial officials each received over 80% higher pay in the private sector, *id.* at 42.

55 A proposal for biennial review (S. 1989) was introduced in the 93rd Congress. However, S. 1989 focused on a somewhat different problem — in 1973, members had begun to discover a need for more frequent adjustments in their income levels. In this respect, S. 1989 was basically a precursor to the Executive Salary Cost-of-Living Adjustment Act, *see* S. REP. No. 93-292, 93rd Cong., 1st Sess. 4 (1973) and H.R. REP. No. 93-392, *supra* note 51. The biennial review concept was also embraced by the second Quadrennial Commission, *see* 1973 REPORT, *supra* note 16, at 12. Despite this support, S. 1989 was unable to gain passage in the Senate.

level,[56] and the additional cost to taxpayers of biennial review would be relatively insignificant.[57] The sacrifice in terms of Congress' time would surely be less than that demanded by the present system, and the gains in flexibility and diminished risk of public opposition would provide more than sufficient justification for the change.

4. *Consideration During Non-Election Years.* Biennial review has been opposed by at least one congressional subcommittee because of fears that the two-year House term would coincide with salary increases[58]; critics anticipated increased election year jitters and an accompanying politicization of the pay raise debate. But, this dilemma has an obvious solution: requiring consideration of pay raises in odd-numbered years.[59] This type of proposal has been attacked as an effort to evade the will of the electorate.[60] Congressmen must nonetheless still go on record in any pay raise vote,[61] and concerned constituents can easily ascertain where their representatives stand on the salary issue.

5. *Pay Raise Deferral.* One final alteration in the present pay determination procedure would also seem advisable. Given the potential explosiveness of the salary issue, it would appear wise to adopt legislation deferring the effective date of future salary increases until the next Congress came into office.[62] The obvious advantage would be to minimize the appearance of a congressional

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56 For state legislation adopting biennial reviews, *see:* 1 CONN. GEN. STAT. § 2-9a (1979); 11 IDAHO CODE § 67-406b (1979); MASS. GEN. LAWS ANN. ch. 6, § 162 (West 1978); MICH. CONST. art. 4 (1978); PA. CONST. STAT. ANN. § 364(b) (Purdon 1978); 4 WASH. REV. CODE § 43.03.028(2) (1976).

57 According to David McAfee, Staff Director of the second Quadrennial Commission, the total cost of salary review in 1969 was $17,000, and in 1973 was approximately $38,000. *See 1973 House Hearings,* note 45 *supra,* at 48. *See also* S. REP. NO. 93-292, *supra* note 55, at 5 (the additional cost of biennial review determined to be "relatively small").

58 1977 SUBCOMM. ON PRES. PAY RECOMMENDATIONS, *supra* note 45, at 14.

59 *See Executive, Legislative and Judicial Salaries: Hearings Before the Senate Comm. on Post Office and Civil Service,* 93rd Cong., 1st Sess. 2 (1973) (statement of Sen. Gale W. McGee); 1977 SUBCOMM. ON PRES. PAY RECOMMENDATIONS, *supra* note 45, at 10 (endorsing off-year review and pointing out that Congress has not approved an election year increase since 1866).

60 S. REP. NO. 93-292, *supra* note 55, at 29.

61 This is required by the Federal Salary Act Amendments of 1977, note 31 *supra.*

62 Legislation providing for such a deferral strategy was introduced, *see* H.R. 9282, 95th Cong. 1st Sess. (1977). H.R. 9282 passed the House but was defeated in the Senate. *See also* H.R. REP. NO. 95-717, 95th Cong., 1st Sess. (Part I) (1977), and 1977 SUBCOMM. ON PRES. PAY RECOMMENDATIONS, note 45 *supra,* at 3, 13.

conflict of interest on the pay raise issue.[63] Such a measure could also defuse the political fireworks and rhetoric which typically accompany this dispute and allow the merits to intrude into the analysis.[64]

Postponement has been quite popular on a state level. As of 1974, thirty-seven states prohibited their legislators from collecting a pay raise during the term of its enactment.[65] The preference for pay deferral can, at least in part, be attributed to its positive effects on legislative accountability.[66] If deferral were adopted on the national level, then the entire House and one-third of the Senate would have to face the electorate before any pay raise took effect.[67] The impact of such electoral scrutiny on members' voting patterns should not be underestimated.

Conclusion

The events of October 1979 clearly demonstrated the existence of serious flaws in the current legislative pay determination system. One explanation for the failures of the present congressional pay raise mechanism must be its haphazard and piecemeal evolution. The Federal Salary and the Executive Salary Cost-of-Living Adjustment Acts seemed to be shaped more by considerations of politics and paychecks than by any comprehensive vision of an ideal compensation system.

The reform proposals in this Comment are offered in the latter spirit. It is suggested on the one hand that recommendations from an outside commission and odd-year salary voting can supply con-

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63 Some analysts would underscore the word "appearance." Since most members return to Congress term after term, critics argue that the improvement in ethics might be more form than substance.

64 First-term legislators would derive particular benefit from this development. On occasion, freshmen congressmen have faced pay raise votes as early as their second month in office. Having run for a position with a given salary, it is next to impossible, regardless of the merits, for freshmen to vote for an increase in that salary, H.R. REP. No. 95-717, *supra* note 62, at 4.

65 For a list of these states, *see Presidential Pay Recommendations Hearings, supra* note 5, at 207.

66 *See* H.R. REP. No. 95-717, *supra* note 62.

67 It must be pointed out that perfect accountability is not achieved here; a majority of senators will be allowed to collect pay increases without answering immediately to constituents. Nonetheless, the alternative — forcing some Senators to wait up to six years for a pay raise to take effect while members of the House face a maximum two year delay — seems unacceptable.

gressmen with some breathing room for detached decision-making. On the other hand, roll-call votes and pay deferral are meant to ensure that legislators are ultimately answerable to constituents for those decisions. In combination, these various suggestions for reform should strike a neat conceptual balance. On a more practical level, they provide the framework for a workable alternative to current congressional pay raise mechanisms.

STATUTORY COMMENT
H.R. 2659: AMENDING THE FTCA

MARK DROOKS*

Since the Supreme Court created a constitutional tort remedy in the Bivens *case nine years ago, the courts have struggled repeatedly with the scope and impact of that remedy. In response to that inquiry, Congress has now proposed H.R. 2659. The bill is designed to make the government the sole defendant in* Bivens *type actions and to facilitate compensation to victims of constitutional torts.*

In this Comment, Mr. Drooks argues that the bill has major problems, despite its admirable objectives. He, therefore, suggests several possible changes, including a more precisely defined cause of action along the model of Section 1983 of the Civil Rights Act of 1964.

Introduction

In 1971, the Supreme Court decided *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,*[1] holding that Bivens had a cause of action arising directly under the Constitution for damages against the individual federal officers who wrongfully arrested him and searched his home. Nine years later, Congress is considering H.R. 2659,[2] a bill to amend the Federal Tort Claims Act[3] (FTCA) and thereby improve the law created by *Bivens* and its progeny. This Comment analyzes that bill and particularly explores the consequences its enactment would have upon the availability of a remedy in *Bivens*-type cases.

Bivens precipitated thousands of suits seeking damages from federal employees for alleged violations of constitutional rights.[4]

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1 403 U.S. 388 (1971).

2 H.R. 2659, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1107 (daily ed. Mar. 6, 1979).

3 Federal Tort Claims Act, 28 U.S.C.A. § 1346, 2671 *et seq.* (Supp. 1979).

4 Bell, *Proposed Amendments to the Federal Tort Claims Act,* 16 HARV. J. LEGIS. 1, 2 n.5 (1979) [hereinafter cited as *Bell*].

They have been generally unsuccessful.[5] Even where the courts recognize a cause of action, the availability of the "good faith" defense, the limited financial resources of the defendant, and the intangible nature of the harm[6] make actual recovery of compensatory damages extremely difficult. In practice, the *Bivens*-type action serves more to deter official misconduct than to compensate the victims of such conduct.[7]

The holding of *Bivens* has nonetheless been costly to the federal government. Employees acting within the scope of their employment are defended by Department of Justice attorneys and the

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5 To date, only seven money judgments have ever been entered against federal employees on *Bivens* claims. As of June 20, 1979, all of these cases except Askew v. Bloemker, S.-Civ-73-79 (S.D. Ill., Sept. 29, 1978), were pending on appeal. In *Askew*, a DEA agent was found liable for violating the Fourth Amendment rights of three plaintiffs in conducting an unlawful search; the jury awarded damages of $22,000. Prior to the verdict, however, plaintiffs agreed not to enforce any judgment against the federal agent but rather to proceed against several defendant state employees who were insured. The six other cases pending are: Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied sub nom.* Wilson v. Dellums, 438 U.S. 916 (1978) (chiefs of Capitol and District of Columbia police held liable for unlawfully disrupting a congressman's speech at the Capitol Building by wrongfully arresting and jailing the listeners; the amount of the damages in this class action is still being litigated); Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977) (inspector of District of Columbia police held personally liable for damages for unlawfully disrupting twenty-nine plaintiff demonstrators outside the White House); Weiss v. Lehman, No. 375-36 (D. Idaho, July 14, 1978) (Forest Service ranger ordered to pay $1000 to a single plaintiff on the theory that the ranger had violated plaintiff's Fifth Amendment rights by destroying plaintiff's property); Jihad v. Carlson, C.A. No. 5-71-805 (E.D. Mich., Oct. 18, 1979) (prison guard held liable for $992 in damages to an inmate for violating his right to religious freedom by segregating the inmate for refusing to shave his beard, which he claimed was necessary for the practice of his religion); Sequin v. Hightower, No. C76-182-V (W.D. Wash., Oct. 24, 1978) (because a government agent waited four and one half months before institutiong a forfeiture action, owner of a car used in a smuggling scheme was awarded $7,300 for the rental value of the car plus consequential damages); Halperin v. Kissinger, 434 F. Supp. 1193 (D.D.C. 1977), *rev'd on other grounds* 606 F.2d 1192 (D.C. Cir. 1979); *see* note 6*infra*. Above cases cited in statement of Benjamin R. Civiletti, Deputy Attorney General, *to be printed in Hearings on H.R. 2659 before the Comm. on the Judiciary of the House of Representatives, Subcomm. on Administrative Law and Governmental Relations,* 96th Cong., 1st Sess., 2 n.9 (1979). The author attended these hearings on June 20, 1979 and has typed copies for the prepared statement. The page numbers refer to that typed copy, available at Harvard Journal on Legislation, Langdell Hall 196, Cambridge, Ma. 02138 [hereinafter cited as *Civiletti Statement*].

6 In Halperin v. Kissinger, 434 F. Supp. 1193 (D.D.C. 1977), for example, after plaintiffs proved that they had been subjected to unlawful telephone wiretaps for a period of twenty-one months, they were awards nominal damages of one dollar each. This damage award was reversed on appeal (606 F.2d 1192 (D.C. Cir. 1979)).

7 A major contention of Administration proponents of H.R. 2659 has been that *Bivens* has resulted in too much deterrence — the fear of litigation has restrained federal employees from zealously performing their duties. *See, e.g., Bell, supra* note 1; *Civiletti Statement, supra* note 6, at 2.

government often must retain private counsel when ethical considerations preclude representation by government attorneys.[8] Former Attorney General Bell and Attorney General Civiletti have also claimed that the fear of personal liability has inhibited federal employees from zealously performing their jobs.[9]

H.R. 2659,[10] according to the Administration, would facilitate compensation for victims of official misconduct, reduce the cost to the government of defending *Bivens*-type suits, and provide for continued deterrence of official misconduct. The bill amends the FTCA[11] to provide a statutory damages remedy against the United States government in all *Bivens*-type actions provided that the employee acted within the scope of his employment.[12] The United States government would be the exclusive defendant in all such constitutional tort actions.[13] Immunizing the individual employee in these situations, the bill further provides a damage remedy against the government for most intentional common law torts committed by federal officials.[14]

H.R. 2659 is not designed to alter the scope of the *Bivens* remedy as it has been and continues to be defined by the courts.[15] According to the Administration advocates, all conduct which would be remediable under *Bivens* absent the statutory remedy would still be compensable under the proposed statutory remedy for constitutional torts. Nonetheless, the existence of congressionally-mandated remedies under H.R. 2659 is sure to affect future judicial application of *Bivens* remedies and the scope of the constitutional tort doctrine.

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8 The Department of Justice has spent over two million dollars retaining private attorneys since 1976. *Civiletti Statement, supra* note 6, at 6.

9 Note 7 *supra.*

10 Note 2 *supra.* The companion bill in the Senate is S. 695, 95th Cong., 1st Sess. (1979), 125 CONG. REC. S2920 (daily ed., Mar. 15, 1979).

11 Note 3 *supra.*

12 Department of Justice, Section by Section Analysis of H.R. 2659 (1979) (unpublished) at 3. Typed copies of this document are also available at the Harvard Journal on Legislation. *See* note 5 *supra* [hereinafter cited as Section by Section Analysis].

13 H.R. 2659, § 1 (amending 28 U.S.C. § 2679(b), *supra* note 3). All amending cites hereinafter will refer only to the section of the FTCA.

14 H.R. 2659, § 4(c) (amending § 2680(h)).

15 H.R. 2659, § 3 (new § 2681(b) makes the government liable "to the extent liability for such claim is recognized or provided by applicable Federal law"). *See also* Section by Section Analysis, *supra* note 12, at 4.

I. CURRENT LAW: *BIVENS* AND ITS PROGENY

On its facts, *Bivens* was a narrow decision, involving a flagrant violation of Fourth Amendment rights.[16] An adequate federal remedy did not exist and, because no criminal charges were ever brought, the exclusionary rule was irrelevant.[17] The federal government was protected by sovereign immunity, which had not been waived under the FTCA for international torts.[18] Furthermore, the Court had rejected a state court action for a common law tort as inadequate.[19] Thus, the Court recognized that denying Bivens a damage remedy directly under the Constitution would be dispositive of his rights in a federal court.

Bivens did not decide the availability of the remedy for a broad range of other official misconduct and, after struggling with the question for nine years, courts still have not determined the scope of the *Bivens* doctrine.[20] Courts have nonetheless recognized two crucial limitations on the availability of a *Bivens* remedy: first, that the particular substantive provision of the Constitution allegedly violated may not give rise to a damage remedy[21]; second, that notwithstanding the substantive protections guaranteed by the Constitution, a judicially-created remedy is inappropriate when an adequate alternative remedy exists.

The Court's reasoning in *Bivens* relied at least in part on the fact that the victim's Fourth Amendment rights had been violated.[22] In his concurrence, Justice Harlan specifically noted that, though damages are appropriate to redress a claim arising under the Fourth Amendment, "the same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted."[23] In the years following the decision, many courts were unwilling to extend the

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16 403 U.S. at 389.
17 *Id.* at 410 (Harlan, J., concurring).
18 *Id.*
19 *Id.* at 395-97.
20 *Id.*
21 *See, e.g.,* La Bar v. Royer, 528 F.2d 548, 549 (5th Cir. 1976). *See also* note 19 *supra.*
22 403 U.S. at 395-97.
23 *Id.* at 409 n.9.

Bivens remedy beyond cases involving the Fourth Amendment,[24] while other courts declined to address the issue at all.[25] A majority of courts, however, did not so limit the *Bivens* remedy.[26]

In keeping with that majority, the Supreme Court has recently decided two cases which, though they do not define the precise scope of *Bivens,* indicate that many, if not all, constitutionally protected interests may be compensable by damages directly under the Constitution. In *Butz v. Economu,* the Court characterized *Bivens* as establishing

> that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official.[27]

Even more significant, in *Davis v. Passman,*[28] the Court extended the *Bivens* remedy to a case involving alleged sex discrimination constituting a violation of the Fifth Amendment.[28] Consequently, the nature of the protected interest is no longer such an important restriction on the availability of a damage remedy.[29]

As the scope of the *Bivens* remedy has expanded with respect to the nature of the interests protected, courts have *limited* the availability of the remedy by relying on an alternative remedies rationale. The *Bivens* remedy is discretionary with the court; it is not mandated by the Constitution.[30] The Government has thus argued that *Bivens* is an extraordinary remedy, inappropriate where Congress has supplied another adequate remedy for injury due to the unlawful conduct involved.[31] This argument has a good deal of support in the Supreme Court decisions, including both the ma-

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24 Note 21 *supra; see* cases cited in Lehmann, *Bivens and Its Progency,* 4 HASTINGS CONST. L. Q. 531, 566 n.226 (1977) [hereinafter cited as Lehmann].

25 *See* cases cited in Lehmann, *supra* note 23, at 566 n.227.

26 *See* cases cited in Lehmann, *supra* note 23, at 566 n.229.

27 Butz v. Economu, 438 U.S. 478, 504 (1978).

28 Davis v. Passman, 442 U.S. 228 (1979).

29 In Carlson v. Green, No. 78-1261 (filed Sept. 1979), *cert. granted,* 442 U.S. 940 (1979), Government attorneys do not contend that violations of the Eighth Amendment can never rise to an implied cause of action. Brief for the Petitioners at 16 n.8 [hereinafter cited as *Carlson Brief*].

30 *Bivens, supra* note 1, at 396.

31 *See, e.g.,* Carlson v. Green, *supra* note 29; Hernandez v. Lattimore, 612 F.2d 61 (2d Cir. 1979); Torres v. Taylor, 456 F. Supp. 951 (S.D.N.Y. 1978).

jority opinion and Justice Harlan's concurrence in *Bivens.*[32] In *Butz v. Economu,* the Court noted that the presence or absence of congressional authorization for suits is "relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution."[33] And the four dissenters in *Butz* indicated that it would be inappropriate to permit suits against individual officers where Congress had amended the FTCA to allow actions for damages against the government for injury due to official misconduct.[34] In *Davis v. Passman,* the Court stated that "of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated."[35]

Finally, in *Brown v. General Services Administration,*[36] the Court refused to allow an action under *Bivens* where the plaintiff could have proceeded under section 717 of Title VII of the Civil Rights Act of 1964, which the Court held constituted a federal employee's exclusive remedy for employment discrimination. Accordingly, many lower courts have refused to extend *Bivens* to situations in which the plaintiff has an adequate alternative remedy.[37]

The most significant example of the possibilities for seriously limiting the availability of a *Bivens*-type remedy is *Carlson v. Green,* recently argued before the Supreme Court.[38] In *Carlson,* the mother of an inmate at a federal prison seeks damages for the death of her son due to poor medical care, basing her claim solely on constitutional violations of the Fifth and Eighth Amendments. The FTCA has long been construed to encompass prisoners' claims for damages due to prison medical malpractice.[39] The Government argues in *Carlson* that the plaintiff should be denied a *Bivens* remedy because the conduct complained of is within the scope of the FTCA and there is an adequate statutory remedy;[40]

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32 403 U.S. at 317, 407.
33 438 U.S. at 503.
34 *Id.* at 524-25 (Rehnquist, J., concurring in part and dissenting in part).
35 442 U.S. at 248.
36 Brown v. General Services Administration, 425 U.S. 820 (1976).
37 *See* cases cited in *Carlson Brief, supra* note 29, at 23 n.16.
38 *See* note 29 *supra.*
39 *See, e.g.,* Brown v. United States, 374 F. Supp. 723 (E.D. Ark. 1974). *See also* S. REP. No. 1327, 89th Cong., 2d Sess. 6 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS at 2520.
40 *Carlson Brief, supra* note 29, at 10-13, 16-41.

moreover, the Government argues that a *Bivens* remedy is inappropriate because it would allow the plaintiff to circumvent the administrative scheme imposed by the FTCA to dispose efficiently of claims.[41]

Although the legislative history of one of the pertinent provisions of the FTCA may undermine the Government's argument,[42] much of the battle in *Carlson* is over the adequacy of the remedy which the FTCA provides. The Government points to the comprehensive administrative scheme, the government's deep pocket and the completeness of the remedy for all injuries, even that arising from negligent mistreatment, in claiming that the FTCA is adequate and perhaps superior to a *Bivens* remedy. The plaintiff in turn notes the unavailability of a jury trial, punitive damages, or injunctive relief under the FTCA. In earlier proceedings, the Seventh Circuit peremptorily dismissed the Government's argument, reasoning that a remedy for negligence could not adequately compensate plaintiffs for serious deprivation of constitutional rights.[43]

The Supreme Court's decision in *Carlson* may clarify the relationship between the scope of *Bivens* and the structure of congressionally created remedies. For now, it seems fair to say that many lower courts will limit *Bivens* remedies when there are alternative congressionally created remedies available to the plaintiff.

II. H.R. 2659 AND THE SCOPE OF THE *BIVENS* REMEDY

H.R. 2659 would provide a special statutory remedy for "a tort claim arising under the Constitution of the United States, to the extent that liability for such claim is recognized or provided by ap-

41 *Id.* at 29-31.

42 Reorganization Plan No. 2 of 1973 — Amendment, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974) amended the FTCA to allow suits against the Government for certain intentional torts committed by investigative or law enforcement officers. The Government has successfully argued before two district courts that the provisions precludes a *Bivens* remedy where it is applicable. Torres v. Taylor, *supra* note 30; Hernandez v. Lattimore, 454 F. Supp. 763 (S.D.N.Y. 1978). However, the Second Circuit reversed *Hernandez, see* note 30 *supra,* concluding that Congress has not intended to preclude a *Bivens* remedy is so amending the FTCA. The Government takes exception to this analysis in *Carlson Brief, supra* note 29, at 31-34. In any event, Carlson also involves claims of negligence that fall outside the scope of that amendment.

43 Green v. Carlson, 581 F.2d 669 (7th Cir. 1978). It appears that the Court of Appeals failed to take account of the 1974 amendment to the FTCA discussed at note 43 *supra.*

plicable federal law."[44] In other words, the statute is to apply to constitutional torts. Successful claimants would be entitled to liquidated damages where actual damages are not substantial[45] as well as reasonable attorneys fees.[46] Class actions, not normally authorized under the FTCA, would be available subject to restrictions.[47] The "good faith" defense, currently available to individual defendants, would be waived by the Government unless the act or omission giving rise to the claim is that of a "Member of Congress, a judge, or prosecutor, or a person performing analogous functions."[48] These provisions provide an incentive to plaintiffs to allege and prove a constitutional tort if they are victimized by conduct which is unlawful under both the common law or the Constitution.

The bill is designed to leave the scope of the *Bivens* remedy untouched as currently framed by the courts and to operate only after the *availability* of the remedy has been decided. According to the Justice Department:

> It is not contemplated that every unconstitutional act necessarily will rise to the level of a constitutional tort. The bill makes no attempt to define the breadth or scope of those rights or constitutional deprivations which are compensable under a *Bivens* theory. Rather, that is left to developing case law.[49]

When a judicial remedy is *unavailable,* H.R. 2659 does not propose a congressional remedy; when a judicial remedy is *available,* H.R. 2659 would *substitute* a congressional remedy.

Presumably, Congress expects the courts to apply the same tests they have thus far used to determine when official misconduct constitutes a constitutional tort. Does Congress mean to include the courts' limitation of *Bivens* when adequate alternative remedies exist? If it does, H.R. 2659 could drastically reduce the scope of constitutional tort doctrine. The bill contains amend-

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44 H.R. 2659 § 3 (creating new 28 U.S.C. § 2681(b)).
45 *Id.*
46 *Id.*
47 H.R. 2659, § 3 (creating new § 2681(d)). Although beyond the scope of this comment, these limitations are significant and may effectively prevent many viable class actions.
48 H.R. 2659 § 3 (creating new § 2681(b)).
49 Section by Section Analysis, *supra* note 12, at 4.

ments to the FTCA that go beyond recognizing statutory damages for *Bivens*-type claims. The bill would also eliminate the existing exclusion in the FTCA for many intentional common law torts committed by federal employees.[50] Only actions for libel, slander, misrepresentation, deceit, or interference with contract rights would remain outside the scope of the FTCA. Assault, battery and other intentional torts (for which the United States may now be sued only if committed by an investigative or law enforcement officer) would become actionable under the FTCA.[51] Because many constitutional torts can also be characterized as common law intentional torts, these new damage remedies provided for common law torts could be deemed adequate to remedy the harm done to the victim, thereby rendering the special provisions covering constitutional torts inapplicable.

Such a result would not, however, be *compelled* by H.R. 2659. The phrase "arising under the Constitution" implies that the plaintiff's claim will fail or succeed depending upon a judicial interpretation of some provision of the Constitution irrespective of the existence of alternative remedies. The logical legitimacy of the adequate alternative remedy limitation is undermined by the basic purpose of H.R. 2659. Courts currently must choose between a congressionally created remedy and a judicially created remedy. Separation of powers counsels deference to Congress where it has acted. But H.R. 2659 would make the issue a choice between two congressionally chosen remedies. The courts would be called upon only to determine when the extra protection of the constitutional tort is appropriate. The existence of the special remedy of H.R. 2659 would itself imply a judgment by Congress as to the inadequacy of the usual remedy under the FTCA. The special remedy should therefore be considered a superior rather than a superfluous remedy. The victim of conduct characterizable as a common law tort, which also violates a constitutionally protected interest, should get the additional protection of the constitutional tort remedy under H.R. 2659.

The language of H.R. 2659 does not insure this interpretation, however. In the absence of a clear congressional preference, courts

50 H.R. 2659 § 4(c), amending 28 U.S.C. § 2680(h). *See also* note 43 *supra.*
51 *Id. See also* 28 U.S.C. § 2680(h) (Supp. 1979).

may consider it unnecessary to reach the constitutional tort issue when the plaintiff can proceed on a common law tort theory. The Department of Justice intends that the boundary of constitutional tort doctrine be carefully policed:

> [s]killful counsel may plead the existence of a constitutional tort when their case in reality sounds in a traditional, common law cause of action. It is intended that the courts be alert to such a possibility and rule on the attorney fees issue based upon the true gravamen of the tort as alleged and proven.[52]

In *Bivens,* the Supreme Court faced a problem arising from congressional omission — failure to extend the Civil Rights Act to federal officials. The judicial remedy was a bold step toward greater protection for constitutional rights. Through nine years of congressional inaction, the courts have proceeded slowly in a field which they acknowledge is better dealt with by Congress. Yet H.R. 2659 would not fill the void. There Congress would act while disclaiming any intent to limit judicial discretion in the field. The courts would still be required to determine if a government official has injured constitutionally protected interests so as to make damages appropriate. In turn, the bill would throw into doubt the alternative remedy rationale used to limit the scope of *Bivens*; discarding the alternative remedy limitation would greatly expand the scope of the constitutional tort remedy. The current trend toward recognizing causes of action other than those for Fourth Amendment violations has already been noted.[53] The elimination of the alternative remedy limitation does seem logical, however, given the design of H.R. 2659, since continued adherence to this course could deprive victims of egregious government conduct of the very benefits H.R. 2659 provides for constitutional torts.

It remains to be seen exactly how the courts will react to congressional action such as H.R. 2659's amendments to the FTCA. Since the bill self-consciously fails to express any particular policy or intent, the resulting judicial interpretations could well be confused and conflicting.

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52 Section by Section Analysis, *supra* note 12, at 15.

53 The Fourth Circuit has said that there is "no principled basis for limiting Bivens to the fourth amendment." Loe v. Armistead, 582 F.2d 1291, 1294 (4th Cir. 1978), *cert. pending* sub. nom. Moffit v. Loe, No. 78-1260.

III. AMENDING H.R. 2659

If the above problem is to be dealt with, Congress must legislate concerning the *availability* of the constitutional tort remedy it is creating. The issue is a matter of substantive law. Because the FTCA does not deal with matters of substantive law, it would perhaps be better to pass H.R. 2659 as a separate act, creating its own specially-crafted remedy for well-defined tortious conduct.[54] But in whatever form the remedy is codified, the substantive issue of availability must be addressed. A number of approaches exist for Congress to consider.

The simplest approach would be a proviso in the bill to the effect that where the plaintiff has alleged a "tort claim arising under the Constitution," he shall be entitled to the special remedy notwithstanding the existence of any remedies available to him under statute or common law. Because the meaning of the phrase "arising under the Constitution" is itself the issue, this approach is awkward and logically circular. Does the "claim" itself exist where an adequate alternative remedy exists? But in practice, such a proviso would make the intent of Congress clearer with respect to the adequate alternative remedy limitation, and it is hard to imagine the courts limiting *Bivens* in the face of such language.

Yet such a proviso would not provide any affirmative guidance to the courts as to when violation of a constitutionally protected interest is of sufficient importance to merit the special damage remedy. It would simply eliminate what has become the principal limitation on the scope of *Bivens*. In light of the current trend toward expanding the range of constitutionally protected interests under *Bivens*, the effect of a proviso might well be to create an implied cause of action for constitutional deprivations. On the other hand, elimination of the adequate alternative remedy limitation might encourage courts to adopt a more restrictive view of the

54 The Committee on Federal Legislation of the Bar Association of the City of New York has recommended severing H.R. 2659 from the FTCA in a soon to be published report on the bill. *See* COMM. ON FEDERAL LEGISLATION, REMEDIES FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS BY FEDERAL OFFICERS AND EMPLOYEES: PROPOSED AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT 17-18 (1980). The author would like to thank Steven B. Rosenfeld, Chairman of the Committee, and Kathleen Imholz, for providing a draft and printer's galleys of this report.

range of protected interests to prevent an onslaught of litigation. If Congress intends to create a cause of action to allow victims of official misconduct to vindicate their constitutional rights, the proviso seems an undesirable manner in which to proceed.

Congress should define a constitutional tort in the form of a statutory cause of action. Although the exact scope of the cause of action is a matter for debate, the model for it is readily apparent — section 1983 of the Civil Rights Act of 1871.[55] H.R. 2659 should therefore explicitly provide that every employee who, "under color of office[56] or within the scope of his employment, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution of the United States, shall be liable to the party injured in an action under sections 1346(b) and 2672 of the FTCA."[57] Such a definition would be the most logical and straightforward approach. Congress should not carefully fashion a remedy without specifying the injury for which it is created.

If enacting a statutory cause of action against the federal government for the vindication of constitutional rights is politically impossible, another alternative exists. H.R. 2659 could embody an Attorney General certification process to determine entitlement to the special remedy for constitutional torts. Whenever a claimant sought the special remedy for injury for which an alternative remedy existed, the Attorney General could be required to certify, pursuant to the standard articulated above for the statutory cause of action, the availability of the special remedy regardless of whether a common law or constitutional tort is ultimately proved in court. His determination would be subject to judicial review for abuse of discretion. Such a screening process would probably preclude plaintiffs with highly questionable constitutional claims from reaching court on that issue where an alternative remedy existed. Although this result may be attractive to some members of Congress, the legitimacy of effectively vesting authority to inter-

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55 42 U.S.C. § 1983 (1976).

56 For a discussion of the meaning of "color of office," *see* Section by Section Analysis, *supra* note 12, at 5-6.

57 Note 3 *supra*. These provisions of the FTCA would substitute the Government as the exclusive defendant in most cases.

pret the Constitution in these cases to the Attorney General, rather than the courts, is open to question.

Conclusion

Notwithstanding its admirable objectives, H.R. 2659 as drafted has a major problem. At best, the bill provides no guidance to the courts as to what sort of injury the carefully fashioned constitutional tort remedy is designed to remedy. At worst, it greatly narrows the scope of *Bivens* and its progeny, forcing plaintiffs to proceed under state law to vindicate constitutional rights violated by federal officials.

BOOK REVIEW

PLANNING, POLITICS, AND THE PUBLIC INTEREST. By *Walter Goldstein,* ed. New York: Columbia University Press, 1978. Pp. viii, 202, appendix. $12.50.

*Reviewed by Roger B. Porter**

These are difficult days for the U.S. economy. High inflation, relatively high unemployment, low rates of real economic growth, a declining value of the dollar, and two years with virtually no increases in productivity now characterize the economy's performance. These difficulties are compounded by a growing dependence on foreign sources of oil. The cheap energy era has ended and realistic policy alternatives today involve distributing pain rather than dividing greater wealth. Such times invariably produce renewed interest in national economic planning. Some see planning as a means of doing better with less. Others see national economic planning as a vehicle for implementing their vision of how society should be structured. They are not satisfied with the allocation of resources that results from the market. They want to supersede economics by politics.

Planning, Politics, and the Public Interest explores the prospects for national economic planning in the United States and provides a forum for those who favor and oppose greater planning. The essays in this collection, all original and prepared for a conference organized by the University Seminar on Technology and Social Change which has met at Columbia University since 1962, vary greatly in their scope. Some are focused narrowly, others broadly. The central issue of planning is often difficult to follow. But the book does raise an important question and offers some useful insights.

Andrew Hacker writes about a complex of ideas he calls "the New Rationality" as a source of support for government regulation of business and moves toward economic planning. Unfortunately, his essay is punctuated with assertions such as: "at least half of all products made, bought, and sold are not 'needed' by

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any objective reckoning. Much of our economic life is largely frivolous" (pp. 12-13); and "the more truth we have, the less people will buy on impulse" (p. 18). His central point is the claim that there is a growing constituency for a "public sector conception of the national interest" which sustains the rise in government regulation and proposals for national economic planning. But his evidence is largely at the level of assertion.

Eli Ginzberg contributes an interesting but relatively narrow essay on manpower planning in a pluralist economy. Franklin Long's essay on the role of government in technological innovation is in turn a straightforward, sensible review of the government's role in research and development.

Two essays in the book attempt to make the case for economic planning. Robert Lekachman in "The Inevitability of Planning" and Walter Goldstein in his concluding essay on "The Politics of Planning for the Public Interest" both argue the merits of such planning. Their notion entails a relatively detailed allocation of resources and investment under government guidance and control. Lekachman acknowledges the need for a better data base: "The federal capacity to contemplate and actually undertake the sort of interventionist planning that systematically influences prices, production patterns, and consumer spending, expands with the size and quality of the data base" (p. 152). What he would like, but does not anticipate, is the opportunity to "preside over a planning process which drastically alter[s] present allocations of income, wealth, and power" (p. 158). Instead, the planning that he sees as inevitable will be "conservative, corporate-dominated planning" (p. 158). The sense of need rather than a realistic conception of what is possible dominates his essay. "The case for planning derives in the end from the need to coordinate plans for a wholesome environment *and* full employment, energy conservation *and* improving living standards, tax equity *and* adequate capital formation . . ." (p. 159).

But those who are skeptical about interventionist planning in the U.S. present the more compelling arguments. Three general themes run through their analysis. One central difficulty of national economic planning is the strength of its underlying foundation — the data base on which it must rest. Long-range planning, if it is to be effective, requires accurate forecasting. How could an

economic planning body know where to allocate capital, how much to raise or lower taxes, or otherwise tinker with the economy without accurate forecasting? Forecasting is dependent not only on the elements of an econometric model; it also depends on the assumptions that are used and the information that is supplied. Despite considerable effort, economists have had a disappointing record in forecasting the economy, particularly for any extended period in the future. There are too many factors outside their control. Those who urge greater efforts at national planning and resource allocation have a much clearer idea of the result they would like than the means whereby it can be achieved.

A second difficulty facing would-be U.S. planners is that the transportation and communications revolutions have helped "knit together" the national markets of the industrial democracies. Raymond Vernon, in the book's most interesting and stimulating essay, "National Planning and the Multinational Enterprise: The U.S. Case," outlines the changes that have made obsolete the 1950's notion of planning that tended to define objectives in terms of national economic aggregates achieved in part by conscious government intervention.

The traditional distinction between domestic and foreign economic policy has blurred during the past quarter century. With the rise of the multinational enterprise, business is increasingly global in its outlook. A significant reduction in the natural, artificial, and psychological barriers to foreign trade and international capital movements has occurred. National economies have become more open and more sensitive to developments in the economies of their trading partners. This is true for both fiscal and monetary instruments. The American economy, in short, is becoming increasingly dependent on foreign markets and on foreign products. National planners can no longer consider the foreign sector as an element external to the national plan. Open borders limit the "planner's capacity to take the foreign environment as given and to concentrate his attention on the national turf alone" (p. 87).

Vernon concludes that "a realistic view of national planning, American style, therefore has to recognize that it is likely to be a fairly limited exercise" (p. 90). He outlines a choice among difficult alternatives faced by industrialized countries. Either they can

seek to regain effective control over their internal economies by restoring national restrictions at the border (a costly alternative in terms of economic efficiency) or they must "harmonize their national actions in the field of monetary and fiscal policy sufficiently to compromise their disparate national interests. For the present, the industrialized countries have rejected the first alternative and are still contemplating the implications of the remaining choice" (p. 93).

But effective national planning in the U.S. would require more than accurate forecasts on which to base resource allocations and insulation from external forces. Those who yearn for greater central control over the economy often fail to appreciate the most essential characteristic of the U.S. political system — that it consists of processes that diffuse power, divide authority, and distribute influence. The U.S. political system, as currently structured, is simply too fragmented to permit vast new planning powers. As Vernon notes: "The basic style of U.S. governance may well prove to be incompatible with national planning in any ordinary sense of the term. . . . American society is caught up in 'a perennial quest for a way of dividing, diffusing and checking power, and preventing its exercise by a single interest' " (p. 89). This central characteristic of fragmented authority is buttressed by weak political parties whose ideological differences are much less sharp than parties in Europe and Japan. Moreover, "compared with Britain, France, Japan, Germany, or Italy, the U.S. bureaucracy is a diverse group with neither common training, common ideology, nor a common perception of role and function" (p. 89).

Yet, while the realistic prospects for national economic planning in America seem dim, government's pervasive role has often made it a crucial factor in corporate decisionmaking. Specific government policy decisions, beyond overall fiscal and monetary decisions, now directly determine or heavily influence a major portion of new capital investment. Murray Weidenbaum, in his essay, argues that "currently business decision-making is shifting from the professional management selected by the corporation itself to the vast corps of government planners and regulators who are influencing and often controlling the key managerial decisions of the typical business firm" (p. 46). This is so pervasive, according to

Weidenbaum, as to constitute a second managerial revolution, the shift of decisionmaking power from the formal owners of the modern corporation to professional managers having constituted the first. He characterizes this as a "relatively silent, unintentional" revolution — an "unexpected byproduct" of the expanding role of government in our society (p. 47). And he cites a litany of costs that have resulted from growing governmental intervention in business decisionmaking — lower productivity, increased uncertainty, adverse effects on employment, and a reduced rate of innovation. His proposals for reforming government regulation, however, are increasingly accepted — careful examination of the costs and benefits of alternative governmental actions, modification or elimination of those with excessive costs, and creation of some form of regulatory budget to limit the aggregate "social costs" that regulators can impose on the private sector.

Yet the debate over national economic planning is just one aspect of the interface between the public and private sectors. This is thus a timely book in focusing attention on the evolving relationship between government and business. Decisionmaking in both the public and private sectors is increasingly complex. While the federal government's aggregate dollar share of the G.N.P. has not altered markedly in the last twenty years, the number and scope of its programs have. The federal government is not merely responsible for administering these arithmetically expanding programs, but for resolving the geometrically expanding conflicts between their objectives and priorities. At the same time, government has become a more pervasive and significant feature of the environment in which businessmen must operate.

Those in both the public and private sectors have much to learn about each other and the pressures each faces. Managing business-government relations constructively promises to be one of the greatest challenges facing the United States during its third century.

BOOK REVIEW

MARKETS AND MORALS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES. By *Viviana A. Rotman Zelizer.* New York: Columbia University Press, 1979. Pp. xiv, 208, bibliography, notes, index. $15.00.

*Reviewed by Allen Early**

The somewhat improbable title of this account addresses the dilemma faced by U.S. life insurance companies as they began to grow around the middle of the nineteenth century. The author suggests that some companies and agents find themselves in the same quandary today: are life insurance companies eleemosynary agencies concerned with protection for widows and orphans, or are they financial institutions whose primary concern is profits? How could a business which was once widely condemned on economic and moral grounds come to be such an important part of our lives? Viviana A. Rotman Zelizer looks beneath the oratory that has characterized the battle against life insurance to try to isolate the changing cultural and ideological forces that shaped the growth of the industry in America.

At a time when economic factors seem to loom so large in all our decisions, it is a little surprising — although somewhat refreshing — to find a study which explores the impact of non-economic factors on human behavior. The author is assistant professor of sociology at Barnard College and Columbia University. She believes that existing interpretations of life insurance history have stressed economics at the expense of cultural factors. Consequently, she proposes to: (1) introduce cultural and ideological as well as selected socio-cultural variables vital to life insurance history; and (2) show how economic variables, although insufficient by themselves, constitute necessary elements of a multivariate model.

Within the general context of the impact of noneconomic factors on economic behavior, there is the specific problem of the cultural and structural dilemma created by "putting death on the market" (p. viii). Professor Zelizer says the early opposition to life insurance resulted largely from a value system that "condemned a

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strictly financial evaluation of human life" (p. xiv). In seeking to explain this opposition and the way it has been overcome, she uses a diverse group of contemporary sources. These include advertising booklets published by life insurance companies, insurance journals and magazines, textbooks, agents' training manuals, and a wide variety of published material both critical and favorable.

As might be expected in a sociological study, there is much less about what life insurance companies did than what is said about them — both by their own spokesmen and by others. The first formal life organization was the Corporation for Relief of Poor and Distressed Widows and Children of Presbyterian Ministers. It was established in 1759 by the Presbyterian Synods of New York and Philadelphia to insure the lives of their ministers. This company, and a similar institution created by Episcopal ministers ten years later, were regarded by some economic historians as being "half-charitable, half-insurance institutions" (p. 2). This first organization, now known as the Presbyterian Ministers Fund, ranks among the fifty largest mutual life insurance companies from the standpoint of assets.

This ambivalence between business and charity plagued the industry for many years. In spite of the growth of fire and marine companies, and of trust companies and savings banks, in the first half of the nineteenth century, there was little growth of life insurance. The author lists a number of reasons why this should *not* have been the case. Prior to the 1840's, when life insurance reached what economist W. W. Rostow calls the "take-off," the country seemed to have both a need for life insurance and the ability to support it. The purchasing power of the nation was growing. Urbanization had taken many people away from the security of the family farm. There was an increasing actuarial knowledge, and some awareness of mortality rates. And, in contrast to some European countries, government policies were generally favorable. What, then, held it back?

In Professor Zelizer's view, the diffusion of American life insurance was more than a matter of economics or sophisticated actuarial tables. It challenged deeply institutionalized values relating to death and the role of Providence in the social order. To religious leaders, speculation with the solemn event of death was a sacrilegious wager that God would "resent and punish as a crime"

(p. 77). A German Lutheran pastor from Hartford, Connecticut, is quoted as saying, "While I am pastor in this church, none of my parishioners shall carry life insurance" (p. 77). An editorial in the *New York Times,* February 23, 1853, declared:

> In its application to fire and marine risks (insurance) is generally safe enough, because those are contingencies which none will court and against which insurance will make men in general none the less careful. But very much of the current talk about life insurance as the grand panacea for all possible evil and as the main reliance of all men who live on salaries or fixed incomes is calculated to encourage reliance upon something besides economy and industry and to lead accordingly to the relaxation and decay of those cardinal virtues of society (p. 32).

Turning to a more familiar approach, the author considers the ways economic factors influence the adoption of innovations. She describes life insurance as a social innovation, and says the adoption of an incompatible innovation often requires the prior adoption of a new set of values. For life insurance to become acceptable throughout our society, it was thus necessary to effect significant changes in the public's views about death, risk, and gambling.

As the United States shifted from an agricultural society in the nineteenth century, various aspects of life moved from "family and neighborhood" affairs and became institutionalized. The professional funeral director replaced neighbors and relatives who had taken care of the disposal of the dead. Lawyers and accountants provided highly individualized estate planning instead of a deathbed scene where fairly generalized arrangements were made with the family and close friends. And life insurance was part of a general movement to rationalize and formalize the management of death.

Resistance continued, however, to "placing a value on human life" (p. 45). Vestiges of such beliefs are seen today in relation to sales of blood, although donations are almost universally acceptable. As organ transplants grow in feasibility — and in practice — another set of values will be imperiled. Although not treated in this book, there is a potential field of medical practice which will further challenge our mores and our laws. If heart and kidney transplants are possible, what about arms and legs? Biologists tell us such transplants may be a reality within our lifetimes. Suppose two persons are badly mangled in an accident and the parts are

reassembled into one. Which one is it? In religion and in law we are no more prepared to cope with these situations than early nineteenth century Americans were prepared for life insurance.

But, our sociologist author reminds us, money that corrupts can also redeem. Sacrilegious because it equated cash with life, life insurance became, on the other hand, a legitimate vehicle for the symbolic use of money at the time of death. Promoters of insurance also pointed out that the tranquility and peace of mind that came from making adequate provision for one's family could definitely promote longevity. By the beginning of the twentieth century, life insurance companies began to realize that extending the life-span of their customers would reduce the costs of their business. Promotion of life-conserving measures thus made more profits, and helped erase the taint of being concerned only with death.

Changing attitudes toward risk and gambling also had a major impact on the legitimation of life insurance. Many felt that life insurance was a form of gambling, and thus morally objectionable. Certain aspects of early forms of life insurance were outright bets on human lives, with the purchasers of policies on elderly persons clearly hoping for their early demise. The kinship between gambling and insurance was also sanctioned by law under the general rubric of aleatory contracts: *Actus quo fortuna praedominatur.* The risk of a fortuitous event is at the core of both types of contracts. Professor Zelizer refers to an article in the *Journal of Risk and Insurance* as late as 1964 which asked: "Are insurance and gambling the same?" (p. 70). Other industry authorities are cited to bring out the distinction that though the form is the same, the moral aspects are exactly the opposite. "While the purpose of gambling is to create risk, the intent of insurance is to reduce risk by transferring it to specialists" (p. 71).

An important factor in making clear the distinction between gambling and insurance was the concept of insurable interest. First introduced in England in 1774, it prohibited all insurance on lives "except in cases where the person insuring shall have an interest in the life of the persons insured" (p. 71). This has been a difficult concept to define clearly, however, and even today some questions arise as to whether this interest exists in specific circumstances.

If the fears of "blood money" as the result of the death of a loved one, and the stigma of gambling, could be overcome, finan-

cial protection through life insurance could become a readily salable and purchasable commodity. But it could not qualify as a moral substitute for self-help and cooperative methods of support where men are bound by trust and community solidarity. (These latter factors help explain the proliferation of types of life insurance activities among fraternal and ethnic groups throughout our nation.) The life insurance business had to establish its legitimacy by convincing the public that paid protection for widows and orphans was not merely technically efficient, but a morally superior system.

Life insurance was packaged as a religious item, and religious terms were used to describe this method of meeting "responsibility to God and the family" (p. 989). Life insurance could help avoid the corrupting influence of crime which came from poverty. It could place its beneficiaries above the need of public charity. In such a campaign the clergy could be enlisted, and many were. The moral and theological arguments were so successful that between 1840 and 1860 life insurance became thoroughly established as a morally beneficent institution.

Yet its very success was its undoing. By 1870, the major companies had lost their charitable image and become powerful corporate institutions. As such, they had to abandon the garb of charity. The protection and welfare of policyholders and beneficiaries became secondary to the industry's overriding concern with accumulation and economic growth. What was earlier described as family protection came to be lauded as family investment. By the end of the nineteenth century, interest in the investment features of life insurance overrode all other considerations. Moralistic appeals dwindled, and prospective customers (clients) were urged to buy insurance for their own economic advantage.

And so we come to a more complete understanding of the title of the book, which might better read, *Markets or Morals: The Unresolved Dilemma.* The dual nature of life insurance was acclaimed at the first World Insurance Congress in 1915, where it was stated that no other activity "comes nearer combining the altruistic and commercial instincts of man" (p. 112). This ambiguity has contributed to endless tension within the industry and among its agents.

Without a clearly defined goal, it is impossible to have a consistent and rational course of action. When the companies stressed

beneficence they were accused of inefficiency, but when they emphasized a rational, impersonal approach, they were said to be neglecting the widows and orphans. Nowhere was this polarity more pronounced than in the role of the agent. Was he a salaried missionary or a business solicitor? Whatever the role, he was indispensable.

Peter Drucker, well-known as an analyst of business management, has criticized the life insurance industry as having one of the most costly distribution systems in American business. For a variety of reasons, insurance is not *bought,* it is *sold.* Companies would be overjoyed if customers would come in and "buy it off the shelf." But few do. Although there is a great deal of group business today, the industry has grown by the face-to-face efforts of the agent with the insured. Agents are praised for service to their clients, yet they are rewarded on the basis of policies sold. The industry is plagued with an extremely high turnover among its agents. Is it because they are unable to meet the exacting standards, or is it because, as disgruntled former agents charge, the companies take anyone who can sell a few policies to his friends? When the salesman cannot make a living in a field, despite the roseate predictions of rewards, he leaves the field for something else.

The author describes the alleged low prestige of life insurance agents in the community. This is certainly less true now than formerly, but the presence of many former and part-time agents, especially if they are disgruntled and critical, will cast a blight on those who continue. Certainly many agents today are respected civic and community leaders. The industry is continually striving to upgrade its agents and enhance their professional standing. The Chartered Life Underwriter degree (CLU) is a coveted award, but earned only after long and diligent study and preparation. Reputable agents will not practice, and reputable companies will not tolerate, some of the practices common in an earlier day. Notorious among these was "twisting," in which an agent would get a client to drop one company's policy for another's — often through untruths and misrepresentations.

Yet, as in any industry, there are some who give the industry a black eye. Less than five percent of those licensed to sell life insurance become members of the Million Dollar Round Table.

They are the ones, however, who sell a substantial amount of all the insurance sold. And they are really selling in a different market from that which existed thirty or forty years ago. Professor Zelizer does not point out that the basic needs of burial expenses and immediate death benefits are now largely met through Social Security and company group policies. The successful agents today are helping to meet needs which largely are business-related. To that extent, they have found a sense of mission, or calling, and can recognize that they have an almost unparalleled opportunity to achieve material rewards commensurate with their efforts. These may have overcome the sense of inner tension of which the author wrote. For others, no doubt, the question of Markets or Morals may well remain.

RECENT PUBLICATIONS

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW. By *John Hart Ely*. Cambridge, Mass.: Harvard University Press, 1980. Pp. viii, 268, notes, index. $15.00.

In *Democracy and Distrust: A Theory of Judicial Review,* John Hart Ely wrestles with the problem that has occupied constitutional scholars since *Marbury v. Madison*: how does a society committed to the democratic ideal nonetheless provide protection for minorities who lack the political power to protect themselves?

Ely first elaborates, then rejects, two theories concerning the constitutional protection for minorities. The first restricts the sphere of legitimate constitutional interpretation to the constitutional text itself, i.e., "clause-bound interpretivism" (p. 12); the second considers judicial imposition of "fundamental values" not found expressly or clearly implied in the constitutional text, i.e., "non-interpretivism" (ch. 3). Both are rejected because of their essential incompatibility with the democratic ideal, the former because it cedes control to governmental actors who have long since died, and the latter because it grants unchecked power to an unelected judiciary. Since these two alternatives are unacceptable, Ely spends the balance of the book developing his own theory of judicial review, with an emphasis on process and the equality principle.

Thus, Ely argues for a "representation-reinforcing approach to judicial review" (p. 88), in which the Court will intervene only when the "channels of political change" (ch. 5) are blocked or the majority systematically disadvantages a minority because of hostility or prejudice. In the first instance, Ely discusses malapportionment (p. 116) and freedom of speech (p. 105). In the second, he discusses decisions regarding suspect classifications (p. 145), affirmative action (p. 170), the death penalty (p. 173), and the right of interstate travel (p. 177).

Ely's major departure from most commentators in this area is his choice of a constitutional provision to protect minority rights. He chooses the Privileges and Immunities clause of the Fourteenth Amendment and the Ninth Amendment. Ely criticizes the current reliance on the Due Process clause to guarantee substantive rights

arguing that "substantive due process" is as non-sensical as "procedural due process" is redundant (p. 18). At the same time, he chooses Privileges and Immunities and the Ninth Amendment because they "contain the sort of invitation to substantive oversight that the Due Process clause turns out to lack" (p. 18).

Professor Ely's discussion of the Burger Court and the defects of that Court's interpretation of fundamental values (ch. 3) is especially illuminating. After canvassing possible sources of these fundamental values (*e.g.,* natural law, neutral principles, reason, tradition, consensus, pp. 48-69), Ely mounts a frontal attack on this method of jurisprudence. His argument is that freezing fundamental values into a constitution is both unnecessary and ineffectual. If a value is truly widely held, there is little need for the constitution (and the Court) to protect it, and if it is not, an attempt by the Court to impose that value on the political system will simply not work. Thus, he argues, attempts to preserve specific fundamental values are doomed from the start, and must therefore rely on process. As an example of the futility of a fundamental values approach, Ely cites the Eighteenth Amendment, repealed 14 years later by the Twenty-first Amendment (pp. 99-100).

In this major new work, John Hart Ely has made a valuable contribution to the literature on judicial review. His treatment of the First Amendment is particularly noteworthy as both a new and brilliant assessment of the values of that amendment. *Democracy and Distrust* is sure to be of significant value to judges, practitioners, students, and academics.

Don Thompson

FOREIGN POLICY BY CONGRESS. By *Thomas Franck and Edward Weisband.* New York: Oxford University Press, 1979. Pp. 293, index. $15.95.

In their book, *Foreign Policy by Congress,* Thomas Franck and Edward Weisband describe and analyze what they see as a revolution in the formulation of American foreign policy since the end of the Vietnam War. The authors assert that there has been a radical and potentially permanent shift of power in the control of foreign policy from the executive branch and the traditional leaders of Congress to the congressional rank and file. While they note

several major disadvantages of this shift in power, including ineffective compromises, the inability to act quickly, if at all, the politicization of foreign policy, and the potentially disproportionate influence of special interests, the authors suggest that these drawbacks are outweighed by the advantages of an increased legitimacy and democratization in our foreign relations.

The book is divided into four parts. The first — Congress Becomes a World Power — chronicles the expansion of congressional control over foreign policy since the early seventies. Beginning with the congressionally-mandated halt to the bombing in Indochina, the "Bastille Day of the congressional revolution" (p. 13), the authors describe how a distrustful and resentful Congress ended U.S. involvement in Southeast Asia over the objections of both the President and many of Congress' own leaders. This revolution disrupted the traditional power structure, bringing far greater egalitarianism to the 535 members of Congress (p. 32). While this dispersion of power limited the ability of Congress to command actions, it did not foreclose Congress' power to block any Presidential move which it thinks dangerous to its newly found influence.

The second section of the book — Codetermination: Congress Alters the Ground Rules — discusses how Congress has attempted to institutionalize its increased influence to ensure that foreign policy is codetermined by the Congress and the President. Most important of these efforts is the War Powers Resolution of 1973, which limits Presidential discretion in the use of force without the advice and consent of the Congress. Congress has also built provisions into the budgetary process to oversee and influence the role of human rights, military assistance, nuclear exports, intelligence gathering, and covert operations in U.S. foreign policy. While acknowledging criticism that these measures have hurt the nation's ability to act decisively, the authors chastise the executive branch for confounding the requirement to consult with Congress with the requirement to avoid areas within the "legislative" domain (p. 157).

In the third part of the book — Will the Congress Come to Order — Franck and Weisband examine the ability of Congress to help formulate an effective foreign policy. One potential problem they cite is the increased lobbying of Congress by foreign governments, ethnic minorities, and special interests. The authors believe

that these efforts will generally cancel themselves out in a form of foreign policy pluralism. Another problem is that, while the revolution provided Congress with additional influence, it "badly mauled the instruments and structure through which the Congress traditionally exerts power" (p. 210). If a new structure fails to emerge, paralysis could result and codetermination could become nondetermination. Along with these problems, the authors note the rapid increase of expertise available to Congress. Through additional staff and information support services, Congress now has the resources to formulate its own policies and conclusions without having to rely completely on the information provided by the executive branch.

The final segment — In Search of the Lost Consensus — describes efforts of the executive branch to accommodate the new congressional power. Both the White House and individual agencies have increased efforts to communicate with the Congress over major issues. After berating President Carter for conducting the Panama Canal Negotiations entirely in secret, the authors applaud his efforts to keep the Senate informed about the SALT II negotiations, describing the SALT II treaty debate as a major test of the post-revolutionary system.

The book is at its best in reporting the battles and events of this congressional revolution. While the organization is somewhat choppy, the discussion of individual issues is detailed and, for the most part, interesting. The authors succeed in convincing the reader that a major redistribution of power did take place in the determination of U.S. foreign policy, and they do a good job of discussing some of the consequences of this redistribution. Where they fail is in convincing the reader that this redistribution is in America's best interest. The book points out several major disadvantages — the paralysis and politicization of foreign policy — and only offers the hope that the Congress will solve these problems in some way. One senses that, failing a solution to the acknowledged problems of the present reign of congressional power, the revolutionary Congress could prove even more inept in the handling of U.S. foreign policy than the power structure it replaced.

Larry Latourette

MONEY IN CONGRESSIONAL ELECTIONS. By *Gary Jacobson.* New Haven: Yale University Press, 1980. Pp. xix, 251, index. $15.00.

During the past decade, one of the hottest topics on the congressional agenda has been campaign finance reform. Nowhere else can legislators more directly influence their own reelection prospects, and not surprisingly, the net effect of ten years of reform has been to make incumbent members more invulnerable than ever. What may be surprising to those unfamiliar with the course of the reform movement is the fact that Congress has been aided in its enterprise by a formidable array of public interest organizations acting with only the best of intentions.

In *Money in Congressional Elections,* political scientist Gary Jacobson undertakes to explain how the reformist impulse transformed itself into a formula for incumbent protection. This is not, however, merely another tale of public-spirited legislation being twisted to selfish ends. Rather, maintains Jacobson, the whole thrust of the recent campaign finance legislation has its roots in a fundamentally mistaken view of the role of money in congressional campaigns.

Professor Jacobson starts his analysis with the unobjectionable proposition that, for electoral democracy to be meaningful, electoral competition must be vigorous — or at least potentially vigorous. The price of competition is high, however. It is, of course, no new notion that there is a direct relationship between the amount of money available to challengers and their success at the polls. But Jacobson documents this relationship more thoroughly than ever before. In fact, Jacobson estimates that, all other things being equal, a newcomer must spend at least $200,000 to mount a realistic challenge to a sitting member of the House (p. 164).

Moreover, in his most significant findings, Jacobson shows that campaign spending by *incumbents* is more or less irrelevant to the chances of challengers. In other words, the more a challenger spends, the better he will do no matter how far he might be outspent by the incumbent. What emerges from these findings is a model of electoral competition in which incumbent advantage is essentially a matter of voter recognition. So long as the incumbent

has kept his image in reasonably good repair, there is little he can do at election time to enhance his standing. For the challenger, on the other hand, the task is to become as widely recognized as possible, and this means spending as much money as possible. While, in theory, challenger spending could also reach the point of diminishing returns, in practice, this threshold is so high that it is almost never crossed.

It follows that any system of campaign finance regulation directed toward limiting the amount of money spent on campaigning is bound to be biased in favor of incumbents and against challengers. Yet, this is precisely what the would-be reformers have sought to do, and Congress has been only too willing to allow. Instead of concentrating on making more money available to challengers, the reform legislation has concentrated on reducing the role of private funding in political campaigns. Individual contributions have been restricted, and plans have been proposed for a system of public funding that would require candidates to accept predetermined spending limits.

It was always recognized that the contribution limitations enacted under the Federal Election Campaign Act Amendments of 1974 would leave political campaigns underfinanced. Proponents of the legislation argued, however, that public funding would serve as an adequate alternative to private contributions and that, in any event, the system would tend to neutralize incumbent advantage and place challengers on a more equal footing. Unfortunately, the proponents proved to be wrong in a number of important respects.

First, as Jacobson shows, the problem of incumbent advantage could not be solved by reducing incumbent spending, but only by increasing challenger spending. Second, once congressional leaders caught on to this fact, they insisted that any public financing legislation incorporate expenditure limits low enough to lock-in the existing incumbent advantage and preclude any effective challenge. As a result, the legislation was blocked by Republicans who correctly perceived that any system tending to perpetuate incumbent advantage would also tend to perpetuate Democratic control of Congress.

What remains in place is a scheme of regulation that was really not designed to operate without public funding — and doesn't. As

Jacobson observes, "It is simply not possible to finance most campaigns adequately with small individual donations, and even those of the size now permitted provide insufficient funds for large, competitive campaigns" (pp. 196-197). Furthermore, since the contribution limits are not indexed for inflation, this problem is bound to get worse.

Jacobson concludes by restating the dilemma of the campaign reform effort. The current limits on private funding will soon become intolerable for incumbents and challengers alike. The only version of public funding that has any chance of success in Congress is one that would place challengers under an even more severe handicap. Jacobson has not set out to be prescriptive, yet his findings cannot avoid undermining many of the basic assumptions upon which the system of campaign finance reforms rest. Whether the entire edifice should be demolished is by no means clear, but at a minimum, Jacobson's work should force us to take a close, hard look at the potential consequences before we reflexively applaud any program that proposes to "reform" the political process.

George White

CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT. By *James O. Freedman.* New York: Cambridge University Press, 1978. Pp. xi, 324, notes, appendices, index. $15.95.

In examining the "recurrent sense of crisis" that has marked the history of the American administrative process, James O. Freedman finds a deep-seated doubt about the legitimacy of the "process" itself. The first, and more provocative, half of his book *Crisis and Legitimacy* identifies several sources of this doubt and pronounces it largely unjustified. The second part attempts to develop a theory of legitimacy that centers on the quality of administrative justice.

First, Freedman discusses the administrative agency's nonconformance with two of the most hallowed concepts of American political theory: the separation of powers and the judicial model of decisionmaking. He argues that criticism directed at this noncon-

formity takes too simplistic a view of the governmental process, both as envisaged by the framers and as realized in practice, and ignores the functions and needs of large-scale administrative bodies.

Second, he examines widely-held public attitudes that undermine the acceptance of administrative legitimacy: ambivalence toward economic regulation, distaste for the increasing bureaucratization of everyday life, and concern about the supposed insulation of agencies from political accountability. Freedman's exploration of these issues provides the most stimulating reading in *Crisis and Legitimacy*. He notes that the administrative process can hardly be expected to function effectively if Congress, unable to agree on the desirability or form of regulation in a particular area, provides an agency with neither support nor direction.

In response to the impression that agencies are independent satrapies of power, unaccountable to elected officials, Freedman makes several observations: agencies are in fact subject to considerable political influence; a measure of independence promotes the stability, coherence and continuity necessary for effective operation; and the nonmajoritarian character of agencies is shared by such other institutions as the cabinet and the congressional committee system.

Finally, Freedman acknowledges that "bureaucratic ossification," which glorifies rule and routine at the expense of flexibility and concern for the individual, poses a major problem that is capable of only limited solutions. He reminds us, however, that bureaucratic organization is essential to the administration of complicated regulatory schemes.

In addition to successfully refuting many of the misconceptions that underlie the "sense of crisis" over the American administrative process, Freedman contends that more emphasis on fair procedures is required if the process is to be accepted as legitimate. Freedman finds that the Administrative Procedure Act has succeeded in achieving greater fairness in formal administrative proceedings. But as for informal action, which constitutes the bulk of administrative decisionmaking, he suggests more frequent promulgation of rules, provision of reasons for agency decisions, and expedited hearings to ensure fairness.

Though many of Freedman's recommendations seem indisputable, his emphasis on procedural fairness seems too limited a response to the problems raised in the opening half of his book. The two sections of *Crisis and Legitimacy* are not congruent. The first half argues persuasively that fundamental, pervasive concerns lie at the root of public dissatisfaction with the administrative process. These concerns, with their broad ideological and symbolic content, transcend the particular contacts that members of the public make with administrative agencies. The second half, by comparison, seems contracted in scope. While fairness is a laudable goal, and will undeniably lead to greater acceptance of the "fourth branch of government," it operates only *within* the administrative process and does not bear directly on some of the larger concerns Freedman discusses. The primary value of his book, therefore, lies not in its particular suggestions and recommendations, but in its identification and analysis of these larger concerns.

Mitch Berg

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ABRAHAM LINCOLN AND RECONSTRUCTION: THE LOUISIANA EXPERIMENT. By *Peyton McCrary.* Princeton, N.J.: Princeton University Press, 1979. Pp. xvii, 356, appendices, bibliography, index. $25.00, cloth.

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