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# ARTICLE

# STANDING OF FOREIGN GOVERNMENTS TO BRING ANTITRUST SUITS: CONGRESS RESPONDS TO *PFIZER V. INDIA*

JEAN M. PARPAL*
EMORY M. SNEEDEN**

*The Supreme Court decided in* Pfizer v. India *that foreign governments can sue United States corporations for treble damages in antitrust suits. This decision triggered a number of legislative responses which were directed primarily at two concerns. First, the Court's decision placed foreign governments in a position superior to that of the United States government, which can only recover actual damages in antitrust suits. Second, the decision left American companies open to antitrust suits from governments which do not provide reciprocal rights to the United States.*

*In this Article, Ms. Parpal and Dean Sneeden evaluate the past legislative responses and closely examine and compare the two* Pfizer*-related bills that are currently before the House and the Senate. They argue that the difficulties created by the* Pfizer *decision can and should be remedied by the enactment of two legislative provisions: a limitation of any foreign government's recovery to actual damages (a limitation embodied in both of the current bills), and a mild reciprocity requirement (which would be a compromise between the two bills). They also assert that such provisions are consistent with the United States' international obligations.*

In the 1978 case of *Pfizer Inc. v. Government of India*[1] the Supreme Court held that foreign sovereign governments are "persons" within the meaning of section 4 of the Clayton Act.[2] Thus, for the first time in the over sixty years since passage of the Clayton Act, foreign governments had standing to sue Amer-

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1 434 U.S. 308 (1978).

2 15 U.S.C. § 15 (1976). This section provides:

> Any Person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

ican companies in United States courts for treble damages under the United States antitrust laws.

The *Pfizer* decision drew vigorous dissent from three Justices[3] and prompted intense legislative scrutiny. The case raised two important issues: first, whether foreign governments should be permitted to sue for treble damages under United States antitrust laws while recoveries by the United States government are limited to actual damages under those same laws;[4] and second, whether the right of foreign governments to seek antitrust damages in United States courts under American law should be conditioned upon the existence of reciprocal rights for the United States government under the laws and in the courts of those foreign nations.[5]

The dissenting Justices in *Pfizer* argued that the decision to grant or deny foreign governments the right to sue for treble damages under the Clayton Act properly belongs to Congress.[6] Many members of Congress agreed. Consequently, soon after the *Pfizer* decision, legislative efforts to modify or overturn the case began. Several legislative initiatives were considered by the Ninety-fifth and Ninety-sixth Congresses, but were not successful.[7] The initiatives undertaken in the Ninety-seventh Congress, however, have fared somewhat better.[8] Both the Senate and the House have passed legislation which would modify *Pfizer* by limiting recoveries in antitrust suits by foreign governments to actual damages. The two proposals differ on the issue

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3 434 U.S. at 320 (Burger, C.J., dissenting).

4 *See* 15 U.S.C § 15a (1976). This section provides:

> Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of the suit.

5 Many of the foreign governments that gained the right to sue for treble damages in the *Pfizer* decision have no discernible antitrust policy. Some of them actually engage in or encourage anticompetitive behavior as a matter of national policy. For example, the governments of Iran and Kuwait, plaintiffs in the *Pfizer* litigation, are members of the OPEC oil cartel. Others, including India, have antitrust laws that prescribe penalties for antitrust violators, but have no provision for awarding damages to an injured plaintiff. West Germany, on the other hand, is representative of a small group of foreign sovereigns that have antitrust laws permitting plaintiffs to prove and collect actual damages.

6 434 U.S. at 320-21 (Burger, C.J., dissenting). Justices Powell and Rehnquist joined in the Chief Justice's dissent.

7 *See infra* notes 61-100 and accompanying text.

8 S. 816, 97th Cong., 1st Sess. (1981); H.R. 5106, 97th Cong., 1st Sess. (1981); *see infra* notes 101-07 and accompanying text.

of reciprocity. The Senate version provides that a foreign government may seek protection under United States antitrust laws only after showing that it has enacted and actually enforces laws prohibiting conduct similar to the conduct prohibited by the American antitrust statute under which it wishes to bring suit. Moreover, the Senate version conditions recovery by foreign governments on the existence of reciprocal rights for the United States government under the laws of the foreign government. The House Judiciary Committee deleted similar reciprocity provisions during consideration of its legislation, leaving the Senate and the House at odds on this issue.[9]

Critics of these legislative proposals share the *Pfizer* majority's concern[10] that any modification of the treble-damages remedy currently available to foreign governments under the antitrust laws will subvert the deterrent effect of section 4 of the Clayton Act. The proposed reciprocity requirement has also drawn criticism, most notably from the House of Representatives. Its critics fear that a reciprocity requirement would be perceived as an attempt to dictate to foreign nations the manner in which their economies should be regulated. The legislative sponsors, however, have issued pointed rebuttals to these criticisms. In response to the concern that antitrust violations would be encouraged abroad if foreign governments are limited to actual damage recoveries, the sponsors point to the fact that the United States government is limited to actual damages[11] in antitrust suits, and argue that American corporations are not thereby encouraged to commit domestic antitrust violations. The proponents of reciprocity, in addition to making the conventional pro-reciprocity arguments which address the issue of American dictation of economic policy to foreign nations,[12] consider such a modification of *Pfizer* a move toward a policy of restraint under which the United States government would take a neutral position with regard to American companies doing business abroad. The current position of the government is perceived by many as an adversarial one.[13]

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9 *See infra* text accompanying notes 101-06.
10 *See* 434 U.S. at 314-15.
11 *See supra* note 4.
12 *See infra* text accompanying notes 122-23.
13 *See infra* text accompanying note 67.

*Pfizer* was a case of first impression and has far-reaching significance not only for antitrust lawyers and scholars but also for foreign governments, American corporations, and consumers — all of whom are certain to feel its impact in the future. The precedent set in the case deserves thorough examination and comment.

Section I of this Article discusses the background of the *Pfizer* litigation and reviews the Supreme Court opinions in the case. Section II presents a critical analysis of the *Pfizer* decision. It attacks the majority's reasoning in this case on four grounds: the Court incorrectly applied the legislative history to this case; the Court mistakenly assumed that certain negative repercussions would arise under alternative decisions; the Court did not consider policy choices which are otherwise available to foreign governments in antitrust actions; and the Court misread the case by perceiving the question as one of access to United States courts rather than as a question of substantive rights under particular statutes.

Section III of the Article analyzes the congressional reaction to the *Pfizer* decision. It traces the legislative history of the bills that have been proposed to remedy the policy problems arising from the decision. It details the failure of these proposals in the Ninety-fifth and Ninety-sixth Congresses, and it reviews the House and Senate bills of the Ninety-seventh Congress. Since the House and the Senate have considered substantively different bills during the Ninety-seventh Congress, section III also compares the bills. It concludes that the reciprocity issue will be the most difficult issue to resolve in conference. Section IV evaluates the legislative efforts that have been made to modify the *Pfizer* decision. It presents a detailed examination of three issues: the appropriateness of denying a treble-damages remedy to foreign governments, the need for a reciprocity requirement, and the consistency of the legislation with United States treaty obligations and the Foreign Sovereign Immunities Act. Section IV shows that both legislative proposals are highly desirable except in their treatment of the reciprocity issue, and it proposes a compromise between the House and Senate on reciprocity. The Article concludes that the legislation pending in Congress is, especially if amended to include a workable reciprocity re-

quirement, an important and necessary response to the problems raised by the *Pfizer* decision.

## I. BACKGROUND

The *Pfizer* case involved separate antitrust actions against six American pharmaceutical manufacturers,[14] brought by the governments of India, Iran, and the Philippines.[15] These plaintiffs sought treble damages under the Clayton Act.[16] The governments alleged that the defendants had conspired to restrain and monopolize interstate and international commerce in the manufacture, distribution, and sale of broad-spectrum antibiotics[17] in violation of sections 1 and 2 of the Sherman Act.[18] These suits followed on the heels of numerous other suits brought by federal and state governments and by domestic purchasers.[19]

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14 Defendant firms were Pfizer Inc., American Cyanamid Co., Bristol-Myers Co., Squibb Corp., Olin Corp., and the Upjohn Co. The cases were part of a massive litigation known as the "antibiotics cases" which have involved over 160 plaintiffs. *In re* Antibiotic Antitrust Actions, 333 F. Supp. 276 (S.D.N.Y. 1971); *see also* Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U.L. REV. 1, 1 & n.4 (1975).

15 Although Vietnam was a party in the lower courts and was named as a respondent in the petition for certiorari, its complaint was dismissed by the district court subsequent to the filing of the petition because the United States government no longer recognized the government of Vietnam. The dismissal was affirmed by the court of appeals. Republic of Vietnam v. Pfizer Inc., 556 F.2d 892 (8th Cir. 1977).

Similar actions were also brought by the governments of Spain, South Korea, West Germany, Colombia, and Kuwait. 434 U.S. at 309 n.1.

16 15 U.S.C. § 15 (1976); *see supra* note 2.

17 434 U.S. at 310. Plaintiffs alleged that defendants had engaged in, among other things, price-fixing, market division, and fraud upon the United States Patent Office. *Id.*

Broad-spectrum antibiotics include aureomycin and terramycin, which are closely related predecessor products of tetracycline. Plaintiffs alleged that a free and competitive market in tetracycline, which was foreclosed by issuance of a fraudulently procured patent, would have decreased prices in other broad-spectrum antibiotics. *See, e.g.*, Complaint of the Imperial Government of Iran, Amended Complaint of the Republic of the Philippines, and Complaint of the Government of India, *reprinted in* Appendix to the Petition of Certiorari at A-34-35, A-99, and A-120-21, respectively, Pfizer v. India, 434 U.S. 308 (1978).

18 15 U.S.C. § 1 (1976), and 15 U.S.C. § 2 (1976), respectively.

19 The Federal Trade Commission instituted proceedings in 1958 against Pfizer and other pharmaceutical companies to investigate their patent and licensing policies with regard to broad-spectrum antibiotics. *In re* American Cyanamid Co., 63 F.T.C. 1747 (1963), *vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *on remand*, 72 F.T.C. 623 (1967), *aff'd. sub nom.* Charles Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir.), *cert. denied*, 394 U.S. 920 (1968).

The cases were consolidated for trial in the United States District Court for the District of Minnesota.[20] The defendants asserted as an affirmative defense that foreign nations are not "persons" entitled to sue for treble damages under section 4 of the Clayton Act.[21] Ruling on pretrial motions, the district court held that foreign governments are indeed "persons" within the meaning of section 4, and declined to dismiss the actions.[22] On appeal,[23] the United States Court of Appeals for the Eighth Circuit affirmed.[24] The United States Supreme Court affirmed the judgment of the lower courts, holding five to three[25] that a foreign nation otherwise entitled to sue in a United States court

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The United States government brought a criminal action against several companies, including Pfizer, in 1961, alleging conspiracy to monopolize and restrain trade in a broad-spectrum antibiotic drug, tetracycline. Pfizer and all of the other defendants were acquitted of the charges. United States v. Charles Pfizer & Co., 376 F. Supp. 91 (S.D.N.Y. 1973); *see also* United States v. Charles Pfizer & Co., 426 F.2d 32 (2d Cir.), *modified*, 437 F.2d 957 (2d Cir. 1970), *aff'd by equally divided court*, 404 U.S. 548 (1972).

In addition, 166 private treble-damage suits were filed, among the last of which were suits by foreign governments (India, Spain, Vietnam, South Korea, West Germany, Iran, Colombia, the Philippines, and Kuwait). *See In re* Antibiotic Antitrust Actions, 333 F. Supp. 276.

In the only case tried on the merits, defendant companies were again absolved of wrongdoing. *See* North Carolina v. Charles Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert. denied*, 429 U.S. 870 (1976).

For the earlier history of the civil litigation, see West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710, 741-42 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

20 434 U.S. at 309. The cases were originally brought in the Southern District of New York, before Judge Lord, sitting by assignment from the District of Minnesota. Pfizer Inc. v. Lord, 456 F.2d 532, 534 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972). The cases were transferred for trial pursuant to 28 U.S.C. § 1404(a) (1976). 456 F.2d at 534.

21 15 U.S.C. § 15 (1976); *see supra* note 2.

22 Government of India v. Pfizer Inc., No. 75-48 (D. Minn. 1975) (order denying defendants' motion to dismiss). The district court relied upon an earlier decision which both denied a similar claim and ruled that Kuwait was a "person" within the meaning of the antitrust laws. *In re* Antibiotic Antitrust Actions, 333 F. Supp. 315 (S.D.N.Y. 1971).

23 The trial judge certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976), which provides in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

24 Pfizer Inc. v. Government of India, 550 F.2d 396 (8th Cir. 1976). Upon rehearing en banc, the Eighth Circuit adhered to its affirmance. *Id.* at 400.

25 Justice Blackmun did not participate in the case.

may sue for treble damages to the same extent as any other private plaintiff.[26]

Justice Stewart, writing for the majority,[27] stated that the question whether a foreign government was entitled to sue for treble damages turned upon the meaning of the term "person" in section 4 of the Clayton Act.[28] The Court recognized that neither the text of the statute nor its legislative history provided a clear answer.[29] In fact, the Court observed that the question was never considered at the time the Sherman and Clayton Acts were enacted.[30] The Court noted, however, that there was no evidence of congressional intent to restrict the meaning of the term "person."[31] It concluded that both the broad remedial purposes of the antitrust laws and the general legislative history of the Sherman Act dictated that the phrase "any person" should be construed to have "its naturally broad and inclusive meaning."[32]

The majority opinion noted that the plaintiffs possessed two particular attributes — foreign status and sovereignty — that could arguably exclude them from the scope of the phrase "any person."[33] With regard to foreign status, the Court held that Congress did not intend to make the treble-damages remedy available only to American consumers.[34] Furthermore, the Court speculated that permitting treble-damages suits by foreign plaintiffs might contribute to the protection of American consumers and deter antitrust violations.[35]

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26 434 U.S. at 320.

27 Justice Stewart's opinion was joined by Justices Brennan, White, Marshall, and Stevens.

28 434 U.S. at 311-12.

29 *Id.* at 312.

30 *Id.*

31 *Id.* & n.9.

32 *Id.* at 312.

33 *Id.* at 313.

34 *Id.* at 313-14. The Court noted that it is clear that foreign *corporations* may sue for treble damages. The definition of "person" in the Sherman and Clayton Acts explicitly includes "corporations . . . existing under . . . the laws of any foreign country." 15 U.S.C. §§ 7, 12 (1976). The Court also noted that under 15 U.S.C. §§ 1, 2 the antitrust laws extend to trade with foreign nations. 434 U.S. at 313.

35 434 U.S. at 314-15. The Court also noted that, in addition to the deterrence purpose of the antitrust laws, they are intended to *compensate* the victims of antitrust violations. To deny recovery to a foreign plaintiff, the Court reasoned, would permit the party acting illegally to escape full liability and deny compensation to certain victims, merely because that party happens to deal with some foreign customers. *Id.*

Speaking to the significance of the plaintiffs' sovereignty, the Court considered two earlier Supreme Court decisions involving the issue of whether a sovereign government is a "person" within the meaning of the Sherman and Clayton Acts. The Court first distinguished *United States v. Cooper Corp.*,[36] which held that the United States government is not a "person" entitled to sue under section 4 of the Clayton Act for treble damages.[37] The Court stated that *Cooper* did not establish a mechanical rule that *all* sovereigns are to be excluded from the definition of "person."[38] Rather, it interpreted the *Cooper* decision as turning on the availability to the United States government of "separate and distinct" antitrust remedies[39] and on the legislative history, which indicated that Congress "affirmatively intended" to exclude the United States government from the treble-damages remedy.[40] Thus, since neither alternative remedies nor specific legislative history dictated the answer to the sovereignty question in *Pfizer*, the Court implied in its decision that *Cooper* did not dispose of the issue before it.[41]

The second case considered by the Court, *Georgia v. Evans*,[42] held that the states composing the United States are "persons" entitled to sue for treble damages.[43] The *Evans* Court distinguished *Cooper* on the ground that, unlike the federal government, state governments would be without antitrust remedies if the treble-damages remedy were unavailable to them.[44] The *Pfizer* Court chose to follow the *Evans* analysis, stating that foreign governments are in a position similar to state governments with regard to antitrust remedies.[45]

In dissent, Chief Justice Burger characterized the majority decision as an "undisguised exercise of legislative power," at

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36 312 U.S. 600 (1941).

37 *Id.* at 614. It should be noted that Congress subsequently amended section 4A of the Clayton Act, 14 U.S.C. § 15a (1976), to allow the United States to sue for actual damages. Act of July 7, 1955, ch. 283, 69 Stat. 282, 282-83 (codified as amended at 15 U.S.C. § 15a (Supp. IV 1980)). *See supra* note 4.

38 434 U.S. at 316.

39 *Id.* at 316-17.

40 *Id.* at 317.

41 *Id.*

42 316 U.S. 159 (1942).

43 *Id.* at 162-63.

44 *Id.* at 162.

45 434 U.S. at 318. The Court noted that American antitrust laws provide no alternative remedies for foreign nations as they do for the United States government. *Id.*

odds with the statutory language, the legislative history, and the Supreme Court's own precedents.[46] According to the Chief Justice, "resolution of the delicate and important policy issue of whether to give more than 150 foreign sovereigns the benefits and remedies enacted to protect American consumers should be left to Congress and the Executive."[47]

The Chief Justice did not agree that the reasoning in *Evans* dictated the result reached in *Pfizer*.[48] He viewed the decision of the majority as an unwarranted extension of the *Evans* rationale. Unlike domestic states, "whose freedom of action is constrained by the Commerce and Supremacy clauses," foreign states may enact and enforce their own antitrust statutes.[49] In addition, Chief Justice Burger noted, domestic states do not have the arsenal of economic weapons, such as the capacity to resort to international price-fixing and boycotts, which can be employed by foreign states.[50] Nor do domestic states have "in any meaningful sense . . . the conflicting economic interests or antagonistic ideologies" characteristic of relations between nation-states.[51] Therefore, the Chief Justice concluded, the question whether to allow foreign sovereigns to seek treble damages under United States law was one "dramatically different" from that presented by *Evans*.[52] Chief Justice Burger was further troubled by the fact that, while the United States government cannot seek treble damages under its antitrust laws, the *Pfizer* majority would permit foreign nations to sue American companies in American courts for treble damages regardless of whether those nations engage in flagrant anticompetitive practices.[53]

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46 *Id.* at 320 (Burger, C.J., dissenting).

47 *Id.* at 320-21 (Burger, C.J., dissenting).

48 *Id.* at 325 (Burger, C.J., dissenting).

49 *Id.* at 326-27 (Burger, C.J., dissenting). Chief Justice Burger noted that the laws of India and the Philippines are evidence that foreign nations do indeed possess their own antitrust remedies. In addition, during the pendency of the *Pfizer* litigation, West Germany, an amicus in the Supreme Court, began proceedings under its antitrust laws involving some of the same allegations made in the action in United States courts. *Id.* at 327 (Burger, C.J., dissenting).

50 *Id.* at 327-28 (Burger, C.J., dissenting).

51 *Id.* at 328 (Burger, C.J., dissenting).

52 *Id.*

53 *Id.*

Justice Powell, in a brief separate dissent, expressed concern that the Court had resolved a major policy question that was "beyond the province of the Judicial Branch." *Id.* at 330 (Powell, J., dissenting). He also believed that the majority decision led to

## II. CRITIQUE OF THE *Pfizer* DECISION

The majority's analysis in *Pfizer* is vulnerable on a number of grounds in addition to those expressed by Chief Justice Burger in his dissenting opinion.[54]

First, the Court emphasized that the legislative history of the Sherman and Clayton Acts does not specifically place foreign governments outside the class of "persons" entitled to the treble-damages remedy.[55] By giving weight to this factor, the Court placed upon the antitrust defendant the burden of demonstrating that the Acts do not apply to the situation, rather than requiring the plaintiff to prove that the situation is covered by the Acts. This shifting of the burden to require the defendant to demonstrate a negative application of the Acts, especially where the legislative history is silent, has such significant substantive ramifications that such a shift should be within the domain of the legislature rather than the courts. Moreover, while the legislative history does not specifically place foreign governments outside the class of "persons" entitled to the treble-damages remedy, this omission was in all probability due to the fact that Congress could not even conceive of such an issue in 1890, when the Sherman Act was passed. The 1890's were years during which the doctrine of national sovereignty reigned supreme. Thus, the idea of antitrust suits by foreign governments would have been regarded as too absurd to warrant attention. Consequently, Congress's failure to consider this specific issue should be viewed as a sign of complete unawareness rather than as an indication of an intention not to limit the class of "persons" entitled to sue under the antitrust laws.

Second, the Court's asserted concern about the "fringe benefits" of foreign-government suits for American consumers is of questionable significance. It is doubtful that the post-*Pfizer* potential for liability to foreign governments will have a greater deterrent effect on antitrust violations injurious to United States consumers than did the standard existing for the almost ninety

inequitable consequences since American corporations faced the possibility of treble-damages liability to a vast number of foreign governments, many of whom neither have antitrust laws nor provide reciprocal opportunities to the United States to sue in their courts. *Id.*

54 *See supra* text accompanying notes 46-53.

55 434 U.S. at 312-13; *see also supra* text accompanying notes 29-32.

years before *Pfizer*. The antitrust laws are enforced by the Justice Department, the Federal Trade Commission, state attorneys general, and private plaintiffs. Foreign nations are more likely to learn of a violation and "tag along" after initiation of a suit by one of these parties than to initiate their own suit. Indeed, this is precisely what happened in the *Pfizer* litigation.[56]

Third, the Court suggested that denial of a section 4 remedy to foreign governments would actually encourage violations that injure American consumers. It speculated that antitrust violators would prey upon foreign sovereigns and use those excess profits to compile large "war chests" to defend domestic antitrust actions.[57] The Court's speculation, however, ignores the ability of foreign nations to enact their own antitrust laws to protect their interests. Moreover, it is obvious that foreign nations have remedies outside the scope of antitrust laws to which they may turn for protection. Preying upon foreign governments could be a very risky venture for American corporations, considering the respective powers of the parties. The Court's speculation also assumes that the victimization of foreign governments is the best — or only — way for corporations to amass their "war chests." Antitrust violators, however, may find it easier to turn to profitable business opportunities to acquire these reserves.

Finally, the Court asserted that the decision to allow foreign sovereigns to sue for treble damages was merely an application of the long-settled rule that a foreign nation may bring a civil claim in American courts upon the same basis as any domestic corporation or individual.[58] The issue in *Pfizer*, however, was not whether foreign governments should be given *access* to United States courts, but rather whether foreign nations should be given *substantive rights* under particular statutes. The rights and remedies of the Sherman and Clayton Acts might just as easily have been found to be intended only to provide American consumers and private businesses with the benefits of a com-

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56 *See supra* note 19 and accompanying text.

57 434 U.S. at 315 & n.14; *see* Velvel, *supra* note 14, at 7-8.

58 434 U.S. at 319. The majority noted that the decision to allow foreign sovereigns to sue for treble damages does not involve any "novel concept" of federal jurisdiction. *Id.* The Court said it was only applying the long-settled rule that "a foreign nation is entitled to prosecute any civil claim in [United States courts] upon the same basis as a domestic corporation or individual . . . ." *Id.* at 318-19.

petitive marketplace.[59] As the Court itself recognized, there is no evidence that Congress ever considered including foreign governments in the category of "persons" entitled to sue for treble damages.[60]

It is important to realize that in *Pfizer* the Supreme Court was faced with the choice of allowing foreign governments either treble-damages recovery or no recovery at all. The Court did not have the option under the Clayton Act to grant actual damages, nor was the Court at liberty to fashion a rule requiring reciprocal treatment of the United States government in foreign courts. Such choices may be made only by the legislature.

## III. Congressional Reaction to the *Pfizer* Decision

Soon after the Supreme Court handed down the *Pfizer* decision, a number of members of the Ninety-fifth Congress expressed their agreement with the dissent's view that it was the responsibility of the legislature to set the terms for foreign government recovery under the antitrust laws. Bills introduced in both chambers attempted to ameliorate the perceived inequities of the *Pfizer* decision. Many different responses were proposed, including prohibiting recovery by foreign sovereigns altogether, restricting recovery to actual damages, or making reciprocal legal rights a prerequisite for recovery.

Within ten days after the *Pfizer* decision was announced, Senator Strom Thurmond (R-S.C.), now Chairman of the Senate Judiciary Committee, introduced a bill, S. 2395,[61] to reverse the Court's decision. It disturbed Senator Thurmond and the cosponsors of S. 2395 that a foreign government could recover more than the United States government in a similar action in United States courts.[62] The Thurmond bill would have amended section 4 of the Clayton Act expressly to exclude foreign sovereigns from the term "person," thereby denying foreign governments the treble-damages remedy. In addition, the bill would have amended section 4A of the Clayton Act to allow foreign

59 *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).
60 434 U.S. at 312; *see also supra* text accompanying notes 29-30.
61 S. 2395, 95th Cong., 2d Sess. (1978).
62 *See* 124 Cong. Rec. 36 (1978).

sovereigns the same right to recover actual damages as the United States government has.[63]

After the Thurmond bill was introduced, the idea of reciprocity surfaced. The argument for reciprocity is that the United States government should be entitled to vindicate claims in the courts of any foreign nation claiming that right in United States courts. Foreign nations not possessing antitrust laws under which the United States may sue in their courts could enact such laws if they wish to sue in United States courts.

Reciprocity provisions were included in the next bill to address the *Pfizer* decision, introduced by Senator Daniel Inouye (D-Hawaii).[64] Senator Inouye's primary concern was fair treatment of the United States government and its citizens, states, and corporations.[65] He noted that in the past the United States government has been hindered in its investigations of international cartels whose activities distorted American markets,[66] and that United States multinational corporations have faced antitrust restraints that do not inhibit their foreign competitors.[67]

Senator Inouye was also concerned about the diminishing ability of the United States to achieve its economic objectives and policies in an increasingly competitive world.[68] The Inouye bill would have amended section 4 of the Clayton Act to require strict reciprocity as a condition precedent to the maintenance of an action for treble damages by a foreign sovereign in a United States court.[69] The standard of reciprocity demanded by the Inouye bill required not only equivalent access to the courts of the foreign nation, but also equivalent relief.[70] In other words,

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63 According to Senator Thurmond, fairness and common sense dictate that foreign nations should be treated "no better or no worse than we treat our own country in U.S. courts." 124 CONG. REC. 36 (1978).

64 S. 2724, 95th Cong., 2d Sess. (1978).

65 124 CONG. REC. 6470-71 (1978).

66 *Id.*

67 *Id.*

68 *Id.*

69 S. 2724 would have added the following sentence at the conclusion of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976): "A foreign sovereign government, including any agency or agent thereof, may sue for injury pursuant to this section if United States persons and the United States government are permitted equivalent access and relief for the same injury in the courts of such sovereign government." S. 2724, *supra* note 64.

70 *See id.*

the right to sue would have been "dependent upon the existence of foreign laws formulated precisely like our own."[71]

This provision, however, was probably too extreme for most senators. Since no other nation in the world provides a treble-damages remedy,[72] and since none has antitrust laws exactly like those of the United States, Senator Inouye's bill would, in effect, have denied to all foreign governments any antitrust relief in American courts.

A more practical application of the reciprocity concept was embodied in a third bill, S. 2486,[73] introduced by Senator Dennis DeConcini (D-Ariz.).[74] The DeConcini bill incorporated the Thurmond bill's actual-damages limitation[75] and added a requirement of *general* reciprocity, as opposed to the strict reciprocity required by the Inouye bill.[76] Under S. 2486, before suit could be brought by a foreign government, the Attorney General of the United States would have been required to certify that the United States could sue in its own name on civil claims in the courts of that country and that the foreign country by its laws prohibited restrictive trade practices.[77] Senator DeConcini rejected the strict reciprocity approach because even among nations that have antitrust laws, none provides for a private right of action equivalent to that provided by section 4 of the Clayton Act;[78] enforcement is often left solely to the government. The thrust of the DeConcini bill was that those nations which are permitted to sue for antitrust damages in United States courts should have "demonstrated a commitment to the concepts embodied" in United States antitrust laws.[79]

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71 125 CONG. REC. S990 (daily ed. Feb. 1, 1979).

72 S. REP. No. 239, 96th Cong., 1st Sess. 48 (1979) (written statement of Assistant Attorney General Ewing).

73 The Antitrust Reciprocity Act, S. 2486, 95th Cong., 2d Sess. (1978).

74 The bill was cosponsored by Senators Thurmond and Allen, each of whom had introduced their own *Pfizer* bills. Senator Thurmond's proposal is discussed *supra* at text accompanying notes 61-63. Senator Allen introduced an amendment to S. 1874. *See infra* note 80. The Allen amendment was comparable to the Thurmond proposal, which Senator Allen had already cosponsored. *See* Amend. No. 1669, 95th Cong., 2d Sess. (1978) to S. 1874, 95th Cong., 1st Sess. (1977).

75 *See supra* note 63 and accompanying text.

76 *See supra* notes 64-71 and accompanying text.

77 S. 2486, *supra* note 73.

78 124 CONG. REC. 2195 (1978).

79 *Id.* The Senator remarked on the floor of the Senate:

> [T]he purpose of this bill is not to penalize any nation. Each country remains free to accept or reject anticompetitive trade practices. But the United States

The full Senate took no action on any of the above proposals. Its final effort to enact legislation addressing the *Pfizer* decision in the Ninety-fifth Congress was an amendment offered by Senator James Eastland (D-Miss.) to S. 1874, the proposed Antitrust Enforcement Act of 1978.[80] S.1874 was intended to modify the Supreme Court's controversial 1977 decision in *Illinois Brick Co. v. Illinois*.[81] The Eastland amendment included both the Thurmond bill's limitation of recovery by foreign governments to actual damages[82] and the DeConcini bill's reciprocity provisions requiring certification.[83]

The counterpart to the Antiturst Enforcement Act in the House of Representatives was H.R. 11,942.[84] Section 3 of this bill was directed at the *Pfizer* decision. It would have expressly precluded *all* suits by foreign governments under United States antitrust laws.[85] During the House Judiciary Committee's mark-up of H.R. 11,942, Congressman William Hughes (D-N.J.) offered an amendment to replace the section 3 language with the reciprocity provisions of the Senate bill. This amendment was defeated by a vote of 12-20 and the legislation was ordered reported by a vote of 21-12.[86] Ten members of the Committee characterized section 3 as "the most extreme of all possible remedies" and vowed to offer a floor amendment that would

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> ought to utilize its own courts to promote healthy competition and not to reward nations which, on the one hand, allow and sometimes encourage monopoly and price-fixing but, on the other hand, demand to sue when they are the victims of such practices. Justice requires that those nations who do make an honest effort should be afforded the same consideration under the same circumstances as the United States. Those which do not, however, should be excluded from suing under section 4 of the Sherman [sic] Act.

*Id.*

80 The Antitrust Enforcement Act of 1978, S. 1874, 95th Cong., 2d Sess. (1978). The Senate Judiciary Committee reported S. 1874 on June 14, 1978. *See* S. REP. NO. 934, 95th Cong., 2d Sess. (1978).

81 431 U.S. 720 (1977). In *Illinois Brick* the Supreme Court held, *inter alia*, that an indirect purchaser does not have standing to sue for treble damages under the antitrust laws. *Id.* at 729. The decision in *Illinois Brick* is unlikely to bar suits by foreign sovereigns, since they usually purchase directly from American suppliers.

82 *See supra* note 63 and accompanying text.

83 *See supra* note 77 and accompanying text.

84 The Clayton Act Amendments of 1978, H.R. 11,942, 95th Cong., 2d Sess. (1978).

85 *Id.* § 3. This section would have amended section 4 of the Clayton Act to provide: "[T]his section shall not authorize suits by a foreign sovereign government, a department or agency thereof." *See* H.R. REP. NO. 1397, Part I, 95th Cong., 2d Sess. 2 (1978).

86 The Judiciary Committee reported the bill on June 20, 1978. H.R. REP. NO. 1397, Part I, *supra* note 85, at 30.

limit foreign government suits to actual damages and require a showing of reciprocity.[87]

H.R. 11,942 was next referred to the House Committee on International Relations' Subcommittee on International Economic Policy and Trade.[88] That Subcommittee reported that section 3 of H.R. 11,942 could have serious foreign-policy ramifications. The Subcommittee alluded favorably to the "additional views" of the ten members on the House Judiciary Committee,[89] and recommended that the provision not be included in the bill "in its present form."[90]

Entanglement with *Illinois Brick* proposals sounded the death knell for *Pfizer* legislation in the Ninety-fifth Congress. Both S. 1874 and H.R. 11,942 failed to come to a vote on the floor.[91] Thus, the *Pfizer* amendments died when the Ninety-fifth Congress adjourned.

The DeConcini bill was reintroduced early in the Ninety-sixth Congress as S. 317.[92] Senator DeConcini assumed the same posture he had taken in the Ninety-fifth Congress. In his view, the Supreme Court had "entered the legislative arena and exercised an essentially legislative judgment."[93] The Senate Judiciary

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87 *See id.* at 54-55 (additional views of Reps. Seiberling, Hughes, McClory, Beilenson, Drinan, Edwards, Ertel, Harris, Holtzman, and Railsback).

88 Hearings were held on August 3, 1978. Testifying were Lee R. Marks, Deputy Legal Advisor to the State Department, and Ky P. Ewing, Jr., Deputy Assistant Attorney General, Antitrust Division, Department of Justice. *See Hearings and Markup on the Clayton Act Amendments of 1978 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 2d Sess. 12-14 (1978) [hereinafter cited as *1978 House Hearings*].

89 *See supra* note 87.

90 *See* H.R. REP. No. 1397, Part II, 95th Cong., 2d Sess. 2 (1978). Four members of the House Committee on International Relations highlighted their strong aversion to the *Pfizer* provision in H.R. 11,942, *supra* note 85, by calling it "bad legislation." They noted that section 3 benefits "a few U.S. pharmaceutical companies, in a case which has been under litigation for 4 years" and provides a "sledgehammer approach" directed at friendly as well as hostile foreign nations. *Id.* at 7-8 (supplemental views of Reps. Bingham, Fascell, Rosenthal and Cavenaugh).

91 S. 1874 faced both opposition from business interests and a threatened fillibuster. A crowded end-of-session agenda ultimately prevented the bill from reaching the Senate floor. The House refused to bring H.R. 11,942 to the floor until the Senate acted on S. 1874. *See* [July-Dec. 1978] ANTITRUST & TRADE REG. REP. (BNA) No. 882, at A-21 (Sept. 28, 1978), and No. 884, at A-11 (Oct. 12, 1978).

92 The Antitrust Reciprocity Act, S. 317, 96th Cong., 1st Sess. (1979). The provisions of S. 317 were the same as those of S. 2486, 95th Cong., 2d Sess. (1978). *See supra* text accompanying notes 66-67.

93 124 CONG. REC. S990 (daily ed. Feb. 1, 1979).

Committee failed to take any action on S. 317, but later in the year it favorably reported S. 300,[94] another *Illinois Brick* bill,[95] which contained a *Pfizer* provision proposed by Senator DeConcini and modified by Senator Charles Mathias (R-Md.).[96]

The Mathias amendment retained the provision in S. 317 limiting foreign sovereigns to actual damages in antitrust actions, but the bills differed significantly in two other respects. First, the reciprocity requirement of S. 300 was stricter than that of S. 317. S. 300 provided that no foreign sovereign could maintain an action under American antitrust law unless its own laws forbade the *type or category of conduct* upon which the action was based and unless its laws allowed the United States government to recover damages caused *by such conduct* in the courts of the foreign nation.[97] S. 317, on the other hand, allowed a foreign government to sue for antitrust violations under United States law provided that the foreign state had enacted and actually enforced laws generally prohibiting restrictive trade practices and that the United States government was entitled to sue on civil claims in the courts of the foreign sovereign.[98] Second, S. 300 did not require the Attorney General to certify that the conditions imposed in the bill had been satisfied.[99]

The full Senate took no action on S. 300, due again in large part to the controversy over *Illinois Brick*.[100] The bill died on

94 The Antitrust Enforcement Act of 1979, S. 300, 96th Cong., 1st Sess. (1979) (as amended); *see* S. REP. NO. 239, *supra* note 72.

95 *See supra* note 81.

96 The provision read:

> [S]uits under [section 4 of the Clayton Act] brought by foreign governments, departments, or agencies thereof, shall be limited to actual damages; and . . . no foreign sovereign may maintain an action in any court of the United States under the authority of this section unless its laws would have forbidden the type or category of conduct on which the action is based if that conduct had occurred within its territory at the time it occurred in the United States, and unless its laws allow the Government of the United States to recover damages caused by such conduct through the judicial or administrative processes of the foreign state.

S. 300, *supra* note 94, § 3.

97 *Id.* While this reciprocity requirement is stricter than that of S. 317, it is not as strict as the requirement embodied in Senator Inouye's proposal in the 95th Congress. S. 2724, *supra* note 64; *see supra* text accompanying notes 69-72.

98 S. 317, *supra* note 92.

99 S. 300, *supra* note 94.

100 As the press reported, the *Illinois Brick* bill had "become a buzz word for complicated, bad legislation . . . ." *Road Looks Rough for Illinois Brick Bill*, 65 A.B.A. J. 1783 (1979).

the legislative calendar when the Ninety-sixth Congress adjourned.

New legislation addressing the *Pfizer* decision has been introduced in both chambers of the Ninety-seventh Congress. Senator Thurmond has sponsored S. 816[101] in the Senate, while Congressman Caldwell Butler (R-Va.) has introduced companion legislation, H.R. 2812,[102] in the House of Representatives. As originally introduced, both bills would have amended section

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The House of Representatives did not consider any *Pfizer* legislation during the 96th Congress.

101 S. 816, *supra* note 8. S. 816 was introduced on March 26, 1981. 127 CONG. REC. S2789 (daily ed. Mar. 26, 1981) (statement of Senator Thurmond). Cosponsors of S. 816 include Senators Chiles, D'Amato, Danforth, DeConcini, Denton, Dodd, Dole, Domenici, East, Grassley, Hatch, Heflin, Helms, Inouye, Laxalt, Lugar, Mathias, Melcher, Moynihan, Nunn, Percy, Simpson, Specter, and Tsongas. S. 816 provides:

> Section 1. Section 4 of the Clayton Act (15 U.S.C. 15) is amended —
>
> (1) by striking out "That" and inserting in lieu thereof "(a) Except as provided in subsection (b) and subsection (c)," and
>
> (2) by adding at the end thereof the following new subsections:
>
> "(b) Any person who is a foreign government or an instrumentality of a foreign government may not sue, as provided in subsection (a), for damages for an injury unless —
>
> "(1) conduct similar to the conduct prohibited by the antitrust laws and alleged to have caused such injury was forbidden under the laws of such foreign government and applicable to conduct within its national boundaries during the time the prohibited conduct occurred;
>
> "(2) the laws of such foreign government applicable to conduct similar to the conduct of the person sued under this section were enforced by such foreign government; and
>
> "(3) under the laws of such foreign government, the United States may recover actual damages for an injury to its business or property by reason of conduct similar to the conduct of the person sued under this section.
>
> "(c) Any person who is a foreign government or an instrument of a foreign government may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee."
>
> Sec. 2. The amendments made by the first section of this Act shall apply in any action commenced under section 4 of the Clayton Act before or after the date of the enactment of this Act for the recovery of any penalty, forfeiture, liability, or damages unless the judgment in such action is final on or before the date of the enactment of this Act.

The Senate Judiciary Committee favorably reported S. 816 on April 20, 1981. S. REP. NO. 78, 97th Cong., 1st Sess. 4 (1981). The Senate passed the bill on July 9, 1981. 127 CONG. REC. S7411 (daily ed. July 9, 1981).

102 H.R. 2812, 97th Cong., 1st Sess. (1981). H.R. 2812 was introduced on March 25, 1981. 127 CONG. REC. H1143 (daily ed. Mar. 25, 1981). Cosponsors of H.R. 2812 include Reps. Brooks, Evans, Fish, Frenzer, Ireland, Johnston, Kindness, Lagormarsina, Mazzoli, Moorhead, Pashayan, Railsback, Whitehurst, and Whitney.

The language of H.R. 2812 was identical to that of S. 816, *supra* note 8, except for subsection (1)(b)(1) of H.R. 2812 which provided:

> (b) Any person who is a foreign government or an instrumentality of a foreign government may not sue, as provided in subsection (a), for damages for an injury unless —

4 of the Clayton Act to restrict foreign governments to suits for actual damages.[103] In addition, the bills would have limited recovery by foreign governments to cases in which the following conditions were satisfied: (1) the conduct on which the plaintiff foreign government's action is based was prohibited by law of that government within its national boundaries during the time the challenged conduct occurred,[104] (2) those laws were enforced by the foreign government during that period,[105] and (3) those laws allowed the United States government to recover damages caused by such conduct.[106] Finally, both bills contained provisions making them applicable to actions commenced before or after the date of enactment unless the judgment in such action had become final.[107]

Major differences between S. 816 and H.R. 2812 were created when an amendment, later introduced as substitute bill H.R. 5106, was successfully offered by Chairman Peter Rodino (D-N.J.) during the House Judiciary Committee's mark-up ses-

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(1) the conduct prohibited by the antitrust laws and alleged to have caused such injury was forbidden under the laws of such foreign government applicable to conduct within its national boundaries during the time the prohibited conduct occurred;

The House Judiciary Committee reported a substitute bill, H.R. 5106, *supra* note 8, on December 8, 1981.

103 S. 816, *supra* note 8, § 1(c); H.R. 2812, *supra* note 102, § 1(c).

104 S. 816, *supra* note 8, § 1(b)(1); H.R. 2812, *supra* note 102, § 1(b)(1).

The sole difference between S. 816 and H.R. 2812 was that the House version of the bill required a stricter form of reciprocity than the Senate version. S. 816 merely requires that conduct "similar to" the challenged conduct must have been prohibited by the foreign government's laws, whereas H.R. 2812 required that the challenged conduct itself have been outlawed by the foreign government seeking to invoke the Clayton Act. According to the Senate Report on S. 816, the "similar conduct" test expresses the Judiciary Committee's view that the antitrust laws of foreign governments need not be identical to those of the United States in scope or formulation. *See* S. REP. NO. 78, *supra* note 101, at 2. The Report language made this very clear:

> In requiring reciprocal antitrust arrangements, it is not the committee's intention that the laws of a foreign state must precisely parallel the provisions of American law. It must, of course, be taken into account that the United States has the most comprehensive and actively enforced antitrust laws in the world. . . .
>
> . . . .
>
> . . . [T]he bill recognizes that foreign sovereigns can decide what kinds of anticompetitive conduct they want to prohibit and to determine how they want to formulate these prohibitions. In no sense, therefore, does the bill condition the antitrust rights of foreign governments, which have applicable and enforced competition laws, on a willingness to copy the particulars of U.S. statutes.

*Id.*

105 S. 816, *supra* note 8, § 1(b)(2); H.R. 2812, *supra* note 102, § 1(b)(2).

106 S. 816, *supra* note 8, § 1(b)(3); H.R. 2812, *supra* note 102, § 1(b)(3).

107 S. 816, *supra* note 8, § 2; H.R. 2812, *supra* note 102, § 2.

sion.[108] First, H.R. 5106, while retaining the limitation to actual damages contained in H.R. 2812, does not include any reciprocity provisions. The Judiciary Committee and the Departments of State and Justice completely reversed the positions which they had taken on the reciprocity issue in earlier Congresses.[109] From an original stand advocating a prohibition of all suits by foreign governments under United States antitrust laws, the House Judiciary Committee and the Departments of State and Justice came full circle to take a position opposing even general reciprocity requirements.[110] The House Committee members were particularly concerned about the inherently protectionist effect of a reciprocity requirement. They expressed the concern that under the reciprocity doctrine only a very small number of countries in the world would qualify to sue in United States courts.[111] The House also expressed concern that the

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108 H.R. 5106, *supra* note 8. H.R. 5106 was introduced by Rep. Rodino on November 30, 1981. Cosponsors of H.R. 5106 include: Reps. Butler, Brooks, Evans of Georgia, Fish, Hughes, Hyde, Ireland, Johnston, Mazzoli, McClory, Moorhead, Railsback, and Whitley. H.R. 5106, as amended, provides:

That section 4 of the Clayton Act (15 U.S.C. 15) is amended —

(1) by striking out "That" and inserting in lieu thereof "(a) Except as provided in subsection (b)," and

(2) by adding at the end thereof the following new subsections:

"(b)(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

"(2) Paragraph (1) shall not apply to a foreign state if —

"(A) such foreign state would be denied, under section 1605(a)(2) of title 28 of the United States Code, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

"(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

"(C) such foreign state engages primarily in a commercial activity; and

"(D) such foreign state does not function, with respect to such commercial activity or such act, as a procurement entity for itself or for another foreign state.

"(c) For purposes of this section —

"(1) the term 'commercial activity' shall have the meaning given it in section 1603(d) of title 28, United States Code; and

"(2) the term 'foreign state' shall have the meaning given it in section 1603(a) of title 28, United States Code."

109 *See supra* notes 88-89 and accompanying text.

110 It is interesting to note that on April 29, 1981, Assistant Attorney General for Antitrust William Baxter testified on S. 816, and did not oppose reciprocity provisions in that bill. *See* S. REP. NO. 78, *supra* note 101, at 9.

111 *See* H.R. REP. NO. 476, 97th Cong., 1st Sess. 11 (1982).

requirement as expressed in H.R. 2812 would be unworkable for both the courts and the litigants.[112]

A second difference is that the Senate bill applies to cases in which final judgment has not been entered. The bitter battle in the Senate Judiciary Committee on S. 995,[113] the proposed legislation on antitrust contribution among antitrust defendants, probably led the House to avoid prejudgment of the contribution issue by deleting the pending-case provisions from the House bill. The normal rule in the event of statutory silence is that the legislation is applied to pending cases unless such application results in failure to meet the requirements of constitutional due process or would inflict manifest injustice.[114] The difference between the House and Senate versions of the bills on this issue is de minimis and is likely to be settled quickly in conference.

The third point of difference between the Senate and House bills involves an issue which could have posed some problems for the courts. Language was included in the Senate Report to ensure that S. 816 does not apply to "entities that conduct exclusively or primarily commercial activities, even though the [foreign] government may be the sole or controlling owner of such commercial entities."[115] The House tried to avoid the difficulties inherent in definitions and guidelines by inserting language in the substitute bill itself, supported by language in the Report, to exempt commercial entities owned by foreign governments from the provisions of the bill.[116] This change is not likely to provoke disagreement in conference.

The Senate passed S. 816 on July 9, 1981 and the House passed H.R. 5106 on April 27, 1982.[117] Clearly, reciprocity is the issue that will be most difficult to resolve in conference. Philosophical differences may prove quite difficult to reconcile.

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112 *Id.* at 7-10. *See infra* text accompanying notes 134-40.

113 S. 995, 97th Cong., 1st Sess. (1981).

114 *See* S. REP. No. 78, *supra* note 101, at 12-15.

115 *Id.* at 12. It is clear that the Senate bill is not intended, for example, to apply to companies such as Renault, an automobile manufacturer owned by the French government. *Id.*

116 *See* H.R. 5106, *supra* note 8, § (2)(b)(2)(d), and H.R. REP. No. 476, *supra* note 111, at 12-13.

117 127 CONG. REC. S7411 (daily ed. July 9, 1981), and 128 CONG. REC. H1599-1602 (daily ed. Apr. 27, 1982), respectively. On April 29, 1982, the House referred its bill to the Senate Judiciary Committee.

The ability to resolve this question will likely decide the fate of *Pfizer* legislation in the Ninety-seventh Congress.

## IV. Evaluation of Legislative Efforts to Modify the *Pfizer* Decision

As the above discussion suggests, two major concerns have sparked legislative efforts to modify the Supreme Court's decision in the *Pfizer* case. The first concern is that the decision created a dichotomy between the rights of the United States government and those of foreign governments under American antitrust laws.[118] The second is that the decision afforded foreign governments a right to sue that, in many instances, is not reciprocally accorded to the United States government, either because a foreign nation has different or no antitrust laws, or because its laws do not provide the United States access to its courts.[119]

### A. *The Inappropriateness of a Treble-Damages Remedy for Foreign Governments*

The *Pfizer* decision has created a situation in which foreign governments are treated more favorably under United States antitrust laws than is the United States government. The *Pfizer* bills currently before Congress, which confine foreign governments to actual damages and thereby put those governments on the same footing in antitrust actions as the United States government, is an appropriate response to the difference in treatment created by *Pfizer*.

A major purpose of the treble-damages remedy is to encourage plaintiffs to become "private attorneys general" to aid in the enforcement of American antitrust laws — even though the effect is to create a "windfall" for those plaintiffs. Congress, however, has determined that no such additional incentive is, or should be, necessary to encourage the United States govern-

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118 *See* S. Rep. No. 78, *supra* note 101, at 1.
119 *Id.*

ment to sue to enforce the antitrust laws.[120] Similarly, it seems inappropriate to offer such an incentive to encourage another sovereign government to protect its own interests or those of its citizens.

Furthermore, mercenary enforcement of United States laws by foreign nations, most of whom do not share American antitrust principles, is illogical at best. Not only is it unlikely that a foreign government will be anything but a tag-along to antitrust suits initiated by other plaintiffs, but recruiting foreign governments to aid in the enforcement of United States antitrust laws will exacerbate American efforts to reduce foreign trade deficits. Foreign governments that win antitrust actions will recover three times any overcharge an American company might have remitted to the United States economy.[121]

### B. *The Need for Reciprocity*

In addition to the limitation to actual damages, the *Pfizer* legislation, as passed by the Senate in the Ninety-seventh Congress, requires several elements of reciprocity as a precondition to antitrust claims by foreign governments. The overriding purpose of the American antitrust laws is to protect United States consumers from the economic consequences of monopolies and monopolistic behavior.[122] Other governments may choose to

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120 In 1955 Congress amended § 4 of the Clayton Act, *supra* note 2, by adding § 4A, *supra* note 4, which gave the United States government the right to sue only for actual damages under the Clayton Act. Congress had found it improper to offer the government a monetary incentive to protect its interests. *See* S. REP. No. 619, 84th Cong., 1st Sess. 3 (1955).

121 These treble-damage recoveries and consequent remittances will not be lessened by United States income taxes. A treble-damages recovery by a foreign government would be free from United States income tax, although this is not the case when a foreign corporation receives such a recovery. *Compare* I.R.C. §§ 881, 882 (West 1981) (income to foreign corporations from United States sources is taxable) *with* I.R.C. § 892 (West 1981) (income to foreign governments from investments in the United States in stocks, bonds and other securities is not taxable) *and* Rev. Rul. 298, 1975-2 C.B. 290 (income from United States sources is not taxable either to foreign governments or organizations created and wholly owned by them).

122 *See* S. REP. No. 78, *supra* note 101, at 2; *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (treble-damages provision is primarily a remedy for the people of the United States to counterbalance difficulties of bringing private antitrust actions); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (treble damages are a means of protecting consumers).

protect their own consumers from the same type of behavior. If they extend that protection to the United States government and United States citizens as well, it is entirely appropriate to reciprocate by affording like remedies under United States law. Conversely, if a foreign government provides no protection against anticompetitive conduct injuring the United States government or its citizens, it should have no complaint when the United States declines to afford the foreign government a right to sue for damages in its courts.

For many years, the United States has extolled the virtues of a competitive economy throughout the world. A major goal of American international economic policy is to create a trading system that encourages United States companies to export more goods. One of the many advantages of requiring reciprocity as a condition for antitrust suits by foreign governments is the incentive that this requirement will provide to those governments to adopt and enforce laws promoting competition without discriminating against United States companies. To the extent that American firms face potential liability not faced by their foreign competitors, they are disadvantaged in competing for overseas business. By encouraging foreign nations to develop and use their own antitrust laws against all companies engaged in anticompetitive activities, the United States can help destroy artificial trade barriers that hinder the ability of American exporters to compete successfully with their foreign counterparts. The reciprocity test in the Senate version of the proposed legislation is designed to achieve this end.

It is worth noting that in most countries there are no antitrust laws. In others, laws which resemble antitrust laws are simply not enforced. In fact, only eleven countries in the world provide an express statutory remedy for injuries resulting from restrictive trade practices.[123] Thus, a reciprocity requirement is fair and reasonable.

Although the concept of reciprocity seems desirable when viewed in this light, there is a question as to its workability. Courts called upon to determine whether the reciprocity provisions have been met will be faced with some serious problems.

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123 *See* S. REP. No. 78, *supra* note 101, at 7; H.R. REP. No. 476, *supra* note 111, at 11.

This is one of the primary reasons the House deleted the reciprocity provisions.[124]

Presumably, rule 44.1 of the Federal Rules of Civil Procedure[125] would govern the introduction and proof of the existence of foreign antitrust laws.[126] Under this rule, the party relying on the foreign law has the burden of proving the law and its interpretation.[127] Thus, in future cases like *Pfizer*, the foreign government wishing to sue would have to prove that its laws meet the requirements set forth in the Senate bill. This would probably be done by citing the foreign statutes and case law thereunder to the court[128] and perhaps by presenting expert testimony.[129] Trial courts have broad discretion in deciding what material to consider in determining a question of foreign law,[130]

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124 *See* H.R. REP. No. 476, *supra* note 111, at 7.

The alternative to having the courts make this determination was expressed in S. 2486, *supra* notes 71-77, whereby the United States Attorney General would be required to certify the foreign law questions. This requirement, however, could be viewed as impractical, unusual, and unwieldly. In addition to placing an unnecessary burden on the Attorney General's office, such a requirement ignores the success courts have traditionally had when called upon to determine foreign law.

125 FED. R. CIV. P. 44.1. This rule provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissable under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

FED. R. CIV. P. 44.1 preempted many cases which found that the determination of foreign law questions were issues of fact. *See, e.g.*, Albert v. Brownell, 219 F.2d 602 (9th Cir. 1958); Barber v. Tadayasu, 186 F.2d 775 (9th Cir.), *cert. denied*, 342 U.S. 832 (1951); Pisacane v. Italia Societa Per Azioni Di Navigazione, 219 F. Supp. 424 (S.D.N.Y. 1963).

126 Although the cases under rule 44.1 are all ones in which the foreign law at issue governs the case in the traditional conflict of laws situation, it can be presumed that the rule would also apply in the slightly different context of determining qualification to sue under reciprocity provisions.

127 Application of Chase Manhattan Bank, 191 F. Supp. 206, 209, *reargued*, 192 F. Supp. 817 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

128 Telesphore Couture v. Watkins, 162 F. Supp. 727, 730 (E.D.N.Y. 1958).

129 *See supra* note 125.

The resolution of foreign-law questions has long been regarded as an appropriate function for the court rather than for the jury. *See, e.g.*, Jansson v. Swedish-American Line, 185 F.2d 212, 216 (1st Cir. 1950); Daniel Lumber Co. v. Empresas Hondurenas, S.A., 215 F.2d 465 (5th Cir. 1954); 9 J. WIGMORE, EVIDENCE § 2558 (3d ed. 1940); *see also* FED. R. CIV. P. 44.1 (foreign-law determinations are questions of law).

130 *See* FED. R. CIV. P. 44.1 advisory committee note. Under the rule, the court may consider any relevant material and testimony, whether or not it is submitted by the parties, and without regard to admissibility under the Federal Rules of Evidence; *see supra* note 125.

and a review of the cases reveals that many types of evidence have been accepted by trial courts as proof of foreign law.[131]

Furthermore, since rule 44.1 clearly states that such questions shall be treated as questions of law, the "clearly erroneous" standard of review set forth in rule 52(a) does not apply.[132] Appellate courts are therefore free to make independent determinations on questions of foreign law. Consequently, the question is a proper one for disposition on motion for summary judgment, which is probably what would happen in most cases under the *Pfizer* legislation.[133]

Thus, a functioning mechanism for determining foreign-law questions exists in federal courts. This does not mean, however, that the determinations required under the Senate reciprocity provisions would necessarily be made easily. First, the legislation sets forth no clear guidelines as to what constitutes "similar conduct."[134] This question calls for a subjective judgment. Certainly, judges could have different views on just how "similar" the foreign nation's laws must be to American laws.

Second, as the House Report points out, it is often difficult in an antitrust suit to determine at the start of litigation — when these determinations would have to be made — exactly what conduct caused the injury at issue.[135] Therefore, it could prove difficult for courts to know what conduct to examine in their effort to compare foreign law on the subject.

Third, the Senate bill requires a showing that the foreign nation enforces its laws that are applicable to the conduct at issue.[136] Such a showing presents a very difficult requirement of proof. Government enforcement policies are often quite fluid.[137]

131 *See, e.g.*, Application of Chase Manhattan Bank, 191 F. Supp. at 209 (affidavits); Harris v. American Int'l Fuel & Petroleum Co., 124 F. Supp. 878 (W.D. Pa. 1954) (stipulation, expert testimony or depositions of qualified persons); Kalmich v. Bruno, 553 F.2d 549 (7th Cir.) (unsworn opinion letter of foreign law expert), *cert. denied*, 434 U.S. 940 (1977).

132 FED. R. CIV. P. 52(a). *See* FED. R. CIV. P. 44.1 advisory committee note.

133 Burnett v. TWA, 368 F. Supp. 1152, 1156 (D.N.M. 1973); *see also* Instituto Per Lo Svilupp Economico Dell' Italia Meridionale v. Sperti Products, Inc., 323 F. Supp. 630 (S.D.N.Y. 1971) (question of foreign law can be decided on motion for summary judgment).

134 *See* S. 816, *supra* note 8, § 1(b)(1).

135 *See* H.R. REP. No. 476, *supra* note 111, at 8.

136 *See* S. 816, *supra* note 8, § 1(b)(2).

137 Even in the United States, antitrust policies can vary significantly. Consider, for example, the change in antitrust enforcement policies from the Carter to the Reagan Administration. *See* H.R. REP. No. 476, *supra* note 111, at 8.

In addition, they may not be available to the public in any written or otherwise accessible form.[138] It may be impossible for a court to determine with any certainty the enforcement policy of a particular nation during a particular period of time.

Finally, it must be shown that the United States government could recover actual damages under the laws of the foreign government for injuries suffered from conduct similar to that of the person being sued.[139] This showing could possibly be made by proving that the United States is generally entitled to recover on civil claims in the courts of the plaintiff nation. However, in the absence of precedents in the antitrust area, it may be unclear whether a particular antitrust statute permits recovery by sovereign governments.[140] In such a situation the trial court would have to decide the issue as it believes that the highest court of the foreign jurisdiction would decide it.

Given both the desirability of some form of reciprocity and the difficulties attendant to the current Senate reciprocity provision, a *general* reciprocity requirement would seem appropriate. Such a requirement was embodied in S. 2486, which was sponsored by Senator DeConcini in the Ninety-fifth Congress.[141] This bill would have preconditioned an antitrust suit by a foreign government in United States courts on the ability of the United States government to sue in its own name on *civil claims* in the courts of that country and on the prohibition by that country's laws of restrictive trade practices *in general*.[142] This type of reciprocity provision[143] would avoid the complicated judicial determinations that the current Senate provision necessarily requires. A United States court faced with a general reciprocity requirement, therefore, would not be burdened by the defini-

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138 *See id.*

139 *See* S. 816, *supra* note 8, § 1(b)(3).

140 As the House Report points out, for example, it was unclear in the United States until *Pfizer* whether foreign sovereigns could sue under our antitrust laws. H.R. REP. No. 476, *supra* note 111, at 8. Similar interpretive problems could exist abroad.

141 *See supra* note 73.

142 *See supra* note 77.

143 The DeConcini bill's requirement that the United States Attorney General certify that the preconditions have been met for the foreign state to bring suit should be replaced by a *judicial* determination of whether these preconditions have been met. This substitution is based on the arguments discussed *supra* note 124.

tional problems[144] and the complicated proof requirements[145] demanded by the strict reciprocity provision of S. 816, yet the court would be able to employ the tested procedures already being used by judges for resolving questions of foreign law.[146]

Furthermore, a general reciprocity requirement could serve as a means for achieving a compromise between the current House and Senate positions. The House, having barred any form of reciprocity in its legislation, would effectively allow almost any foreign nation to bring an antitrust suit in United States courts. The Senate, on the other hand, would effectively preclude almost every foreign nation from bringing such a suit. The general reciprocity provision, therefore, would be a middle ground. Already there are about a dozen nations which could satisfy the preconditions of such a reciprocity requirement.[147]

Such a provision would be a compromise for the additional reason that it balances two major interests of the House and the Senate. The House is concerned that strict reciprocity would result in the dictation of extremely particularized economic policy to foreign governments. The Senate, however, is interested in promoting the export of American products by destroying trade barriers caused by the unequal prosecution between nations of restrictive trade practices. To achieve this end, the Senate bill would require almost exact duplication of American antitrust law by foreign governments before they may sue on antitrust grounds in United States courts. A desirable compromise is achieved by a reciprocity provision requiring only a general prohibition of restrictive trade practices, because it would allow foreign governments substantial leeway in the way they choose to structure their antitrust laws while at the same time encouraging them to adopt laws that would place American corporations on an equal footing with their foreign competitors in the area of worldwide antitrust enforcement.

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144 The definitional problems would include defining both the "similar conduct" standard and the exact conduct at issue in the antitrust case. *See supra* notes 134-35 and accompanying text.

145 The Senate bill requires a showing that the foreign nation enforces the laws applicable to the conduct at issue and that the United States could recover actual damages in an antitrust suit under the laws of the foreign government for injuries suffered by conduct similar to the conduct for which the foreign government is bringing suit. *See supra* notes 136-40 and accompanying text.

146 *See supra* notes 125-33 and accompanying text.

147 *See supra* text accompanying note 123.

### C. *International Obligations of the United States*

During consideration of the various bills that have addressed the *Pfizer* decision, questions have been raised as to whether the legislation conflicts with United States treaty obligations or the Foreign Sovereign Immunities Act. A close analysis of these issues, however, reveals that the bills present neither of these difficult legal questions.

#### 1. Treaty Obligations

The reciprocity provisions of S. 816 are consistent with the treaties of friendship, commerce and nagivation ("FCN") that the United States has entered into with more than one hundred foreign nations.[148] These treaties do not grant any rights to the governments of either contracting nation, but merely impose requirements regarding the treatment of nationals and companies of each nation.[149] Consequently, they are not relevant to determining the judicial rights of foreign governments themselves in the courts of the other nation.

In the absence of other treaties dealing expressly with antitrust matters, these rights depend exclusively on the legislative and executive choices made domestically by each nation. In the United States, Congress, with presidential concurrence, is responsible for deciding which statutory rights, if any, should be extended to foreign governments and what conditions, if any, should be imposed upon the exercise of these rights. S. 816 and H.R. 5106 offer certain statutory rights to foreign governments under reasonable conditions.

In addition, the provisions of typical FCN treaties guaranteeing mutual access to the courts of each party for the nationals of the other relate essentially to procedural and jurisdictional issues of access.[150] The *Pfizer* legislation addresses the entirely different question of the *substantive* rights that are to be available to a foreign government. The legislation is based upon a

148 *See* S. REP. No. 78, *supra* note 101, at 11 & n.3 .

149 *See, e.g.*, Treaty of Friendship, Commerce, and Navigation, October 29, 1954, United States-West Germany, art. VI, para. 1, 7 U.S.T. 1839, T.I.A.S. No. 3593.

150 *See, e.g., id.*; Treaty of Friendship, Commerce, and Navigation, January 21, 1950, United States-Ireland, art. VI, para. 1(c), 1 U.S.T. 788, T.I.A.S. No. 2155.

policy judgment concerning the intended beneficiaries of United States antitrust laws and the nature of the remedies that should be available in the event of a violation. These issues are lawfully within the power of Congress to determine as a matter of national economic policy. Foreign governments are entitled to gain access to United States courts in order to prove that the conditions for asserting antitrust rights have been satisfied. Since all foreign governments would be treated the same way under the bills, the "most favored nation" provisions found in many treaties would not be offended.[151]

The legislation is also compatible with the treaties dealing expressly with antitrust matters.[152] Those treaties reserve to each government the right to determine through its own domestic legislation the "appropriate" means for dealing with business practices that restrain competition in international trade.[153] S. 816 would exercise that reserved power by defining the conditions of reciprocity under which foreign governments could seek to recover actual damages under United States antitrust law. H.R. 5106, on the other hand, would exercise that power without imposing any conditions on recovery by a foreign government.

During hearings on H.R. 11,942,[154] an earlier version of *Pfizer* legislation which would have completely barred foreign governments from maintaining antitrust actions, officials of the Justice and State Departments testified that such legislation would not have violated the international treaty obligations of the United States.[155] The current bills certainly fall within the same scope of acceptability since neither of them even presents the issue of a complete bar to foreign government access to United States courts in antitrust actions. Therefore, these bills constitute a proper exercise of legislative power consistent with American treaty obligations.

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151 *See, e.g.*, Treaty of Friendship, Commerce, and Navigation, United States-West Germany, *supra* note 149, at art. III, para. 1; Treaty of Friendship, Commerce, and Navigation, United States-Ireland, *supra* note 150, at art. VI, para. 3(a).

152 *See, e.g.*, Treaty of Friendship, Commerce, and Navigation, United States-West Germany, *supra* note 149, at art. XVIII, para. 1; Treaty of Friendship, Commerce, and Navigation, United States-Ireland, *supra* note 150, at art. XV, para. 1.

153 *See supra* note 152.

154 *See supra* note 84; *see also 1978 House Hearings*, *supra* note 88.

### 2. The Foreign Sovereign Immunities Act

It might be argued that the reciprocity provisions of the *Pfizer* legislation passed by the Senate are unfair, since under the Foreign Sovereign Immunities Act[156] foreign governments are subject to United States antitrust liability for acts in the international commercial marketplace. Thus, it seems that if foreign governments can be liable for treble damages, they should also be eligible to recover treble damages.

This argument is based upon faulty premises. First, the Foreign Sovereign Immunities Act is designed to define and limit the circumstances under which a foreign government may claim diplomatic immunity from the process of American courts. By contrast, the antitrust laws, including the pending bills, are addressed to the entirely separate question of determining substantive rights. Second, it is not at all clear that foreign governments may be sued under the Sherman and Clayton Acts. In a recent case, a federal district court held that foreign sovereigns are not "persons" who can be sued under United States antitrust laws.[157] Passage of the Foreign Sovereign Immunities Act in 1976 did not, in that court's view, alter the application of the Sherman Act.[158] Furthermore, the Supreme Court's 1978 holding in *Pfizer*, that a foreign nation may be a "person" for purposes of *bringing* suit, did not mean that a foreign nation was also a "person" for purposes of being sued.[159] Other courts have also taken this view.[160]

Furthermore, the committee report accompanying the Senate bill[161] and the language in the House bill[162] make it clear that the

155 *1978 House Hearings*, *supra* note 88, at 12-14.

156 28 U.S.C. §§ 1602-11 (1976).

157 Int'l Ass'n of Machinists v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981) (court of appeals held that the dismissal of the complaint was proper under the act-of-state doctrine, finding it unnecessary to reach the issue of whether a foreign soveriegn is a "person" under the Sherman Act).

158 477 F. Supp. at 571.

159 *Id.* at 576.

160 *See* Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970) (Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns); *cf.* Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir.) (act-of-state doctrine forecloses judicial determination of the legality of acts of foreign states on their own soil in deference to the conduct of foreign policy by the President and Congress), *cert. denied*, 434 U.S. 984 (1977).

161 *See supra* note 115.

162 *See supra* note 116.

limitation to actual damages does not apply to injured commercial enterprises of foreign states that meet certain conditions,[163] since such entities are not entitled to immunity under the Foreign Sovereign Immunities Act.[164] When determining whether a foreign government should be limited to actual damages, courts may therefore find the need to refer to case law under the Foreign Sovereign Immunities Act.

S. 816 and H.R. 5106 allow foreign governments unrestricted access to American courts, but S. 816 conditions their substantive rights on a demonstration of reciprocity. Both bills are fully consistent with the spirit and the letter of the Foreign Sovereign Immunities Act.

## CONCLUSION

In *Pfizer Inc. v. Government of India*, the Supreme Court decided important questions of antitrust and international policy — questions that were better suited to legislative and executive resolution. Legislative proposals now pending in the Ninety-seventh Congress address the *Pfizer* decision. They seek to strike a proper balance between the legitimate interests of the United States, its states, citizens, and corporations and the legitimate interests of foreign governments.

Each version of the *Pfizer* legislation, if enacted, would serve many useful functions. First, both would clarify the rights of foreign governments to sue under United States antitrust laws. Second, they would place foreign governments on an equal footing with the United States government by permitting only actual-damage recoveries, thereby ending the unequal treatment created by the *Pfizer* decision. Finally, they would alleviate some of the discrimination currently faced by United States businesses in the international marketplace. The Senate version,

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163 According to the House Report, a "foreign state," which is defined to include agencies and instrumentalities of such states, may recover treble damages if (1) the agency or instrumentality could not assert sovereign immunity as a defense with regard to the transaction underlying the suit, (2) it waives all defenses arising out of its status as a foreign state to claims against it in the same suit, (3) it engages in primarily commercial activities, and (4) it does not function in the transaction at issue as a procurement entity for the state of which it is a part or another foreign state. H.R. REP. No. 476, *supra* note 111, at 12-13.

164 *See supra* notes 156-58 and accompanying text.

despite some of its workability problems, would serve some additional functions. It would ensure reciprocal treatment for the United States government in those countries that wish to take advantage of American antitrust laws and would permit only those foreign governments who share the United States commitment to free and open competition to seek protection under American antitrust laws. The reciprocity provisions in the Senate bill would also encourage foreign governments to enact and enforce their own antitrust statutes, thereby serving the interests of free and open competition on a worldwide basis.

The *Pfizer* proposals currently under consideration have benefited from study by two previous Congresses. Subject to the limitations discussed above, a compromise of the House and Senate bills adopting a mild form of reciprocity would be a necessary and sound solution to the issues raised by the Supreme Court's 1978 decision. Enactment of this legislation is a compelling and desirable goal for the Ninety-seventh Congress.

# ARTICLE

# EDUCATIONAL RIGHTS OF HANDICAPPED CHILDREN

NANCY LEE JONES*

*Before 1975, public education for the majority of handicapped children was either inadequate or nonexistent. The Education for All Handicapped Children Act (EAHCA) was designed to eliminate this perceived injustice by providing federal money and federal guidelines by which the states could implement education programs for the handicapped. In the budgets for both 1982 and 1983 the Reagan Administration has proposed that all EAHCA funds be distributed as part of a block grant to the states. Administration officials argue that consolidating EAHCA funding into a block-grant program would increase administrative efficiency and reduce costs.*

*In this Article, Ms. Jones describes the destructive impact these block-grant proposals would have on the substantive protections of the EAHCA. She also discusses the effectiveness of alternative federal and state protections for handicapped children and argues that these alternative protections are inadequate as compared to the EAHCA. She contends that the elimination of the EAHCA would not merely save administrative costs, but would also substantially undermine the very purposes for which education of the handicapped exists.*

Chief Justice Earl Warren, in striking down local school board policies denying equal educational opportunity on the basis of race, observed, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[1] But for decades before and since that observation, handicapped children routinely have been deprived of the opportunity for an equal education. Recognizing and desiring to correct this basic inequality, Congress in 1975 passed the Education for All Handicapped Children Act (EAHCA). The Act's means of protecting handicapped children is simple: states receive federal funds on condition that their programs disbursing those funds follow a detailed set of guide-

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1 Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

lines that entitle handicapped children to specific substantive and procedural rights. The language of the statute and its regulations enables handicapped children to document this entitlement in a straightforward manner before a court or administrative agency.

In seeking to effectuate its concept of federalism, the Reagan Administration has attempted to eliminate most of the conditions attached to federal funding of local activities. In particular, in both the 1982 and 1983 budgets the Administration has proposed to include EAHCA funds in an education block grant to the states. Under the 1982 budget proposal, states would have continued to receive federal money, but would not have been required to adhere to the substantive and procedural guidelines.[2] Congressional advocates of handicapped children's rights were successful in preventing the EAHCA from being included in an education block grant in the 1982 budget, and EAHCA funding levels for the program were in fact increased.[3] In response to objections that elimination of federal guidelines was a de facto repeal of the protections provided by the Act, the Administration returned with a proposal for 1983 which does not explicitly remove all guidelines. The proposal merely states that consolidation into a block grant reflects a desire to "eliminate undue Federal burdens and limitations on State and local efforts" and to constrain "the scope of the Federal role in education."[4]

The Deputy Undersecretary of Education has indicated, however, that the Administration in fact intends in the 1983 block grant to eliminate conditions which supply significant protections for handicapped children. These conditions include requirements for individualized education plans, mainstreaming, and the extension of the school year beyond nine months to meet a handicapped child's needs.[5] In addition, the Administra-

2 S. REP. No. 1103, 97th Cong., 1st Sess. (1981); *see also* 127 CONG. REC. E3153 (daily ed. June 23, 1981) (remarks of Rep. Bedell).

3 Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 554, 95 Stat. 357, 464-65; *see also* S. REP. No. 139, 97th Cong., 1st Sess. 895 (1981), *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 396, 919.

4 OFFICE OF MANAGEMENT AND BUDGET, MAJOR THEMES AND ADDITIONAL BUDGET DETAILS, FISCAL YEAR 1983, at 152 (1982); *see also* BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1983, at 5-112 (1982).

5 Babcock, *Handicapped Policy Undergoing a Rewrite*, Washington Post, Mar. 4, 1982, at A27, col. 2.

tion is considering a proposal to reduce school boards' financial reponsibility for supplying related services and a proposal to allow school board officials to judge parental appeals concerning the education of their handicapped children.[6] These changes would significantly dilute the guarantees which have aided numerous handicapped children.[7]

Proponents of block grants nevertheless have argued that placing EAHCA funds in a block grant would have little or no negative impact on the educational rights of handicapped children. They contend that these rights would be adequately protected by alternative federal and state guarantees, including section 504 of the Rehabilitation Act of 1973, state statutory and constitutional provisions, and the constitutional guarantees of due process and equal protection. Indeed, proponents of block grants suggest that administrative cost savings and increased local flexibility will render education programs more efficient overall.[8]

This Article will examine both the Education for All Handicapped Children Act and the alternative federal and state guarantees for the educational rights of handicapped children. This examination will show that although the Education for All Handicapped Children Act is not the only source of educational rights for handicapped children, its protections are far less ambiguous and more complete than those of the alternative guarantees. Consequently, relegating EAHCA to a program that dispenses unconditional block grants is likely to result not merely in savings of administrative costs, but in a dramatic reduction of educational opportunities for handicapped children.

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6 *Id.*

7 *See* 127 CONG. REC. E3154 (daily ed. June 23, 1981) (remarks of Rep. Bedell). The same dilution of guarantees might occur simply by increased budget cuts. Since the application of the rights in the Act is conditioned upon the receipt of federal funds, if any federal funds are received under the Act and its substantive provisions are intact, the states are required to comply with these provisions regardless of the amount of funds received. There is a point, however, at which the cost of administering the programs outweighs the benefit of receiving federal funds. At that point states simply may decide not to apply for the federal funds, and the requirements of the EAHCA would not have to be followed. The 1983 budget proposes a 30% spending cut for handicapped education. Babcock, *supra* note 5.

8 *See, e.g.*, 127 CONG. REC. H3056-59 (daily ed. June 17, 1981).

## I. Current Statutory and Constitutional Provisions for the Education of Handicapped Children

### A. *The Education for All Handicapped Children Act*

The statute containing the most specific substantive and procedural provisions for the education of handicapped children is the Education for All Handicapped Children Act. States receiving federal funds under the Act are required to provide a "free appropriate public education" for handicapped children. As stated by the Act itself, its purpose is

> to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[9]

The legislative history of the EAHCA is extensive and reveals four motives for its enactment, all of which reflected an increased sensitivity of Congress and the public to the needs of handicapped children. A primary motive for the EAHCA was the realization that handicapped children routinely failed to receive an adequate education. During floor debates in the House, legislators admitted that the bill "acknowledges that the handicapped have been denied their inherent right to full public education"[10] and that the "legislation flows from . . . a spirit of concern for a group of children the country has far too long overlooked."[11] Both the House and Senate committees which held hearings on the proposed act noted in their reports that statistics provided by the Department of Health, Education and Welfare indicated that of the more than eight million handicapped children in the country "only 3.9 million such children are receiving an appropriate education, 1.75 million handicapped children are receiving no educational services at all, and 2.5

9 Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 775 (1975) (codified at 20 U.S.C. § 1401 (1976)).

10 121 Cong. Rec. 25,538 (1975) (remarks of Rep. Cornell).

11 *Id.* (remarks of Rep. Harris).

million handicapped children are receiving an inappropriate education."[12] As one representative stated during the congressional debate, "the need for a strong measure like the Education for All Handicapped Children Act of 1975 is made evident by . . . [these] grim and depressing facts."[13]

A second motive for the EAHCA was a series of judicial decisions, including *Pennsylvania Association for Retarded Children v. Pennsylvania*[14] and *Mills v. Board of Education*,[15] which indicated for the first time that handicapped children had a right to publicly provided education under the U.S. Constitution. As the report of the Senate Labor and Public Welfare Committee noted, the Act "followed a series of landmark cases establishing in law the right to education for all handicapped children,"[16] which "pointed to the necessity of an expanded Federal fiscal role."[17]

Another motive underlying the enactment of the EAHCA was the inability, even of those states and localities which recognized the needs of the handicapped or faced judicial mandates, to fund education programs for handicapped children. Despite the efforts of some states, it was clear as of 1975 that "lack of financial resources has prevented the implementation of the various decisions which have been rendered."[18] Moreover, the protections provided by the states remained persistently inadequate despite the fact that "courts [had] stated that the lack of funding may not be used as an excuse for failing to provide educational services."[19]

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12 H.R. REP. No. 332, 94th Cong., 1st Sess. 11 (1975); S. REP. No. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432.

13 121 CONG. REC. 25,537 (1975) (remarks of Rep. Ford). A table was inserted into the Senate record indicating by type of handicap the estimated number of handicapped children assisted and not assisted. 121 CONG. REC. 19,487 (1975).

14 343 F. Supp. 279 (E.D. Pa. 1972).

15 348 F. Supp. 866 (D.D.C. 1972).

16 S. REP. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430.

17 *Id.* at 5, 1975 U.S. CODE CONG. & AD. NEWS at 1429. A more detailed discussion of these cases and other judicial decisions which have found a constitutional requirement for the education of handicapped children will be discussed *infra* text accompanying notes 151-63.

18 S. REP. No. 168, 94th Cong., 1st Sess. 7, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1431.

19 *Id.* at 8, 1975 U.S. CODE CONG. & AD. NEWS at 1432. The floor debates on the EAHCA also discussed the inability of the states to fund education for handicapped

Finally, the EAHCA reflected a recognition of the economic value of having handicapped children become productive members of society. The Senate report discussed the economic and social costs of having large numbers of handicapped children fail to receive an appropriate education as follows:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.[20]

The result of Congress's recognition of these facts was the enactment of a law that is both detailed and wide-ranging. The basic premise of the EAHCA is that states can receive federal funds if they agree to educate handicapped children in accordance with federal guidelines. Local education agencies must submit a detailed application[21] and must fulfill certain conditions[22] to be eligible for federal funding. The broadest and most

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children. Senator Randolph noted that during hearings on the legislation, "State representatives stressed that a strong supportive Federal role was necessary if States were to meet their responsibilities to handicapped children." 121 CONG. REC. 19,482 (1975). Representative Jeffords likewise stated:

> Some people feel very strongly . . . that the burden ought to be where the educational burdens have been in the past, that is, with the local and State governments. Others, and I fall in this category, believe that, because of the extreme burden placed upon the real estate taxes of this country which have been used fundamentally to provide education and because of the financial straits in which our States find themselves, it is essential that we change our Federal priorities. New areas of education which must be funded, such as we have here, should be absorbed and taken up within the Federal priorities.

121 CONG. REC. 23,705 (1975).

20 S. REP. NO. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433. The House report echoed this language, stating: "The long-range implications are that taxpayers will spend many billions of dollars over the lifetime of these handicapped individuals simply to maintain such persons as dependents on welfare and often in institutions." H.R. REP. NO. 332, 94th Cong., 1st Sess. 11 (1975). Similar arguments were expressed in both the House and Senate debates. *See* 121 CONG. REC. 23,703 (1975) (remarks of Rep. Brademas); 121 CONG. REC. 19,492 (1975) (remarks of Sen. Williams).

21 20 U.S.C. § 1414 (1976). The application must provide accountings of how such payments are to be spent, information and records concerning handicapped children, and assurances that the local entities are establishing appropriate procedures to adequately carry out the policies of the Act.

22 20 U.S.C. §§ 1411-1412 (1976).

important condition is that the state guarantee to have a policy that assures handicapped children "the right to a free appropriate public education." Specifically, states are required to submit a plan which contains policies and procedures designed to "assure that full education opportunities are available to all handicapped children."[23] For each handicapped child, the educational agency must submit an individual education program which contains a statement of the child's level of educational performance, formulates annual educational goals, lists all special services provided by the agency, and establishes objective criteria by which to evaluate and revise the program.[24] In addition to assuring an appropriate education, each state must make positive efforts to employ handicapped individuals and allow them to earn job promotions.[25] Other sections of the Act provide for administration, program evaluation, incentive grants, and building alterations to remove architectural barriers.[26]

Agencies receiving funds under this program also must "assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education."[27] The system of procedural safeguards required by the Act grants parents a right to prior notice of proposed changes in evaluation or placement of a child and a right to present a complaint concerning their handicapped child's education.[28] Parents and children are also entitled to "an impartial due process hearing" before a local educational agency, with local hearings appealable to the state educational agency.[29] If this administrative procedure fails to resolve the conflict, an aggrieved party may bring a civil action in a state or federal court, which shall "receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."[30] The Act provides that agencies

23 S. REP. No. 168, 94th Cong., 1st Sess. 3, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1427.
24 20 U.S.C. §§ 1401(19), 1412(4) (1976).
25 *Id.* § 1405 (1976).
26 *Id.* §§ 1417-1419, 1406.
27 *Id.* § 1415.
28 *Id.*
29 *Id.*
30 *Id.* § 1415(e)(2).

may have payments withheld if either the procedural or the substantive requirements are not adequately met by the state program.[31]

The regulations promulgated by the Department of Health, Education and Welfare[32] demonstrate the depth of detail of the Act's provisions. The Office of Education did not have greatly to expand upon or interpret the statute. Rather, the Office incorporated the basic wording or substance of the statute directly into the regulations, expanding on the statutory language in only a few places.[33]

The provisions of the Education for All Handicapped Children Act have generally been interpreted by the courts to provide a broad range of rights for handicapped children. Litigation has centered on three provisions of the Act: the definition of a "free" education, the definition of an "appropriate" education, and the procedures necessary to protect a "free appropriate" education.

There is no question that the statutory language of the EAHCA and its regulations require state agencies receiving funds to provide a "free" education for handicapped children, but the term "free" is ambiguous. If, for example, parents voluntarily place their child in a private educational setting, the public school district may be excused from financial liability.[34] The attempts of school districts to limit their financial liability have given rise to several suits to determine the extent to which school systems are financially responsible for the education of handicapped children. In *Boxall v. Sequoia Union High School District*,[35] the plaintiffs, an autistic child and his father, contended that a meaningful right to an appropriate public education must include the provision of a full-time tutor for a child who cannot fit into another educational setting, and sought reimbursement for a private tutor whom they had hired. The court

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31 *Id.* § 1416.

32 45 C.F.R. § 121a.1-.754 (1980). When the new Department of Education was formed, these regulations were recodified with no substantive changes at 34 C.F.R. pt. 300 (1980).

33 *See* 42 Fed. Reg. 42,474 (1977).

34 R. MARTIN, EDUCATING HANDICAPPED CHILDREN — THE LEGAL MANDATE 45-55 (1979). For a discussion of school district arguments to limit the definition of "free," see *id.* at 45-52.

35 464 F. Supp. 1104 (N.D. Cal. 1979).

rejected the defendant school district's argument that the EAHCA contemplated only injunctive and not compensatory relief. It stated that reimbursement for necessary services not provided by the school clearly "is within the scope of the statutory scheme."[36] Similarly, in *Mahoney v. Administrative School District*,[37] the court rejected the argument that financial responsibility was either discretionary or limited to a duration equivalent to the public-school year, noting that "the Act plainly does not give the states and localities discretion over whether the appropriate educational programs they develop are to be 'free'."[38]

The definition of "appropriate" education for handicapped children is an even more complex and oft-litigated issue. Courts have generally interpreted the term broadly, finding that handicapped children have the right to a twelve-month school year, to special services and opportunities, and to placement in a proper educational setting.

The leading case concerning whether a school year in excess of the traditional nine months is required is *Battle v. Pennsylvania*,[39] in which it was argued that handicapped children were entitled to educational services twelve months a year if they suffered substantial regression during the summer months when they were not in school. The district court found a violation of the Education for All Handicapped Children Act and therefore did not reach other issues presented by alternative statutory and constitutional provisions.[40] Although the court of appeals found that the district court had erred in not emphasizing that the Act contemplates that each state has the responsibility of setting individual educational goals, it affirmed the lower court's holding that the imposition of a 180-day rule precluded the proper

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36 *Id.* at 1109.

37 42 Or. App. 665, 601 P.2d 826 (1979).

38 *Id.* at 669, 601 P.2d at 829; *see also* Hark v. School Dist., 505 F. Supp. 727 (E.D. Pa. 1980). However, in Bishop v. Starkville Academy, 442 F. Supp. 1176 (N.D. Miss. 1977), a class-action suit brought on behalf of black children alleging discrimination in the provision of funds to private schools which pursued racially discriminatory practices, the court enjoined state payments of the costs of providing special education to handicapped children placed in those schools. The court reasoned that the EAHCA did not overrule statutory policy against racial discrimination. 442 F. Supp. at 1179.

39 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 101 S. Ct. 3123 (1981).

40 Battle v. Pennsylvania, 476 F. Supp. 583, 600 (E.D. Pa. 1979).

determination of the content of a free appropriate public education and thus violated the Act.[41]

Courts have also held that a wide number of services are required to be provided as part of an "appropriate" education. In *Tatro v. Texas*,[42] the issue was whether the defendant school officials had a duty under the EAHCA or section 504 of the Rehabilitation Act to provide routine catheterization services. The court found that such services were required by both acts since they were related services needed to assist the child in obtaining the benefits of special education to which the child was entitled.[43]

The case defining most comprehensively what services or opportunities are required in an "appropriate" education, and the only case in which the Supreme Court has taken the opportunity to construe the EAHCA, is *Rowley v. Board of Education*.[44] The plaintiff in *Rowley* alleged that the individualized education program prepared by the public school system violated the EAHCA by failing to provide a sign-language interpreter for deaf students. The district court held that the appropriate education requirement of the EAHCA entitled each handicapped child to an "opportunity to achieve his full potential commensurate with the opportunity provided to other children."[45] This standard required comparison between handicapped and nonhandicapped children as to the difference between their potential and actual performance. The deaf child in *Rowley* was found to have a greater difference between her potential ability and her actual performance than comparable

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41 629 F.2d at 280; *see also In re* Scott K., 92 Misc. 2d 681, 400 N.Y.S.2d 289 (Fam. Ct. 1977); Mahoney v. Administrative School Dist., 42 Or. App. 665, 601 P.2d 826 (1979).

42 625 F.2d 557 (5th Cir. 1980).

43 *Id.* at 564; *see also In re* "A" Family, 602 P.2d 157, 165-66 (Mont. 1979), in which a closely divided Montana Supreme Court found that psychotherapy was a service which the school system must provide to handicapped students, holding that federal EAHCA regulations mandating such provision overrode state regulations to the contrary.

44 632 F.2d 945 (2d Cir. 1980), *cert. granted*, 50 U.S.L.W. 3351 (U.S. Nov. 2, 1981) (No. 80-1002). The Supreme Court heard oral argument on the case on March 23, 1982. 50 U.S.L.W. 3782 (U.S. Mar. 30, 1982); *High Court Given Plea From Deaf for the Deaf*, N.Y. Times, Mar. 24, 1982, at B1, col. 1. The Court is expected to issue its ruling by late June.

45 Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980) (citation omitted); *see also* Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1118 n.101 (1979).

nonhandicapped children. The court of appeals agreed with this interpretation and emphasized that without an interpreter the child could understand only fifty-nine percent of what was said in the classroom but with an interpreter she could understand one hundred percent.[46]

The court of appeals did, however, restrict this broad definition of "appropriate" by explicitly limiting the decision to the unique facts of the case.[47] Moreover, in a strongly worded dissent, Judge Mansfield argued that the proper standard was whether handicapped children were receiving an education which would enable them to be as free as reasonably possible from dependency on others.[48] Even if the Supreme Court adopts Judge Mansfield's relatively narrow standard of appropriate education, *Rowley* would continue to support the proposition that handicapped children have a right to a wide range of services under the EAHCA. Indeed, Judge Mansfield's dissent noted that the emphasis of the legislative history on the economic value of education indicated that handicapped children were entitled to sufficient services to make them "independent, productive citizens."[49]

Courts interpreting the term "appropriate" have also addressed the issue of the type of program into which handicapped children have a right to be placed. An "appropriate" education has been found to include placement in both public and private residential and nonresidential facilities as may be necessary for a particular child. For example, in *North v. District of Columbia Board of Education*,[50] the court held that the EAHCA granted a multiply handicapped child a right to be placed in a residential treatment facility which would provide medical supervision, special education, and psychological support.[51] The Act, however, also explicitly contemplates "mainstreaming."[52] Main-

46 632 F.2d at 948.
47 *Id.*
48 *Id.* at 953.
49 *Id.* at 952.
50 471 F. Supp. 136 (D.D.C. 1979).
51 *Id.* at 138; *see also* Kruelle v. New Castle County School Dist., 642 F.2d 687 (3d Cir. 1981); Sherry v. New York State Educ. Dept., 479 F. Supp. 1328 (W.D.N.Y. 1979).
52 The exact statutory language requires that handicapped children be "educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occur only when the nature or severity of the handicap is such that education in regular classes

streaming has been described as the policy of placing handicapped persons in educational facilities with nonhandicapped persons whenever possible.[53] The courts have interpreted the mainstreaming provision and the term "appropriate education" not as conflicting, but as complementary. The two provisions reflect congressional intent to produce a broad definition of "appropriate" education, a definition which grants handicapped children the right to placement in the educational setting in which they can maximize their potential to enter society successfully.[54]

A case which involves both placement and mainstreaming issues, and which also contains one of the most comprehensive discussions of the Education for All Handicapped Children Act, is *Mattie T. v. Holladay*.[55] *Mattie* was a class action brought on behalf of all school-aged children classified as handicapped in Mississippi, challenging the alleged denial of special education services to handicapped children, the provision of segregated and isolated "special education" programs, the use of racially and culturally discriminatory procedures in the placement of handicapped children, and the absence of procedural safeguards for the review of decisions by school officials. Although the plaintiffs also brought their claim under section 504 of the Rehabilitation Act and the U.S. Constitution, the court concluded that the children's rights under the EAHCA had been violated, granted summary judgment to the plaintiffs, and approved a comprehensive consent decree. The decree relied upon the Act to establish specific and detailed criteria for determining when a school district may place handicapped children in classes which are separate from those used by nonhandicapped children. It further required the state agencies which administer institutions to develop specific plans with local school districts for the placement of institutionalized children into local day-care programs and provided that this placement was to be part

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with the use of supplementary aides and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B) (1976).

53 Some commentators have objected to the use of the term "mainstreaming" in connection with the EAHCA since they feel it more appropriately describes the placement of all handicapped children indiscriminately in regular classrooms. *See* Note, *supra* note 45, at 1118.

54 *See In re* "A" Family, 602 P.2d 157 (Mont. 1979).

55 No. D.C. 75-31-S (N.D. Miss. Jan. 26, 1979).

of the individualized educational plan.[56] The consent decree also required the state to hire outside experts to revamp the local procedure for classifying and placing handicapped children, to provide compensatory educational opportunities for children who had been misclassified, and to implement procedures for complaints and private enforcement.[57] Although the case was settled under a consent decree, it does indicate the type of specific substantive rights courts include in the definition of "appropriate" education.

The EAHCA defines the procedures necessary to protect the substantive rights in a "free appropriate education." The Act's detailed due-process provisions were described in one decision as providing "the basic structure for the establishment of a review procedure by the states."[58] These procedural protections are triggered whenever a handicapped child faces a significant change in educational circmustances, such as indefinite suspension or expulsion. In *Stuart v. Nappi*,[59] the district court held that the attempted expulsion of a handicapped child violated the EAHCA and mandated that the Act's procedure for the placement of disruptive children should be followed whenever the current educational placement of a child is changed. In *S-1 v. Turlington*,[60] the Fifth Circuit Court of Appeals interpreted the Education for All Handicapped Children Act and section 504 of the Rehabilitation Act to require that, in addition to the enumerated safeguards, "a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapped condition" before a handicapped child may be expelled.[61] Moreover, the court found that although expulsion of a handicapped child is permissible, the complete cessation of educational services is not.[62]

Courts have split as to whether state administrative remedies must be exhausted before a civil action may be brought to

56 *Id.*, slip op. at 9-10.
57 *Id.*, slip op. at 6-8.
58 Eberle v. Bd. of Public Educ., 444 F. Supp. 41, 43 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1274 (3d Cir. 1978).
59 443 F. Supp. 1235 (D. Conn. 1978).
60 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 566 (1981).
61 635 F.2d at 350.
62 *Id.* at 348; *see also* Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); Sherry v. New York State Educ. Dept., 479 F. Supp. 1328 (W.D.N.Y. 1979); Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418 (D. Minn. 1979).

enforce the EAHCA. The key question on which the courts have focused is whether state administrative remedies would actually rectify the problem of which the plaintiff complains. Courts have required plaintiffs to utilize local procedures whenever the potential administrative remedies corresponded closely to the complaint.[63] However, exhaustion was not required when the administrative remedy did not respond specifically enough to the plaintiff's complaint.[64] In addition, exhaustion of either the EAHCA or the section 504 administrative guidelines has been seen as sufficient to exhaust both sets of guidelines.[65]

In sum, the EAHCA is the most important statute concerned specifically with education of the handicapped. The Act is detailed in several respects, particularly its legislative history, its statutory language, and its regulations. This detail has both permitted and impelled courts to define a large number of specific substantive and procedural rights for the education of handicapped children.

### B. *Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973[66] is the primary federal statute concerned with discrimination against handicapped persons. Section 504 prohibits discrimination against, or the denial of benefits to any "otherwise qualified handicapped individual,"[67] solely by reason of the handicap, in any federally

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63 Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979).

64 Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979).

65 Boxhall v. Sequoia Union High School Dist., 464 F.Supp. 1104, 1111 (N.D. Cal. 1979).

66 29 U.S.C. § 794 (1976 & Supp. III 1979), *as amended by* Pub. L. 95-602, §§ 119, 122(d)(2), 92 Stat. 2982, 2987 (1978).
Section 504 states:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

67 29 U.S.C. § 706(7) (1976 & Supp. III 1979) defines "handicapped individual" as "including any person who (i) has a physical or mental impairment which substantially

financed activity. The law also has been interpreted to provide heads of agencies with authority to promulgate regulations to carry out the congressional policy.[68] Those regulations particularly concerning the education of the handicapped rely heavily upon the language of the Education for All Handicapped Children Act and are quite similar in scope.[69]

There is little legislative history on section 504, for the congressional debate on the Rehabilitation Act of 1973 did not discuss section 504 specifically. The statement of Senator Robert Dole, a co-sponsor of the Senate version of the Rehabilitation Act, is typical:

> The primary goal of this bill is to assist handicapped individuals in achieving their full potential for participation in our society . . . .
>
> I believe this bill will work to the real benefit of America's disabled.
>
> This bill contains the State plan requirements, the individualized written programs, strong emphasis on research and training, and antidiscrimination provisions . . . .[70]

Secretary of Health, Education and Welfare Joseph Califano, commenting on this lack of legislative history, noted that "Congress enacted the legislation without legislative hearing and with virtually no floor debate in either House. There is thus little Congressional guidance on the host of complex issues raised by the law's far-reaching prohibition against discrimination."[71]

The most comprehensive discussion of congressional intent concerning section 504 occurred in the Senate Report on the Rehabilitation Act Amendments of 1974, one year *after* the enactment of section 504. Although section 504 itself was not amended by this Act, the definition of handicapped individual was amended. In the discussion of this change, the Senate Com-

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limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."

68 29 U.S.C. § 794 (Supp. III 1979).

69 34 C.F.R. §§ 104.31-.39 (1981); *see also infra* text accompanying notes 89 and 178.

70 119 CONG. REC. 24,589 (1973).

71 U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, HEW News 7 (Apr. 28, 1977), *quoted in* Levitan, *Discrimination Against the Handicapped in Federally-Funded State Services: Subpart F of the Rehabilitation Act Regulations*, 12 CLEARINGHOUSE REV. 339, 340 n.11 (1978). Similar statements have been made by other commentators and courts. *See* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285 (7th Cir. 1977); Clark, *Access for the Handicapped--A Test of Carter's War on Inflation*, 42 NAT'L J. 1672, 1672-73 (1978).

mittee on Labor and Human Resources stated that "[s]ection 504 was enacted to prevent discrimination against all handicapped individuals regardless of their need for, or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs."[72] But in the past the Supreme Court has accorded statements made subsequent to enactment little weight in determining legislative intent.[73]

The judicial decisions interpreting and enforcing section 504 of the Rehabilitation Act substantially overlap with the judicial decisions concerning the Education for All Handicapped Children Act. Since together these two acts serve as the principal foundation for the protection of the rights of the handicapped, many of the cases concerning the education of handicapped persons were brought under both statutes. But because section 504, unlike the EACHA, covers post-secondary education,[74] claims by handicapped university students must rely solely on section 504. Decisions in these cases provide an opportunity to determine the extent of the protection afforded by section 504 alone. Chief among these cases is the Supreme Court decision in *Southeastern Community College v. Davis*.[75] *Southeastern* was brought under section 504 by a hearing-disabled person who was denied admission to a college nursing program because of her disability. The college based its denial on the fact that even with a hearing aid the applicant could not understand speech without lip-reading. The disability, the college argued, would adversely affect her ability to perform the requirements of the training program.

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72 S. REP. No. 1297, 93d Cong., 2d Sess. 38 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6388.

73 In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the Supreme Court rejected an argument that the legislative histories of the 1974 and 1978 amendments indicate that section 504 requires affirmative action. The Court stated that "these isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment . . . . Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent 'legislation' such as this Court might weigh in construing the meaning of an earlier enactment." *Id.* at 411 n.11 (citations omitted); *see infra* text accompanying notes 75-89.

74 34 C.F.R. § 104.41 (1980).

75 442 U.S. 397 (1979).

The district court ruled that for the purposes of section 504 an "otherwise qualified handicapped individual" must be able to "function sufficiently in the position sought in spite of the handicap."[76] Since the plaintiff's handicap prevented her from safely performing in both the training program and the nursing profession, the court held for the defendant college. The court of appeals reversed, holding in part that the district court had erred in considering the plaintiff's handicap when determining whether she was "otherwise qualified," rather than looking to other factors such as her past academic performance.[77]

The Supreme Court unanimously reversed the court of appeals.[78] The Court based its decision on the language of section 504, noting that the statute did not specifically compel educational institutions "to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate."[79] Although the Court did focus on the requirement that an "otherwise qualified handicapped individual not be excluded from participation in a federally-funded program,"[80] it echoed the district court in defining an otherwise handicapped person as "one who is able to meet all of a program's requirements in spite of the handicap."[81] The regulations promulgated by the Department of Health, Education and Welfare under section 504 were cited by the court in support of this interpretation.[82] This aspect of the holding overruled the court of appeals' broad definition of "otherwise qualified," which the Supreme Court characterized as "prevent[ing] an institution from taking into account any limitation resulting from the handicap, however disabling."[83]

The Supreme Court also rejected the contention that section 504 required the college to take affirmative action to dispense with a nurse's need for effective oral communication. The plain-

76 Davis v. Southeastern Community College, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976).

77 Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978).

78 442 U.S. 397 (1979). The Court did not reach two other issues raised by the parties: whether there is a private right of action under section 504 and whether the plaintiff should have first exhausted administrative remedies.

79 *Id.* at 405 (1979).

80 *Id.*

81 *Id.* at 406.

82 *Id.*

83 *Id.*

tiff argued that she should be given individual supervision by faculty members when she attended patients. The Court rejected the argument, stating:

> [I]t appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring . . . . In light of respondent's inability to function in clinical courses without close supervision, Southeastern with prudence could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.
>
> Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity.[84]

The Court did observe that the "line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons" will not always be clear.[85] But the Court found in the case before it that the types of adjustments sought by the plaintiff were lawfully refused by the defendant college under section 504 because of the "undue financial and administrative burdens"[86] the adjustments would impose. The Court concluded that "[s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[87]

*Southeastern* indicates that the general nature of section 504's statutory language precludes courts from finding many specific substantive protections for the education of the handicapped.[88] Moreover, the relative broadness of the Education for All Handicapped Children Act protection is demonstrated by the fact

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84 *Id.* at 409-10.

85 *Id.* at 412.

86 *Id.*

87 *Id.* at 413; *see also* Kampmeier v. Nyquist, 553 F.2d 29 (2d Cir. 1977).

88 The Court's narrow interpretation of the protections provided by section 504 negates the broader interpretations adopted by lower courts in cases such as Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977), and Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977). In both of these cases the district courts issued preliminary injunctions requiring that the defendants provide interpreters for the handicapped plaintiffs.

that the section 504 regulations cited by the Supreme Court in support of its narrow definition of "otherwise handicapped" were *not* taken from the EAHCA. Indeed, the Court's suggestion that any broader interpretation of the regulations would lack a statutory basis casts doubt on the strength of the section 504 regulations that do track the EAHCA.[89]

### C. *State Constitutional and Statutory Provisions*

Every state has some constitutional provision concerning education. In some states the constitutional provisions specifically address the education of handicapped children. For instance, the Arizona Constitution requires that "[t]he Legislature shall also enact such laws as shall provide for the education and care of the deaf, dumb, and blind."[90] Most state constitutions, however, make no specific reference to the education of the handicapped.[91] This omission leaves the subject of education of the handicapped open to the interpretation of the state legislatures and the courts.

Numerous state constitutions contain language requiring that the system of public schools be "open to all children of the State."[92] Whether this language includes handicapped children is uncertain. The Missouri Constitution, which requires the establishment and maintenance of "free public schools for the gratuitous instruction of all persons in this state,"[93] was interpreted by the legislature as requiring the education of handi-

89 The effect of the Court's decision on handicapped children may, however, be less than the specific holding would indicate. The fact that the plaintiff could not have performed the normal duties of a nurse without endangering her patients was one of the most important findings of the district court. It is possible that in subsequent decisions where there is no such danger the Supreme Court may allow for broader rights for handicapped individuals under section 504. *See* Note, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern, 80 COLUM. L. REV. 171 (1980).

An opportunity to distinguish *Southeastern* was presented to the Court in University of Texas v. Camenisch, 101 S. Ct. 1830 (1981). In *Camenisch* a deaf graduate student in an academic program alleged violations of section 504 due to a failure by the university to provide a sign-language interpreter. The Court, however, did not reach the merits of the case, but vacated and remanded on procedural grounds.

90 ARIZ. CONST. art. XI, § 1.

91 Pennsylvania, for example, has a provision common to many other states: "the General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education." PA. CONST. art. III, § 14.

92 *See, e.g.*, ALASKA CONST. art. VII, § 1.

93 MO. CONST. art. IX, § 1(a).

capped children.[94] On the other hand, similar language in the Utah Constitution[95] was interpreted by the state legislature as allowing the exemption of handicapped children from school attendance.[96]

A number of state courts have interpreted similar constitutional provisions as mandating a right to education for certain handicapped children. For example, in *Scavella v. School Board*,[97] the Florida Supreme Court held that physically handicapped children are guaranteed a right to a free education. The court based its conclusion on a reading of the Florida constitutional mandate of "a uniform system of free public schools"[98] in conjunction with another constitutional provision prohibiting the deprivation of rights on the basis of physical handicap.[99]

As with the state constitutional provisions, state statutory provisions vary widely in the educational rights they grant to the handicapped. For example, the California statutes provide that "all individuals with exceptional needs have a right to participate in free appropriate public education."[100] California's statutes also protect the handicapped in such areas as definitions,[101] identification and referral of children,[102] educational placement and assessment,[103] procedural safeguards,[104] transportation,[105] and funding.[106] Idaho, on the other hand, provides that "[e]very public school district in the state *may* provide

94 MO. REV. STAT. § 162.670 (1973).

95 "The Legislature shall provide for the establishment and maintenance of a uniform system of public schools which shall be open to all children of the State . . . ." UTAH CONST. art. X, § 1.

96 UTAH CODE ANN. § 53-18-6 (Supp. 1981). This statutory provision allows the exemption to be issued if an evaluation team determines that the handicapped child "is unstable to the extent he constitutes a potential hazard to the safety of himself or to others.".

97 363 So. 2d 1095 (Fla. 1978).

98 FLA. CONST. art. IX, § 1.

99 *Id.* at art. I, § 2; *see also* Elliot v. Board of Educ., 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978) (holding that ILL. CONST. art. X, § 1 guarantees handicapped children the right to a free education); *In re* G.H., 218 N.W.2d 441 (N.D. 1974) (holding that N.D. CONST. art. I, §§ 11, 20 (*now found at* art. I, §§ 21-22) guarantees a right to public school education to all children with physical or mental handicaps except those who can derive no benefit from education).

100 CAL. EDUC. CODE § 56,000 (West Supp. 1981).

101 *Id.* §§ 56,020-56,033.

102 *Id.* §§ 56,300-56,303.

103 *Id.* §§ 56,001, 56,320-56,329.

104 *Id.* §§ 56,500-56,507.

105 *Id.* §§ 56,701, 56,770-56,773.

106. *Id.* §§ 56,700-56,826, 56,875-56,885.

instruction and training for persons to the age of twenty-one (21) years who are exceptional children."[107] Idaho also has provisions concerning definitions,[108] funding,[109] responsibilities of the state board of education[110] and contracting for education by another school district.[111] It does not, however, discuss other subjects such as the identification of handicapped children, their educational placement, or procedural safeguards.

The variation among these state statutes is evidence that they provide for significantly different levels of education for handicapped children.[112] This variation poses three significant problems. First, in those states without extensive guarantees, handicapped children will face the same deprivation of educational rights as before 1975 if federal protections are withdrawn. Second, the mere existence of inequality undercuts the benefits which flow from education of the handicapped. For example, leaving significant numbers of handicapped children uneducated is economically harmful to society regardless of the numbers who are educated. Third, and most significantly, variation in protection violates the fundamental concept reflected both in the legislative history of the EAHCA and in early judicial decisions that all children in society are entitled to an equal opportunity to receive an education.

Even in those states where extensive guarantees are written into law, there is no assurance that the guarantees will be enforced. For instance, an analysis of the Maine statute which provides for the education of handicapped children[113] indicates that although the purpose of the statute was to provide equal educational opportunities for all handicapped children, the high cost of the mandated program prevented the state from attaining this goal.[114] A commentator has noted that implementation of

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107 IDAHO CODE § 33-2001 (1980) (emphasis added). The statute does say, however, that "[e]ach public school district is responsible for and shall provide for the education and training of exceptional pupils resident therein."

108 *Id.* § 33-2002.

109 *Id.* §§ 33-2005, 33-2005A.

110 *Id.* § 33-2003.

111 *Id.* § 33-2004.

112 *See* 121 CONG. REC. 19,487-92 (1975).

113 ME. REV. STAT. ANN. tit. 20, § 3121 (Supp. 1981).

114 Benjamin & Blair, *Implementation of Education Laws Relating to Exceptional Children: The Maine Experience*, 11 CLEARINGHOUSE REV. 449 (1977).

programs for the mentally handicapped has been "slow and irregular,"[115] suggesting that the Maine experience is not unique.

Every state has some statutory or constitutional provision relating to the education of handicapped children. Most of these provisions require that handicapped children shall be provided with an education, although some, like the Idaho statute, are not couched in mandatory language. But the hallmark of state provisions is the degree to which they vary in both the substantive and procedural protections they afford for the education of the handicapped.

### D. *Federal Constitutional Provisions*

Even in the absence of explicit state or federal protection, some judges and commentators have suggested that the Due Process and Equal Protection Clauses of the Fourteenth Amendment might guarantee a right to education for handicapped children. These provisions, described as "the foremost constitutional guarantees of individual rights,"[116] mandate that no state shall "deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."[117]

The Equal Protection Clause of the Fourteenth Amendment requires that all individuals similarly situated be treated in a similar manner.[118] In applying this general concept, the Supreme Court has developed various specific standards of review. The two main standards of review are strict scrutiny[119] and a less strict standard which has been variously referred to as "mini-

115 H. TURNBULL III, LEGAL ASPECTS OF EDUCATING THE DEVELOPMENTALLY DISABLED 7 (1975).

116 Note, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529 (1979).

117 U.S. CONST. amend. XIV, § 1.

118 One commentator has described the equal-protection guarantee in the following manner:

> Equal protection protects members of politically vulnerable groups from governmental discrimination by forbidding government, except in certain narrow circumstances, to classify on the basis of membership in that group or on the basis of characteristics peculiar to that group. The essence of the equal protection clause, then, is to prevent the government from subjecting politically powerless groups to potentially invidious classifications.

Note, *supra* note 116, at 530 (footnotes omitted).

119 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6 (1978).

mum rationality,"[120] "rational relationship,"[121] and "restrained review."[122] For legislation or other state action to withstand the strict-scrutiny test, the government must demonstrate a high level of need,[123] while to withstand the minimum-rationality test the government need only demonstrate that the statutory classification is not wholly arbitrary and capricious.[124] The critical question in any equal-protection case is which standard of review applies, because very few statutes pass strict scrutiny while very few fail minimum rationality.[125]

The Court has applied the strict-scrutiny standard of review in each of two circumstances: when state action interferes with the exercise of a "fundamental interest" or when the state classifies on the basis of a "suspect class."[126] Some rights which the Supreme Court has held to be fundamental are the right to vote,[127] the right of interstate travel,[128] and the right of procreation.[129] However, in *San Antonio School District v. Rodriguez*,[130] the Supreme Court held that education was not a fundamental interest. The Court noted:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether

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120 *Id.* at 994.

121 J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 524 (1978).

122 CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA — ANALYSIS AND COMMENTARY 1471 (1973).

123 *Id.* at 1474.

124 *See infra* notes 142-46 and accompanying text. In recent years, the Supreme Court appears to have used a third intermediate standard of review in some cases, which does not rise to strict scrutiny, but goes beyond minimum rationality. *See infra* note 141.

125 L. TRIBE, *supra* note 119, §§ 16-2 to -6, at 994-1000. The Fourteenth Amendment has been interpreted as also requiring "state action." *See* The Civil Rights Cases, 109 U.S. 3 (1883). In seeking to enforce educational rights, the state action requirement does not usually pose a major threat, because the challenge is most commonly made against the public school system. *See also* Taylor v. Maryland School for the Blind, 409 F. Supp. 148 (D. Md. 1976), *aff'd*, 542 F.2d 1169 (4th Cir. 1976) (private school held to have had sufficient connections with the state to subject the school to the Fourteenth Amendment).

126 *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (per curiam). *See generally* L. TRIBE, *supra* note 119.

127 Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

128 Shapiro v. Thompson, 394 U.S. 618 (1969).

129 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

130 411 U.S. 1 (1973).

> education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.[131]

If education is not a "fundamental" interest, then for strict scrutiny to be the standard of review for laws governing the education of handicapped children the handicapped must be considered a suspect class. In *United States v. Carolene Products Co.*,[132] the Supreme Court suggested, in oft-repeated dictum, guidelines concerning when a group is a suspect class. The Court stated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[133] Indeed, it has been argued that the handicapped are a "discrete and insular minority . . . saddled with disabilities" since, by definition, a handicap is a disability.[134] These disabilities arguably have given rise to unequal treatment of handicapped persons. The facts that certain handicapped persons have sometimes been denied the right to vote or have been faced with architectural barriers at polling places, and have even faced restrictions on the holding of public office, suggest their political powerlessness.[135]

Unfortunately, the existing case law provides little support for the ultimate success of these arguments. In the *Rodriguez* case, the Court emphasized its reluctance to define a class as suspect, stating that in order for a class to possess "the traditional indicia of suspectness" the members must be "saddled with such disabilities, or subjected to such a history of pur-

131 *Id.* at 33-35 (1973) (citations and footnotes omitted).
132 304 U.S. 144 (1938).
133 *Id.* at 153 n.4.
134 Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 906 (1975).
135 *Id.* at 906-07.

poseful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[136]

Another recent Supreme Court decision indicates continued support for a narrow definition of "suspectness." In *Schweiker v. Wilson*,[137] the Court intimated, though it did not hold, that the mentally ill were not a suspect class under the Equal Protection Clause. The Court noted that the lower court's opinion indicated that the mentally ill as a group did not demonstrate all the characteristics the Court has considered as denoting a suspect class. In particular, the Supreme Court referred to the district court's finding that mental health problems were likely to relate to ability to perform or contribute to society, and that it is debatable whether mental illness is an immutable characteristic determined solely by the accident of birth.[138]

Several lower-court cases have discussed explicitly the issue of whether handicapped children are a suspect class. In *Interest of G.H.*,[139] the court held that retarded children are a suspect class. However, in most decisions handicapped children have not been so described. In fact, one court noted that the classification of mentally retarded children "does not involve any invidious characterization of the mentally retarded" but rather was based upon "objective differences which are functionally significant."[140] These cases suggest that until the Supreme Court issues a definitive ruling, lower courts are likely to remain divided on the issue of whether the handicapped are a suspect class.

If the handicapped are not a suspect class and education is not a fundamental interest, then the laws regarding education of handicapped children will most likely be subject only to a min-

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136 411 U.S. 1, 28 (1973).
137 101 S. Ct. 1074 (1981).
138 *Id.* at 1080 & n.11.
139 218 N.W.2d 441 (N.D. 1974).
140 Guempel v. State, 159 N.J. Super. 166, 186, 387 A.2d 399, 409, *modified sub nom.* Levine v. Institution and Agencies Dept. of N.J., 84 N.J. 234, 418 A.2d 229 (1980); *see also* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (holding that the mentally retarded have "not been singled out by use of suspect criteria"). Several other cases have discussed the issue without reaching a decision on this point. *See, e.g.*, New York State Ass'n for Retarded Children v. Carey, 466 F. Supp. 487, 504 (E.D.N.Y. 1979); Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975).

imum-rationality test.[141] The minimum-rationality standard was developed largely in the context of economic regulation, although it has been used in other contexts as well.[142] Under this standard, most statutory classifications do not deny equal protection; only "invidious discrimination" violates the Constitution.[143] The Court has given guidelines to determine when "invidious discrimination" occurs: "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[144] Also, a classification which has some reasonable basis but may in practice result in some inequality does not offend equal-protection guarantees under this test.[145] The burden of proof that the statute does not rest upon any reasonable basis is borne by the person attacking the statute.[146]

Some courts have held that even under this less stringent standard of review, handicapped children might still have an action for a violation of Fourteenth Amendment rights. For example, in *New York State Association for Retarded Children v. Carey*,[147] the court discussed the validity of a proposed plan for segregating within the public school certain mentally re-

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141 In some recent cases the Supreme Court has appeared to use a standard of review which is between the strict-scrutiny standard and the minimum-rationality standard. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (gender classification). For a brief discussion of this intermediate type of review, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 121, at 525. *See generally* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972). One Justice has argued that the Court scrutinizes various classifications depending on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which a particular classification is drawn." San Antonio School District v. Rodriguez, *supra* note 130, at 99 (Marshall, J., dissenting). In Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976), a district court stated that "although learning disabled children are not a suspect class they do exhibit some of the essential characteristics of suspect classes — minority status and powerlessness. We think that the Supreme Court, if presented with the plaintiffs' equal protection claim, would apply the as yet hard to define middle test of equal protection . . . ." *Id.* at 836. A majority of the Supreme Court, however, has never expressly authorized an intermediate standard of review for any case.

142 CONGRESSIONAL RESEARCH SERVICE, *supra* note 122, at 1471.

143 Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

144 F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

145 Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

146 *Id.* at 78-79.

147 466 F. Supp. 487 (E.D.N.Y. 1979).

tarded children who had been classified as carriers of hepatitis B virus. The court found that this plan violated the Equal Protection Clause because the school system did not plan to test any other group for the virus or take any special action with regard to other carriers. The school system's distinction was found to be unsupported by the evidence and the plan to be without a rational basis.[148] However, in *Cuyahoga County Association for Retarded Children & Adults v. Essex*,[149] the court found no constitutional difficulties with a state statute which excluded from the free and mandatory school system children who had been found incapable of profiting substantially from further instruction. The court held that the statutory classification was sufficient to meet the rational-basis test.[150]

The two cases described as "legal milestones"[151] concerning the application of due-process and equal-protection rights to handicapped children, *Pennsylvania Association for Retarded Children v. Pennsylvania*[152] ("*PARC*") and *Mills v. Board of Education*,[153] both lack strong precedential value on the extent of federal constitutional protection for handicapped children. *PARC* was a class-action suit by a state association and parents of thirteen mentally retarded children alleging that the state statutes excluding retarded children from education in the public schools violated constitutional guarantees of substantive and procedural due process. The case was settled in a consent decree which provided in part that mentally retarded children must have access to a free public program of education. Specifically, the decree stated that each mentally retarded child "shall be provided access to a free public program of education and training appropriate to his capacity"[154] and, if possible, receive instruction in a "regular public school class."[155] However, the court's discussion of equal protection was confined to the context of subject-matter jurisdiction. In that context the court

148 *See also* Panitch v. Wisconsin, 444 F. Supp. 320 (E.D. Wis. 1977).
149 411 F. Supp. 46 (N.D. Ohio 1976).
150 *Id.* at 52.
151 Blakely, *Judicial and Legislative Attitudes Toward the Right to an Equal Education for the Handicapped*, 40 OHIO ST. L.J. 603, 608 (1979).
152 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).
153 348 F. Supp. 866 (D.D.C. 1972).
154 343 F. Supp. at 314.
155 *Id.* at 307.

indicated that it accepted jurisdiction over the equal-protection claim in part because it had clear due-process jurisdiction over blatant procedural violations and felt it would be inequitable to separate the two constitutional claims.[156] The value of the court's finding of a substantial equal-protection claim is also limited because the finding was based on a complete denial of any education for the handicapped children.[157] Moreover, consent decrees in the field of constitutional rights have particularly limited precedential value. These facts suggest that the *PARC* case cannot serve as a strong legal foundation for equal-protection suits by handicapped children.

*Mills* was an action brought on behalf of seven school-age children suffering a variety of emotional and physical handicaps who had been excluded from the District of Columbia public school system. The court in *Mills* held that this denial of an education violated certain district statutes and board of education regulations, and was a denial of equal protection under the Fifth Amendment. In addition, the court held that it was a denial of due process to suspend or expel a handicapped child without a prior hearing. The court, discussing the defendant's contention that the relief requested was not financially feasible, made the following far-reaching statement:

> The defendant's failure to afford them due process hearings and periodical review, cannot be excused by the claim that there are insufficient funds. . . . If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[158]

However, as a basis for applying equal-protection doctrine to education of the handicapped, *Mills* raises more questions than

156 *Id.* at 299. In particular, the court discussed whether this was a proper case in which to exercise the discretionary, equitable doctrine of abstention on the equal-protection claim. It ultimately decided against abstention.

157 *Id.* at 296.

158 348 F. Supp. at 876.

it answers. First, the court never made explicit the standard of review it was applying. The court did rely heavily on *Hobson v. Hansen*,[159] which dealt with racial discrimination in the public schools and which clearly applied a strict-scrutiny analysis.[160] But, as noted above, a suspect-class classification for the handicapped has not been consistently applied in later decisions. Second, to the extent that the decision rests on the importance of education,[161] its validity must now be in doubt because of *Rodriguez*'s subsequent rejection of education as a fundamental interest. Third, the clear violations of district codes and board of education regulations provided an additional basis for the court's result and quite probably influenced the judge's decision-making. It is open to question how the court would have decided the constitutional issues absent these statutory and regulatory bases. Thus, a close look at *Mills* and *PARC* reveals that their power to generate constitutional protection for the education of the handicapped is at best weak.[162]

Although questionable as a source for substantive protections, the Fourteenth Amendment could provide procedural protections for handicapped children. Several cases have discussed whether the due-process guarantees of the Fourteenth Amendment were violated by certain actions concerning the education of handicapped children.[163] In the *Cuyahoga County* case, although the court allowed the school district to exclude a handicapped child because of her lack of progress in relation to her ability,[164] the court did hold that the decision to terminate enrollment was subject to due-process requirements. In particular, the school district procedure failed to provide adequate notice

159 269 F. Supp. 401 (D.D.C. 1967).

160 *Id.* at 506-08.

161 348 F. Supp. at 874-76.

162 For more detailed discussion of *PARC* and *Mills*, see Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016 (1976); Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMPLE L.Q. 961 (1977); McClury, *Do Handicapped Children Have a Legal Right to Minimally Adequate Education?*, 3 J. L. EDUC. 153 (1974).

163 Since education has been held not to be a fundamental interest, and since the provision of education has seldom been viewed as a limitation on individual freedom, Fourteenth Amendment substantive due process is not often applied to education for handicapped children. Rather, most due-process claims have alleged inadequate procedural protection.

164 Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46 (N.D. Ohio 1976).

to the handicapped child, opportunity to review the material on which the decision would be made, and opportunity to make a presentation before the decision-making official.[165] These procedural requirements are nearly as extensive as those provided by the Education for All Handicapped Children Act.[166] However, the court of appeals in *Taylor v. Maryland School for the Blind*,[167] while noting that expulsion was subject to due-process requirements, held that the administrative hearing need not be before an independent examiner.[168]

## II. Educational Rights of Handicapped Children in the Absence of the Education for All Handicapped Children Act

As can be observed from the preceding discussions, the Education for All Handicapped Children Act is by no means the only legal requirement for the education of handicapped children. Section 504 of the Rehabilitation Act, state statutory and constitutional provisions, and federal constitutional guarantees of due process and equal protection all have been interpreted to require a certain degree of educational opportunity for handicapped children. However, none of these provisions has the clarity, the comprehensiveness, or the consistency of the EAHCA. As a result, educational rights of handicapped children will receive partial protection at best if the guidelines of the EAHCA are repealed or substantially altered.

For example, the requirements of the section 504 regulations on education are the closest to the requirements of the EAHCA. Both the section 504 regulations and the statutory language of the EAHCA require that handicapped persons be provided a free appropriate public education, that handicapped students be educated with non-handicapped students, that all unserved handicapped children be identified and located by educational agencies, that evaluation procedures be improved in order to avoid

165 *Id.* at 58.

166 *See supra* text accompanying notes 27-30.

167 409 F. Supp. 148 (D. Md. 1976), *aff'd*, 542 F.2d 1169 (4th Cir. 1976).

168 409 F. Supp. at 152. *Compare* 20 U.S.C. § 1415(b)(2) (1976) (EAHCA). *See also* Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978), *vacated and remanded on other grounds*, 623 F.2d 248 (2d Cir. 1980); H. Turnbull III, *supra* note 115, at 20-26.

the misclassification of students, and that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children.[169] Indeed, because section 504 is a general prohibition of discrimination, in certain aspects its coverage is even broader than that of the EAHCA; section 504, for instance, covers post-secondary as well as elementary and secondary education.[170] It could be argued, then, that the repeal of the EAHCA would have little effect on the education of handicapped children.

A closer examination reveals several significant differences between the two acts. First, discrimination against handicapped persons is limited under section 504 to "otherwise qualified handicapped individuals," which the Supreme Court in *Southeastern* interpreted to mean "one who is able to meet all of a program's requirements in spite of his handicap."[171] Comparison of *Rowley*, brought under the EAHCA, with *Southeastern*, brought under section 504, highlights the significance of the "otherwise qualified" requirement. In *Southeastern*, to be "otherwise qualified" the plaintiff had to be able to perform not only in the academic environment but also in the clinical training program. A similar standard applied to elementary and secondary education would likely result in the failure of many handicapped children to meet the definition of "otherwise qualified." For example, a handicapped child unable to participate in a few requirements of public education, such as physical education or language classes, might not be "otherwise qualified" and therefore would not be covered under section 504. In addition, the Supreme Court in *Southeastern* held that extensive modifications of a program to accommodate a handicapped person were not required under section 504. This rejection of affirmative action suggests that in a case such as *Rowley*, in which plaintiffs sought to have the school supply special services for a deaf child placed in a standard nonhandicapped class, an interpreter might not be required. Even the dissent's relatively narrow standard in *Rowley* — that the EAHCA contemplates for a

169 34 C.F.R. pt. 104 (1981). The reason for this parallelism is that the section 504 regulations were based upon the statutory language of the EAHCA. *See supra* notes 69 and 89 and accompanying text; *see infra* text accompanying note 178.

170 34 C.F.R. § 104.41 (1981).

171 442 U.S. 397, 406 (1979).

handicapped child "an education that would enable him or her to be as free as reasonably possible from dependency on others" — contrasts sharply with the Supreme Court's restrictive statement in *Southeastern* that "neither the language, purpose, nor history of section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds."[172]

Second, although the Education for All Handicapped Children Act was enacted in 1975, two years *after* section 504, only the EAHCA provides the fundamental legislative history and regulatory language necessary for courts to determine the extent of the law's protection. The legislative history of the Education for All Handicapped Children Act emphasizes that increased awareness of the educational needs of handicapped children was an important reason for its enactment.[173] In contrast, the legislative history of section 504 is very sparse and contains only a few general references to education.[174] The regulations under the EAHCA are detailed and closely follow the statutory language.[175] The regulations for section 504 were not promulgated until May 1977, two years after passage of the EAHCA, and only after President Ford had issued an executive order[176] and a court had decided a suit brought to compel promulgation of the regulations.[177] Moreover, the regulations of section 504 rely on the EAHCA in numerous places. For example, one section 504 regulation states that compliance with the procedural safeguards of section 615 of the Education for All Handicapped Children Act is one means of meeting the procedural requirements of section 504.[178]

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172 *Id.* at 411. Thus, even should the Supreme Court reverse the ruling of the court of appeals in *Rowley*, the standard of "appropriate education" in the EAHCA is still likely to require much more affirmative action than the standard of section 504 of the Rehabilitation Act. *See supra* text accompanying notes 48-49.

173 *See supra* text accompanying notes 10-11.

174 *See supra* text accompanying notes 70-73.

175 *See supra* text accompanying notes 32-33.

176 Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976).

177 Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

178 34 C.F.R. § 104.36 (1981). A commentator has noted that HEW relied heavily on congressional guidance in the EAHCA in determining whether to require mainstreaming in the section 504 regulations. Engebretson, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 HARV. J. ON LEGIS. 59, 77-79 (1979). He stated that it was "fortunate" that the mainstreaming issue was resolved by the EAHCA so that HEW did not have to make the decision based solely on section 504 since the opposition to mainstreaming was strong. Without the EAHCA require-

The substantial reliance of the section 504 regulations on the EAHCA language is probably due in large part to the fact that few cases were litigated or decided under section 504 until the middle to late 1970's. If, however, the EAHCA were repealed, section 504 regulations would have to be changed, in particular the specific references to the Education for All Handicapped Children Act and its regulations. Because many of the regulations under section 504 are derived directly from the statutory language of the EAHCA, it is simply wrong to argue that protections for handicapped children would remain unaltered if the EAHCA guidelines were eliminated in a block-grant program.

The fact that both acts are relied upon in many judicial decisions concerning education does not guarantee that protections would be the same in the absence of the EAHCA if the regulations under section 504 were changed. Indeed, if Congress repealed the enabling legislation of the EAHCA, it could be argued that Congress no longer intended this reliance and the continuing authority of previous cases resting on both acts would be in doubt.

A third major distinction between section 504 and the Education for All Handicapped Children Act is that the statutory language of the EAHCA is much more specific and detailed than that of section 504. This specificity provides more certainty and uniformity in decisions and less leeway for interpretation of regulations. Moreover, the Supreme Court has indicated that if a statute is couched only in general language, courts should refuse to interpret the statute's requirements in a comprehensive manner. In the recent decision of *Pennhurst State School and Hospital v. Halderman*,[179] the Court held that part of the Developmentally Disabled Assistance and Bill of Rights Act[180] does not grant the mentally retarded any substantive rights to appropriate treatment in the program least restrictive of their freedom.[181] The majority opinion described this section as merely

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ments to rely upon, the entire section 504 regulation might well have been weakened. *Id.* at 79.

179 101 S. Ct. 1531 (1981).

180 42 U.S.C. §§ 6000, 6010 (Supp. II 1978).

181 The present language of § 6010 states in relevant part:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:

expressing "a congressional preference for certain kinds of treatment" and as simply "a general statement of 'findings'."[182] The Court noted that section 6010 was enacted pursuant to the spending power of Congress and reasoned that "legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions."[183] A state, then, must knowingly accept the conditions imposed on the receipt of grants and "[t]here can be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[184]

Both the EAHCA and section 504 condition their requirements on the receipt of federal funds and thus would presumably be subject to the specificity requirements imposed in *Pennhurst*. The EAHCA would appear to have little difficulty meeting these requirements since its statutory language is quite detailed. Section 504, on the other hand, is so general that a state might argue that it is unable to ascertain the conditions attached to the federal funding. While this argument would probably not result in a holding that section 504 was merely a statement of policy, the recent emphasis by the Supreme Court on specificity in federal statutory requirements might well result in a less-expansive interpretation of section 504.[185]

State statutory and constitutional protections are similarly flawed as alternatives to the Education for All Handicapped Children Act. First, many states lack a specific education statute or constitutional provision applicable to handicapped

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(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution . . . that (A) does not provide treatment, services, and habilitation which are not appropriate to the needs of such person; or (B) does not meet the following minimum standards. . . .

182 101 S. Ct. at 1540.

183 *Id.* at 1539.

184 *Id.* at 1540.

185 *See supra* text accompanying notes 84 and 89.

children.[186] In the absence of federal guarantees, children in these states would have to rely on the general educational provisions. These are precisely the provisions which traditionally have proven inadequate to provide the special education that can allow handicapped children to become full participants in society.

Second, even in those states with guarantees, the state provisions are generally not as detailed as the EAHCA. For example, many states do not have statutory provisions providing for procedural safeguards.[187] In contrast, the Education for All Handicapped Children Act contains both a detailed section providing for procedural safeguards[188] and regulations further detailing these requirements.[189] Moreover, enforcement of state provisions varies greatly at present, and is likely to decrease in almost all states in the future. One commentator has noted that the implementation of state statutory provisions by courts and administrative agencies has been slow and irregular.[190] According to a survey by the Advisory Commission on Intergovernmental Relations, the state budgets, adjusted for inflation and population changes, have been decreasing since the mid 1970's and federal aid to states has been decreasing since 1978.[191] Indeed, the Omnibus Budget Reconciliation Act of 1981[192] has reduced the federal aid to states and localities to about seven billion dollars below the 1981 level of ninety-five billion dollars.[193] Since this trend has imposed increasing fiscal constraints on states and localities, the states will have to reduce their expenditures for services. Expansive and expensive educational services for handicapped children may well be among the services cut. The likelihood of inadequate enforcement of state protections is further supported by the fact that even in 1975, before state budgets had begun to shrink significantly, Congress found that the states were unable adequately to fund education for handicapped children.[194]

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186 *See supra* text accompanying notes 90-112.
187 *See supra* text accompanying notes 107-11.
188 20 U.S.C. § 1415 (1976).
189. 45 C.F.R § 121a.500-.589 (1981).
190 H. TURNBULL III, *supra* note 115, at 7.
191 39 CONG. Q. 2048 (1981).
192 Pub. L. No. 97-35, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat. 357) 7.
193 39 CONG. Q. 2047 (1981).
194 *See supra* text accompanying notes 18-19.

Third, if the Education for All Handicapped Children Act were repealed, it could have a direct impact on the language of state statutes. Several state statutes refer explicitly to federal funding,[195] and some contain other references to federal statutes. For example, the Maryland statute provides that all proceedings held and decisions made pursuant to certain sections of the statute "shall be in conformance with applicable federal law."[196] The Vermont statute contains a specific reference to the Education for All Handicapped Children Act. The statute established an advisory council on special education and declared that the council shall "assure all responsibilities required of the state advisory panel by the P.L. 94-142, the Education of All Handicapped Children Act, and regulations issued pursuant to that act."[197] The repeal of the EAHCA would place the substantive rights available to handicapped children under these statutes in limbo. Those state statutes which more generally mention federal law would also necessarily provide less protection since the repeal of the Education for All Handicapped Children Act would change the federal law in the area.

Finally, repeal of the EAHCA would have an indirect but powerful effect on state law. Much of the state legislation has been enacted since the passage of the EAHCA, and it is often modeled on or tailored to the requirements of the Act to assure that the state involved will qualify for funding.[198] If state agencies do not have to conform to federal guidelines to receive funds, states may act to reduce protections for handicapped children. For instance, a survey of state directors of special education found that thirteen directors predicted that their state laws would be drastically weakened or eliminated entirely if the federal statute were repealed. Twelve directors believed that minor changes would occur on the state level, and several indicated that their legislatures were already proposing action on the statutes.[199]

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195 *See, e.g.*, CAL. EDUC. CODE §§ 56,875-56,885 (West Supp. 1981).

196 MD. EDUC. CODE ANN. § 8-409.1 (Supp. 1981).

197 VT. STAT. ANN. tit. 16, § 2945 (1981).

198 *See, e.g., id.* The New York statutes are described by one commentator as also having been enacted at least in part in response to the passage of the EAHCA. Comment, *Educating New York's Handicapped Children*, 43 ALB. L. REV. 95 (1978).

199 *Hearings Before the House Committee on Education and Labor*, 97th Cong., 1st Sess. (Apr. 6, 1981) (testimony of J. Fisher, Assistant Superintendent, Special Education, Illinois State Department of Education, and of the National Association of State Directors of Special Education).

Although the state constitutional provisions relating to education would not be affected by the repeal of the Education for All Handicapped Children Act, their usefulness in providing a right to education for handicapped children is limited. Some of the state constitutional provisions may be broad enough to require education for handicapped children, but many would not. Even when the constitutional language is quite broad, the judicial interpretation of the different provisions has varied greatly.[200]

Federal constitutional protections are inadequate as compared to the EAHCA because the application of the Equal Protection and Due Process Clauses to education for handicapped children is subject to much uncertainty. *Rodriguez* holds that education is not a fundamental interest; no Supreme Court case holds that the handicapped are a suspect class and intimations in *Schweiker v. Wilson* cast doubt on that possibility; and the due-process educational protection for the handicapped might be limited to procedural rights. Even the two seminal lower-court cases oft-cited as supporting the rights of the handicapped leave many open questions.[201]

Moreover, the Supreme Court is unlikely to answer the constitutional questions. A number of Supreme Court cases concerning issues relating to the handicapped, notably *Southeastern*[202] and *Pennhurst*,[203] have been decided on statutory bases. Even if a suit were brought on constitutional grounds concerning the education of handicapped children, the Court might remand with instructions to decide the case based on statutory grounds.[204] Indeed, the EAHCA is in large part the reason why few cases have discussed the constitutional issues in recent

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200 *See supra* text accompanying notes 131, 137, and 163.

201 *See supra* text accompanying notes 151-62.

202 442 U.S. 397 (1979).

203 101 S. Ct. 1531 (1981).

204 *See* Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va.), *vacated and remanded*, 434 U.S. 808 (1977), *rev'd*, Kruse v. Campbell, No. 75-0622-R (E.D. Va. Jan. 5, 1978) (*discussed in* NATIONAL CENTER FOR LAW & THE HANDICAPPED, 3 AMICUS No. 5, 20-21 (1978)). In *Kruse*, the original three-judge district court held that the state violated the Equal Protection Clause by providing a tuition grant limited to 75% of the tuition costs. The impermissible unequal treatment was between those handicapped whose parents could not afford the remaining 25% and those handicapped whose parents could afford it. The court's theory was that the former group of handicapped children were unable to obtain an education at all. The Supreme Court vacated and remanded the district court's decision with instructions to decide the case based on section 504 of the Rehabilitation Act. When the case was so decided, the decision was reversed.

years; plaintiffs and judges realize that if a case can be decided on statutory grounds under the Act, there is little reason to argue or decide constitutional issues. The area is thus uncertain because the lower courts are split on the constitutional issues involved in the education of handicapped children, such as whether the handicapped constitute a suspect class, and the Supreme Court is unlikely to act on these issues. Therefore, the question of what rights to an education would be available to handicapped children under these provisions in the absence of the EAHCA is unclear.

## SUMMARY

As intended by Congress, the Education for All Handicapped Children Act is the primary statutory source of educational rights for handicapped children. By requiring states receiving federal funds to follow a detailed set of substantive and procedural guidelines, the Act provides a clear and simple means by which the handicapped may document and assert their rights to a free appropriate education. Elimination or substantial alteration would force the handicapped to fall back on three alternative sources of educational rights: section 504 of the Rehabilitation Act, state constitutional and statutory provisions, and the federal constitutional guarantees of due process and equal protection.

None of the three, however, would completely replace the Education for All Handicapped Children Act. Section 504's application is restricted to "otherwise qualified" handicapped persons, its regulations rely on the language and legislative history of the EAHCA, and its statutory language might fail to be interpreted broadly by the courts. State statutes and constitutional provisions vary widely in their scope, leaving large numbers of handicapped unprotected, and even those which approach the EAHCA in coverage may be the subject of revision by their legislatures if federal funds are not readily available to support state efforts to educate handicapped children. The constitutional guarantees of due process and equal protection are even more unsatisfactory, given the failure of the Supreme Court to consider education a fundamental right or the handi-

capped a suspect class, the inconsistent interpretations of the extent of constitutional protections by lower courts, and the likelihood that courts will reject constitutional claims in favor of statutory decisions. Thus, making the EACHA funds part of an unconditional block grant is far more than a mere change in funding structure; rather, it is likely to lead to a substantial loss of the educational gains so recently obtained by handicapped children.

As the Senate Report on the EACHA noted, "[t]his Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and prosperity of our people."[205] The EAHCA established a national commitment to this philosophy, a commitment with which the Reagan Administration purports to agree. But without the detailed substantive and procedural provisions of the EAHCA, handicapped children will be unable to document the specific education rights to which they are entitled in the straightforward manner they have since 1975. Faced with both the traditional reluctance of local school agencies to aid the handicapped and the pressure of current budget cuts, handicapped children may be returned to the time when only a fraction of them received the opportunity to realize firsthand the independence and productivity of which all handicapped persons are capable.

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205 S. REP. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

# NOTE

# POLICING EXECUTIVE ADVENTURISM: CONGRESSIONAL OVERSIGHT OF MILITARY AND PARAMILITARY OPERATIONS

NEWELL L. HIGHSMITH*

*In 1973, Congress passed the War Powers Resolution, which limited the President's power to commit American armed forces to combat. The Resolution embodies Congress's view that the constitutionally mandated balance of war powers requires the President to obtain congressional authorization for the use of military force; however, in practice it has had little effect on the President's ability to unilaterally initiate military and paramilitary operations.*

*In this Article, Mr. Highsmith analyzes the ambiguities and loopholes of the War Powers Resolution, and compares it to Title V, the 1980 amendment to the National Security Act of 1947, which ensures congressional oversight of intelligence activities, including paramilitary operations. He argues that the consultation and notification requirements of Title V could and should serve as a model for a reformulation of the War Powers Resolution. Such a reformulation, he concludes, would make voluntary compliance with the law more attractive to the Executive Branch, would eliminate the loophole that now allows the President to avoid the requirements of the War Powers Resolution for a large category of covert operations not strictly military in character, and would enhance Congress's ability to act as a full partner to the President in controlling the use of the military force by the United States.*

The dispute between the President and Congress over which branch of the United States government has the power to commit American forces to war is based on a conflict between two weighty authorities: the Constitution and two hundred years of history and tradition.

The Constitution vests in Congress alone the authority to declare war,[1] naming the President the "Commander in Chief of the Army and Navy of the United States . . . when called

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1 U.S. CONST. art. I, § 8, cl. 11. In addition, Congress has exclusive power to raise and support armies" (cl. 12), to "provide and maintain a Navy" (cl. 13), and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers" (cl. 18).

into the actual service of the United States."[2] These provisions seem relatively unambiguous: the President is to direct the armed forces that Congress chooses to establish and maintain in such endeavors as Congress chooses to pursue.[3] This allocation of power was the "result of a deliberate decision by the framers to vest the power to embark on war in the body most broadly representative of the people."[4]

In practice, however, all war powers usually have been wielded by the President. Between 1798 and 1971, American armed forces were involved in hostilities on 197 occasions, only five of which were pursuant to a formal declaration of war.[5] President Nixon used the historical argument in 1973 to oppose the War Powers Resolution, which specified strict limits on the Executive's power to commit American armed forces to hostilities. He said that the Resolution "would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."[6] Supporters of the President's view argued that the existing balance of authority was consistent with an historical interpretation of the Constitution that accommodated eigh-

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2 U.S. CONST. art. II, § 2, cl. 1.

3 *See* Berger, *War, Foreign Affairs, and Executive Secrecy*, 72 NW. U.L. REV. 309, 319 (1977), stating: "[Alexander] Hamilton was driven to explain [in THE FEDERALIST No. 69 (A. Hamilton)] that the President's authority 'would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral.'" Berger observes "that the face of the Constitution clearly evidences a severely limited allocation of war powers to the President seems to me beyond dispute; it shuts off the President from waging a war not 'begun' or 'authorized' by Congress." *Id.* at 320. This interpretation of the framers' intent is supported by the fact that in 1789 there was no standing army. The framers assumed that only Congress could authorize military action because only Congress could raise an Army and a Navy.

4 Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1773 (1968).

5 Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53 (1971), *reprinted in* 119 CONG. REC. 25,057 (1973) (the author was legal counsel to Senator Goldwater). The absence of a declaration of war does not necessarily mean that Congress was not involved in the decision to engage in hostilities. Congress may authorize military action without a declaration of war, as the Vietnam war was arguably authorized by the Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964). Nonetheless, reviewing the 192 hostilities involving the United States military makes it clear that unilateral executive decisionmaking has been the norm. (The five declared wars were the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II.)

6 VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 171, 119 CONG. REC. 34,990 (1973) [hereinafter referred to as VETO MESSAGE].

teenth-century notions to our "highly complex, interrelated society."[7]

The courts have not clarified this constitutional issue. The dispute between the President, backed by two hundred years of history, and the Congress, supported by the express terms of the Constitution, is considered a nonjusticiable political question by the courts.[8] Therefore Congress must deal *politically* with actions it deems unconstitutional. Yet the incentive to confront the President is usually low during a crisis, when the public and many members of Congress rally around the President and endorse his use of the armed forces.[9] When the President decides that some action is necessary to defend our vital interests, three questions arise: What range of actions may be taken without congressional authorization? What must be done to gain authorization for more serious actions? What will be the consequences of a failure to gain congressional authorization?

The President's freedom to act has been most directly limited by two recent congressional enactments dealing with the two

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7 Emerson, *supra* note 5, at 84; *see also* U.S. Department of State, *The Legality of U.S. Participation in the Defense of Vietnam*, 75 YALE L.J. 1085, 1100-01 (1966). For another viewpoint see King and Leavens, *Curbing the Dog of War: The War Powers Resolution*, 18 HARV. INT'L L.J. 55, 56-68 (1977).

Emerson frames the following questions:

> Does the Constitution unequivocally deposit the controlling power over military matters with Congress? Is there a line of court decisions clearly supporting the view that Congress can forbid the sending of troops outside the country? Does historical practice bear out the doctrine of congressional supremacy over the use of force in foreign affairs?

*Id.* at 57-58. These skillfully framed questions avoid the real issue: historical practice notwithstanding, does the Constitution vest in Congress not "controlling power over military matters," but *sole* authority over one military matter, the commitment of troops to hostilities. Emerson never precisely addresses this question of constitutional doctrine.

8 *See, e.g.*, Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967) (Stewart and Douglas, JJ., dissenting to denial of cert.); *see also* Note, *supra* note 4, at 1794; Spong, *The War Powers Resolution Revisited: Historical Accomplishment or Surrender*, 16 WM. & MARY L. REV. 823 (1975). Senator Javits, a sponsor of the WPR, stated that

> I doubt very much that any court would have decided [the constitutionality of the WPR] before or would decide it now. It is almost a classic example of what the courts have considered a "political question." That was the reason we had to settle it through legislation, including a veto override.

119 CONG. REC. 20,116 (1973).

9 The latter stage of the Indochina War is an exception. The use of American armed forces ordinarily prompts a patriotic public response, almost regardless of the policy goal being pursued. *See, e.g.*, Zutz, *The Recapture of the S.S. Mayaguez: Failure of the Consultation Clause of the War Powers Resolution*, 8 N.Y.U. J. INT'L L. & POL. 457, 476-77 (1976). Congressmen sought favorable public notice by praising President Ford on Mayaguez operation, despite Ford's noncompliance with the WPR.

principal groups conducting nondiplomatic actions abroad: the military and the intelligence communities. One enactment, the War Powers Resolution of 1973[10] ("WPR"), was prompted by the reaction of Congress and the public to the Vietnam War generally and the Cambodian incursion specifically. The other, the 1980 amendment to the National Security Act of 1947[11] ("Title V"), was a compromise between Congress's desire to allow the intelligence organizations sufficient freedom to protect vital interests and its desire to prevent the kinds of abuses that were disclosed in post-Watergate congressional investigations.

Title V and the WPR impose specific constraints and requirements on the Executive's freedom to act abroad and thereby sharpen the more general provisions in the Constitution governing the balance of war powers. The WPR attempts to codify the constitutional doctrine that permits the involvement of American armed forces in wars and other significant hostilities only upon the authorization of Congress.[12] Title V requires that the congressional Intelligence Committees be given advance notification of significant intelligence operations, including so-called "special activities," covert operations used to achieve foreign-

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10 50 U.S.C. §§ 1541-1548 (1976) (H.R.J. Res. 542, adopted over presidential veto on Nov. 7, 1973). For clarity the text of this Article refers to the War Powers Resolution rather than to the U.S. Code. The relevant sections of the U.S. Code are cross-referenced in the footnotes. For the text of the War Powers Resolution, see Appendix A.

11 *See* Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980) (adding "Title V — Accountability for Intelligence Activities" to the National Security Act of 1947, 50 U.S.C. §§ 401-405 (1980)). For the text of the amendment, see Appendix B.

12 In defining "war," the courts have looked primarily to the size of a conflict — in particular, to the quantity of men, money, and equipment committed — as well as to its duration. *See* Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970). An implicit consideration is the magnitude of the "qualitative" commitment to the conflict. *See* King and Leavens, *supra* note 7, at 58-60; Note, *supra* note 4, at 1774-75. This qualitative consideration focuses on the moral and legal consequences of the military involvement, recognizing that a minor use of force against a tiny nation may constitute war while a major commitment of resources (such as in Western Europe) may not. King and Leavens, *supra* note 7, at 58-60. King and Leavens suggest that there is a vast range of military involvements between war, which the President may enter only with congressional authorization, and peacetime military maneuvers, which the President may conduct unilaterally. They argue that Congress and the President share the power to commit the military to combat in that range. The relative political power of the two branches at the time will determine whether hostilities can proceed without congressional authorization. *Id.* at 68. Under this theory, the War Powers Resolution is a political statement, in statutory form, of Congress's power in that gray area.

policy objectives without American involvement being apparent. Title V does not require that Congress authorize the proposed operations, but only that it be informed.

While Title V and the WPR significantly differ with respect to the roles they define for Congress, there is no clear boundary between the "intelligence" actions covered by Title V and the "military" actions covered by the WPR. The activities of the intelligence community overlap extensively with those of the military, most obviously in the Defense Intelligence Agency and the National Security Agency. Furthermore, intelligence agencies and military organizations often give each other direct assistance: for example, military personnel may be "borrowed" by intelligence organizations for certain operations; Central Intelligence Agency (CIA) personnel may be trained, equipped, or supported by the military; CIA-recruited foreign operatives may be used to perform military operations; and military intelligence collectors may serve the civilian intelligence community. In short, a single operation — for example, the attempted rescue of the hostages in Iran or the advising of combat operations in El Salvador — may trigger the requirements of either act depending on how it was conducted and who was involved in it.

This Article seeks to clarify the distribution of war powers between the President and Congress by proposing a reformulation of the WPR in light of Title V. Section I reviews the background and terms of the WPR, concluding that the statute does not adequately define the permissible limits of executive action because its terms are ambiguous and have no effect on paramilitary operations. Section II examines Title V, which has increased the likelihood of presidential compliance with secure, limited congressional oversight over intelligence operations because it avoids the rigid restraints and adversarial relationship that characterize the WPR. Section III describes the current legislative scheme, and explains how the differing requirements of the WPR and Title V and the ambiguity of the WPR allow the Executive to choose which act to comply with, thus creating a "paramilitary loophole" that could be exploited by the Executive. Section IV proposes using Title V as a model for reformulating the WPR to increase compliance with the WPR and to provide one standard for overseeing paramilitary operations.

## I. THE WAR POWERS RESOLUTION OF 1973

The distribution of war-making powers between Congress and the President received only sporadic attention between 1789 and 1970. In May of 1970 President Nixon, without consulting Congress, ordered American troops to invade Cambodia, prompting a bitter debate on the respective war-making powers of the executive and legislative branches. Despite vigorous opposition from the Nixon Administration, including a veto, the War Powers Resolution ("WPR") became law in 1973.[13]

Congress states in the WPR that "It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . ."[14] However, even if the WPR fulfills the framers' intent, it fails to clarify the permissible parameters of executive action. The President's power to act is limited primarily by two sections. Section 3, entitled "Consultation," requires the President to consult with Congress before committing troops to "hostilities." Section 5, entitled "Congressional Action," requires congressional authorization for prolonged use of military forces in hostilities. Yet the vagueness and ambiguity of section 3 render it ineffective.[15] Moreover, the provisions of section 5, vigorously challenged by the President and by others as unconstitutional and inadvisable prior to enactment,[16] have yet to be tested. Thus, the resolution is flawed not only by its failure to clarify the balance of authority between the President and Congress, but also by its uncertain enforceability.[17]

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13 For a detailed history of the passage of the WPR, *see* Spong, *supra* note 8. Spong indicates that the dispute was not only between Congress and the Nixon Administration, but was also between the Senate, which sought tight constraints on the President, and the House, which favored less burdensome constraints. The compromise bill was favored by some senators (Javits, for example) and branded a "surrender" by others (including Eagleton). *Id.* at 823.

14 Section 2(a), 50 U.S.C. § 1541(a) (1976).

15 For a thorough analysis of the failure of section 3 to serve its intended purpose, *see* Zutz, *supra* note 9.

16 The constitutionality of section 5, which sets out the procedure for terminating American involvement in hostilities, is still subject to dispute. *See* Emerson, *supra* note 5; King and Leavens, *supra* note 7, at 83-90; Spong, *supra* note 8, at 842-49.

17 *See* Angst, *1973 War Powers Legislation: Congress Re-Asserts Its War-Making Powers*, 5 LOY. U. CHI. L.J. 83 (1974); Zutz, *supra* note 9, at 472.

If the drafters of the WPR intended for it to codify the constitutional balance of war-making powers, then the effectiveness and enforceability of its terms do in fact determine the latitude with which the President can act. The balance that the WPR attempted to establish between congressional and executive authority is a product of the conflict between the theoretical balance created by the framers and the de facto balance of power developed over the course of the nation's history. To analyze the effectiveness of the WPR in establishing this balance, it is necessary to examine its background, its explicit terms, and its deficiencies.

## A. *The Background of the War Powers Resolution*

### 1. Expansion of the Sudden-Attack Doctrine

While the Constitution vests in Congress the sole authority to involve the United States in war, the framers recognized the need for unfettered presidential power to repel sudden attacks on American territory.[18] The sudden-attack doctrine asserts that

> the power [to defend the nation] need not rest on any specific provision of the Constitution; as a necessary concomitant of sovereignty itself, the inherent right of national self-defense gives the President full power to defend the country against sudden attack with whatever means are at his disposal as Commander-in-Chief.[19]

The scope of this inherent executive authority is the focus of much of the war powers controversy.

In the nineteenth century, the courts upheld presidential actions on the grounds that defense of the United States encompasses protection of American lives and property abroad[20] and that the President's actions may go beyond mere preservation

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18 *See* 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-19 (1911).

19 Note, *supra* note 4, at 1778; *see also* King and Leavens, *supra* note 7, at 70-71.

20 Durand v. Hollins, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).

of the nation until Congress can act.[21] The *Prize Cases*[22] made it clear that the President alone must evaluate sudden threats and decide whether they warrant a military response prior to obtaining congressional authorization. However, Congress generally has supported constitutional limitations on the President's war powers and has labelled as unconstitutional any action not absolutely required to repel a sudden attack unless it was authorized by Congress.

Few of the 192 unauthorized military actions between 1798 and 1971 were needed to defend the nation. Rather, various Presidents considered them necessary to protect American "interests." Such was the case with the war in Vietnam,[23] which intensified the national debate over the President's power to defend the nation.

The WPR embodied Congress's conclusion that the President's authority existed only in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[24] As early as 1967, the Senate Foreign Relations Committee under Senator Fulbright reported that the President could only "repel sudden attack."[25] Testifying before the Committee, Senator Ervin stated that "[a]ny use of the Armed Forces for any purpose not directly related to the defense of the United States against sudden armed aggression, and I emphasize the word 'sudden', can be undertaken only upon congressional authorization."[26]

Not surprisingly, the Executive Branch has usually taken a contrary view, supporting the power of the President to defend broader national interests without congressional authorization.[27] In 1973 the State Department noted: "In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the twentieth century, the world has

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21 The Prize Cases, 67 U.S. (2 Black) 635 (1863). The Prize Cases acknowledged Lincoln's authority to blockade Southern ports after the Fort Sumter incident. They have been embraced by commentators and Presidents alike as authority for the expansion of the sudden-attack doctrine.

22 *Id.* at 668-70.

23 *See* U.S. Department of State, *supra* note 7, at 1100-01, 1106-08.

24 Section 2, 50 U.S.C. § 1541 (1976).

25 SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, SEN. REP. No. 797, 90th Cong., 1st Sess. 3 (1967).

26 *Id.*

27 *See* VETO MESSAGE, *supra* note 6; U.S. Department of State, *supra* note 7; Emerson, *supra* note 5.

grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security."[28] One commentator has suggested that the President's authority extends to all crises that threaten *consequences* as grave as those that the framers feared from sudden attacks.[29] This approach shifts the focus from the narrow concept of an attack on American territory, but it nonetheless requires that a threat be very serious before presidential authority will be triggered.[30] President Nixon's veto of the WPR was prompted by his belief that the President's power to protect American interests extends to an even broader range of threats, many of which would not entail such serious consequences.

The response to the presidential view is that only the amendment process, and not historical exigencies, can alter the dictates of the Constitution.[31] The perceived danger of the expanded sudden-attack doctrine is that once the President had authority to protect American "interests," the scope of potential military involvement without congressional authorization is as broad as the President's definition of "interests." The United States has interests in every corner of the globe, and many are constantly threatened to some degree. Yet the President's unique ability to deal with these unpredictable, ever-changing threats as they arise does not negate the requirement of congressional authorization established in the Constitution.

The effort to expand the sudden-attack doctrine to encompass hostilities such as those in Vietnam demonstrated how fully the President had absorbed the war powers. Accustomed to congressional acquiescence in military actions by the President, the Nixon Administration justified American involvement with weak but traditionally accepted rationales. It took an unpopular war to focus attention on Congress's historical neglect of its war-making duties.[32]

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28 U.S. Department of State, *supra* note 7, at 1101.

29 Emerson, *supra* note 5, at 84.

30 The focus on the consequences that were feared by the framers is accepted by few commentators other than Emerson.

31 *See* Berger, *supra* note 3, at 310-11. The commentators almost uniformly concur in this view. *See also* Powell v. McCormack, 395 U.S. 486 (1969), in which the Supreme Court observed "that an unconstitutional action has been taken before surely does not render that same action any less constitutional at a later date." *Id.* at 546-47.

32 The historical acquiescence of the public and of Congress in war-making decisions by the President may indicate that the de facto balance of war powers existing before 1973 was preferable, irrespective of constitutional provisions. Perhaps practical neces-

### 2. What Constitutes Authorization?

Ironically, although American involvement in Indochina focused attention on the issue of presidential authority to wage war without congressional authorization, the Vietnam war had in fact been authorized by Congress. The Gulf of Tonkin Resolution, passed in 1964, declared that the United States was "prepared, as the President determines, to take all necessary steps, including the use of armed force," in the defense of our Southeast Asia Treaty Organization allies.[33] The Constitution does not require that congressional authorization take the form of a formal declaration of war.[34] In fact, joint resolutions, such as the Gulf of Tonkin Resolution, have been used to authorize intervention on three other recent occasions.[35] The President has even relied on legislation as indirect as military appropriations bills for the authority to use military force.[36]

Allowing less formal and less direct acts of Congress to constitute authorization often results in the "rubber-stamping [of] executive decisions."[37] The President becomes tempted to read authorization into all sorts of legislation, and Congress is allowed to commit the nation's people and resources to war without a direct, deliberate consideration of the reasons for and against involvement. The very formality of a declaration of war makes Congress's intent unequivocal and forces Congress to face the political consequences of applying military force.

On the other hand, allowing less formal acts to constitute authorization may have some utility, particularly when minor hostilities are involved. The advantages of using legislative acts short of a declaration of war to authorize presidential actions

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sity motivated this general acquiescence, and Vietnam has only temporarily upset this otherwise happy balance of war powers. The Constitution may not even cover less significant military involvements not amounting to "war." *See* King and Leavens, *supra* note 7.

33 Southeast Asia — Peace and Security, Pub. L. No. 88-408, 78 Stat. 384 (1964) [hereinafter cited as "Gulf of Tonkin Resolution"]. The Resolution was repealed in 1970.

34 *See* Note, *supra* note 4, at 1801-03; U.S. Department of State, *supra* note 7, at 1106-07.

35 Joint resolutions authorized United States military actions in Vietnam, Pub. L. No. 88-408, 78 Stat. 384 (1964); Cuba, Pub. L. No. 87-733, 76 Stat. 697 (1962); Lebanon, Pub. L. No. 85-7, 71 Stat. 5 (1957); and Formosa, Pub. L. No. 4, 69 Stat. 7 (1955).

36 U.S. Department of State, *supra* note 7, at 1106.

37 Note, *supra* note 4, at 1802.

are that they (1) prevent undue emphasis upon minor uses of force (or significant uses of force when it is in our interest to downplay them), (2) avoid the disruption of domestic and international legal relationships that a declaration of war would entail, and (3) allow Congress and the President to deal jointly and effectively with crises that are as yet undefined or ambiguous.

A proper balance between these considerations can be achieved by carefully delineating what legislative acts short of a declaration of war should constitute authorization of presidential action. Joint resolutions, which require the approval of both houses of Congress, are unobjectionable if they are specific enough in goals, scope, and duration to avoid giving the President a blank check for military action.[38] Other acts, such as appropriations bills and mutual defense treaties, provide less satisfactory bases for inferring congressional authorization. War-making authorization can too easily be buried inconspicuously in appropriation acts. Even those bills that unequivocally earmark funds for a specific military operation may be passed simply because Congress does not want to "abandon our boys" when presented with a "fait accompli."[39] Mutual-defense treaties, which require the consent of the Senate only, cannot function as "inchoate declarations of war"[40] because Congress as a whole does not authorize them. Moreover, treaties such as the North Atlantic Treaty, while treating an attack on one member as an attack on all, require only that members respond as they "deem necessary." The Senate ratification debates indicate that the United States is not "automatically committed" in such instances, but may act in accordance with its constitutional processes.[41]

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38 *Id.* at 1801-03.

39 *Id.* at 1801. The Nixon Administration, however, may have justly believed that it had congressional approval based on Congress's 1965 appropriation of $700 million for the Vietnam buildup. President Johnson had explicitly linked the appropriation to support of the effort in Southeast Asia. Since existing funds were sufficient to prevent any "abandonment" of the troops that were already there, Congress's choice seems deliberate and uncoerced. *See* U.S. Department of State, *supra* note 7, at 1106. Nonetheless, the use of appropriations bills to imply congressional authorization is a practice that is best avoided.

40 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-3, at 175 (1978).

41 Note, *supra* note 4, at 1800.

### B. *The Terms of the War Powers Resolution*

Prior to 1973, the war powers were exercised primarily by the Executive Branch because of its superior capacity for flexible crisis management, including primary access to all foreign intelligence. While the President's constitutional authority, based on his inherent power to defend the nation and on congressional authorization, was subject to theoretical debate, the de facto balance of war powers was weighted heavily toward the Executive. The WPR attempted to change that balance.

The WPR was intended to "fulfill the intent of the framers"[42] and not to "alter the constitutional authority of Congress or of the President."[43] The key provisions of the WPR are sections 2 through 5, each of which has been the subject of some controversy.

Section 2 ("Purpose and Policy") describes when the President can "introduce the United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances:"[44] (1) following a declaration of war; (2) pursuant to specific statutory authorization; or (3) in a national emergency caused by an attack on American territory or armed forces. The WPR thus embodies Congress's narrow view of the scope of the sudden-attack doctrine.[45] However, this description of the scope of the President's war powers may not be anything more than descriptive. While the Senate bill included such language in a substantive provision, the House bill had no such provision at all, so the Conference Committee compromised by making Section 2 a prefatory provision.[46] Senator Eagleton objected to the theoretically

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42 Section 2(a), 50 U.S.C § 1541(a) (1976).

43 Section 2(d)(1), 50 U.S.C. § 1541(d)(1) (1976).

44 Section 2(c), 50 U.S.C. § 1541(c) (1976).

45 Section 2(c)(3), 50 U.S.C. § 1541(c)(3) (1976) covers only attacks on American territory and armed forces. If it intended to exclude all other defensive action by the President, such as the protection of American lives and property abroad, then it is inconsistent with the decision in Durand v. Hollins, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1850). However, there is no evidence in the legislative history to suggest that Congress meant to narrow the President's power in that particular area. *See* 1973 U.S. CODE CONG. & AD. NEWS 2346-66. It is more likely the result of careless draftsmanship.

46 The Conference Report confirmed that "subsequent sections of the joint resolution are not dependent upon the language of [section 2(c)], as was the case with a similar provision of the Senate bill."

nonbinding effect of the amended section 2 on executive authority as a "pious pronouncement of nothing."[47] Nonetheless, section 2 is a useful congressional definition of the limits of executive war powers because it notifies the President that he risks a political confrontation if he disregards these limits.[48]

Sections 3 ("Consultation") and 4 ("Reporting") together set out the procedures that the President must follow whenever the military engages in "non-routine" activities, which range from involvement in hostilities to the mere build-up of American forces in a foreign country.[49] Their terms apply to even the least significant uses of combat troops, such as evacuations. Although free from controversy before passage,[50] sections 3 and 4 have been the focus of the subsequent disputes arising under the WPR.[51] The issue in each case has been whether the action taken required prior consultation under section 3 or merely post hoc reporting under section 4.

Section 3 requires that the President "in every possible instance consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[52] Section 4 requires the President to report to Congress whenever the armed forces are introduced into hostilities, introduced into the territory of a foreign nation while equipped for combat, or significantly built up in a foreign nation.[53]

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47 119 CONG. REC. 18,992 (1973).

48 The entire WPR relies more on good faith and political leverage than on strictly codified, judicially enforceable provisions. Congress would carry greater moral authority into a political confrontation if it could point to a specific violation of the WPR. However, enforceability depends as much on Congress's ability to muster support for a confrontation within its own ranks as on the existence of a specific concrete violation. For discussion of enforceability, see *supra* text accompanying notes 96-110.

49 50 U.S.C. §§ 1542-1543 (1976).

50 Zutz, *supra* note 9, at 464.

51 While nothing approaching a "confrontation" has occurred between Congress and the President since the passage of the WPR in 1973, there have been several disputes. The controversies have arisen from (1) the 1974 evacuation of Cyprus (under President Nixon); (2) the separate evacuations in 1975 of DaNang, Saigon, and Phnom Penh (Ford); (3) the 1975 rescue of the Mayaguez crewmen (Ford); (4) the 1980 attempted rescue of the hostages in Iran (Carter); and (5) the 1981 introduction of military advisers into El Salvador (Reagan). The WPR was also triggered by the 1977 airlift to Zaire (Carter) and was invoked by Congress to forestall intervention in Angola and military action against Iran without consultation with Congress. *See infra* note 106.

52 50 U.S.C. § 1542 (1976).

53 50 U.S.C. § 1543 (1976). The President must report on the circumstances that required the action, the "estimated scope and duration" of the action, and his authority

Section 5 of the WPR ("Congressional Action") is triggered by more prolonged uses of combat troops in actual hostilities; its provisions have not yet been tested. It was controversial, however, even before it was passed.

Section 5, particularly subsection (b), was the source of most of the Nixon Administration's objections to the WPR.[54] Subsection (b) provides that the President must terminate the involvement of the armed forces in hostilities within sixty days of his report to Congress under section 4(a)(1),[55] unless Congress (1) has specifically authorized his action, (2) has extended the sixty-day period, or (3) is physically unable to meet due to armed attack.[56] Subsection (c) directs the President to terminate American involvement in hostilities before the expiration of the sixty-day period if so ordered by a concurrent resolution of Congress.[57]

Section 5(c) confirms the pre-existing constitutional principle that American involvement in hostilities can be terminated by Congress because only Congress can declare war. The effect of section 5(b) is less obvious. Senator Eagleton believed that section 5(b) would give the President a sixty-day license to use the armed forces as he wishes, unless the definition of executive war powers in section 2 was given statutory effect.[58] Yet the President may be constrained by the constitutional scheme that section 2 attempts to describe, no matter what section 2 does or fails to do. Since the President can act only under congressional authorization or in order to defend against an attack,[59] section 5 does not necessarily permit any military action of less than sixty days.

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for ordering the action — for example, a statute, a resolution, the Constitution, or the President's inherent power. *Id.*

54 *See* VETO MESSAGE, *supra* note 6.

55 Only reports on ongoing or imminent hostilities will trigger section 5(b) or section 5(c). Reports on non-routine deployments of combat force under sections 4(a)(2) and 4(a)(3) do not trigger the 60-day limitation.

56 50 U.S.C. § 1544(b) (1976).

57 50 U.S.C. § 1544(c) (1976).

58 *See supra* note 47 and accompanying text.

59 Senator Eagleton is correct, however, if the President's actions are judged solely by the terms of the War Powers Resolution. While a court would look to the underlying constitutional framework as well as the WPR, it is unlikely that the courts will tackle such a "political question." *See supra* note 8. In a political confrontation to force compliance, Congress might fare better if it based its argument on a violation of the resolution rather than relying solely on technical constitutional arguments.

Another fundamental objection, voiced by Congressmen as well as Administration officials, was that section 5 codified a pattern of congressional decision-making by inaction. Opposing the automatic termination provision in section 5(b), President Nixon stated that "the proper way for the Congress to make known its will [is] through a *positive* action. . . . [O]ne cannot become a responsible partner unless one is prepared to take responsible action."[60] Similar sentiments were expressed in the supplemental opinions of seven members and the minority opinion of four members of the House Foreign Affairs Committee in the Committee's report.[61] House Minority Leader Gerald Ford favored requiring affirmative congressional action to terminate military involvement, complaining that "we will stop a war by sitting on our hands and doing nothing."[62]

Despite these criticisms, Representative Whalen's amendment requiring Congress to act within the expiration period either to approve or to order the termination of American involvement in hostilities was defeated.[63] Opponents of the amendment argued that it would create an "undesirable presumption in favor of Presidential action."[64] Thus the WPR does not discourage the continuation of the existing system of "participation" by noncommitment.

The final provision deserving some attention is section 8(a), which provides that congressional authorization "shall not be inferred" from any act, including any appropriations act, that does not specifically state that it is intended to satisfy the WPR.[65] This section should prevent Presidents from basing their authority to commit armed forces to hostilities on congressional

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60 VETO MESSAGE, *supra* note 6, at 34,991 (emphasis added).

61 *See* H.R. REP. NO. 287, 93d Cong., 1st Sess. at 15-20, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2358-63. Representatives Buchanan and Whalen wrote: "Nevertheless, the language in section 4(b) troubles us. It permits the exercise of congressional will through inaction. It is our opinion that in order to fulfill its constitutional responsibility, Congress must act, whether in a positive or negative manner." *Id.* at 17.

62 119 CONG. REC. 8656-57 (1973).

63 Spong, *supra* note 8, at 829.

64 119 CONG. REC. 24,690-92 (1973); *see also id.* at 830. They also feared that a congressional majority opposing military involvement could be defeated under the proposed amendment due to a disagreement between the House and the Senate, a senate filibuster, or a presidential veto. *Id.*

65 50 U.S.C. § 1547(a) (1976).

acts that have not received the same degree of deliberation that is given a formal declaration of war or comparable resolution.

### C. *Deficiencies of the WPR*

The WPR has two main deficiencies. First, the ambiguity of the terms requiring prior consultation with Congress means that these sections are difficult to enforce, which reduces their political desirability. Second, the WPR fails to delineate any restrictions on paramilitary operations — including the use of civilian combatants to conduct covert operations. The President remains free under the terms of the WPR to conduct military operations without consulting Congress, so long as no "United States Armed Forces" are involved.

The President has reported to Congress pursuant to section 4 following all but one of the "incidents" that have occurred since 1973[66] (including one incident where the President thought that the WPR was inapplicable).[67] However, no President has ever complied with the prior consultation requirement of section 3.

While the reporting requirement is a reasonable mechanism for ensuring some degree of congressional involvement in war-making decisions, it is not a significant constraint on the President's freedom to act.[68] Therefore, it has not been difficult to obtain uncoerced compliance with section 4 from the Executive. The prior consultation requirement, on the other hand, significantly alters the Executive's process of decision-making during a crisis. The President often will consider himself uniquely

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66 President Nixon, who opposed the WPR from the beginning, did not submit a report on the evacuation of Americans from Cyprus in 1974. The effort involved five naval vessels and approximately 30 helicopter sorties. Spong, *supra* note 8, at 849; 120 CONG. REC. 25,915-17 (1974) (statement of Sen. Eagleton). While Nixon's authority for the action was not questioned, the WPR required a report nonetheless.

67 President Carter asserted that the attempted rescue of the hostages in Iran was not an aggressive action, but a "humanitarian mission," so that the WPR did not apply at all. N.Y. Times, Apr. 27, 1980, at A1, col. 4. Nevertheless, he submitted a six-page report to Congress on the "objectives, planning, and execution" of the mission, describing the report as "consistent with" the WPR. *Id.* The factor determining whether section 4 is applicable is not intent, as Carter believed, but an objective event: the introduction of military personnel into foreign nations.

68 The President will not be constrained by the requirement of justifying his authority at a later date. Clever State Department attorneys can always derive some authority for the action after the fact.

suited to make the necessary decisions without congressional involvement.[69] Usually politicians who reach the presidency *want* to make the final decisions in crisis situations. As a result, recent Presidents have sought to circumvent section 3, pacifying Congress with a post hoc report under section 4.[70]

The terms of section 3 have been easy to circumvent. One commentator blames "Congress's failure to devote sufficient attention to the language of section 3 when it was originally drafted."[71] He asserts that "the consultation clause was never the subject of debate on the floor of either chamber of Congress. Because the consultation clause met no challenge in Congress, the vagueness of its language was not brought to light prior to its passage."[72] Rather than clarifying the constitutional responsibilities of the President, section 3 raises additional questions. When is consultation not "possible?" Is consultation required even when the President's proposed actions are in fulfillment of his duty to defend American territory?[73] Who in Congress must the President consult?[74] What procedures will be deemed to constitute "consultation?"[75]

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69 Indeed, the President has unique capabilities for crisis management, including expert advisors, the ability to act quickly on his own decisions, access to all available intelligence, and the ability to maintain secrecy. Congress, on the other hand, is perceived as being incapable of acting quickly and secretly. Senator John Glenn acknowledged this following the hostage-rescue attempt. *See infra* note 79.

70 For a list of actions arguably covered by the WPR, *see supra* note 51.

71 Zutz, *supra* note 9, at 464.

72 *Id.* Even President Nixon thought that section 3 was a useful piece of legislation and did not oppose it. *See* VETO MESSAGE, *supra* note 6, at 34,991.

73 In The Prize Cases, 67 U.S. (2 Black) 635 (1863) (summarized *supra* note 21), the Supreme Court held: "If a war be made by invasion of a foreign nation, the President is not only authorized but *bound* to resist force by force. He does not initiate the war but is bound to accept the challenge without waiting for any special legislative authority." *Id.* at 668 (emphasis added). The Court further declared that the President's authority continues until Congress meets and passes an act governing the subject. *Id.* at 660. Thus, in the absence of such an act, the President is authorized to defend the nation as he sees fit, and consultation with members of Congress is constitutionally superfluous. The question then becomes whether Congress can constrain the President's constitutional war powers by statute.

74 An address to the entire Congress certainly was not intended. *See* Zutz, *supra* note 9, at 466.

75 The House Foreign Affairs Committee, reporting on the bill, defined "consultation:"

> Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their

There are several ways to circumvent the vague wording of section 3. First, section 3 covers only hostilities and imminent hostilities, whereas section 4 also covers the introduction of combat forces into foreign nations where they are not involved in hostilities.[76] Although section 3 seems to require a determination of the presence or imminence of *any* hostilities in the area, two Administrations have looked instead to whether or not the involvement of American armed forces in hostilities was anticipated.[77] Thus, without consultation, the President might deploy troops in an area close to a full-scale war, where the risk of involvement is significant, as long as involvement is not "intended" or "anticipated."

Another potential source of circumvention is the phrase "in every *possible* instance." In some cases, the need for immediate action will make consultation impossible. Moreover, "immediacy" will vary from case to case; forty-eight hours between the beginning of a crisis and the decision to use force in its resolution

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approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

H.R. REP. NO. 287, *supra* note 62, at 6-7, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2351. While this definition is clear, Congress has yet to force strict compliance with its terms. President Ford asserted that he had complied with section 3 when his aides notified certain congressional leaders of his consummated decision to order the rescue of the Mayaguez crew. *See* Zutz, *supra* note 9, at 468-72. Yet, he consulted no congressman personally, his decision was not "pending," and the notification occurred about an hour after the operation began. *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. 105-08 (1975) (Appendix: "A Chronology of Events in the *Mayaguez* Incident," prepared by the Congressional Research Service, May 30, 1975) [hereinafter cited as *War Powers Hearings*].

76 For example, if the President had sent combat aircraft rather than reconnaissance aircraft to Saudi Arabia in 1980 during the Iran-Iraq war, section 4(a)(3) would have been triggered and a report would have been required; but section 3 might not have applied because hostilities were neither present nor imminent in Saudi Arabia.

77 President Ford asserted that section 3 was not triggered by the 1975 evacuation of Saigon because, even though fighting raged just outside the city, American forces did not "anticipate" getting involved in the hostilities. *See War Powers Hearings*, *supra* note 75, at 2-8 (statement of Monroe Leigh, Legal Adviser to the Department of State); Zutz, *supra* note 9. Of course, the American forces *would* have fought to protect themselves and the evacuees. In 1980, President Carter similarly argued that the military personnel involved in the hostage-rescue attempt were on a "humanitarian mission" and did not "intend" to use force. N.Y. Times, Apr. 27, 1980, at A1, col. 4. Again, the risk of hostilities was high, and the intent not to use force was belied by the prelaunching of C-130 gunships and A-7 and F-14 fighter-bombers in case air support was required. N.Y. Times, May 3, 1980, at A5, col. 1.

may present ample opportunity for consultation in one case but no opportunity in another. The vague wording of section 3 permits the President to argue that the need for immediate action makes consultation impossible in almost any case.[78] The Executive can also argue that the need for secrecy makes consultation with members of Congress impossible.[79] But this argument proves too much, for while it may be foolish to try to consult with over 500 legislators and their staffs, consultation is surely "possible" with a few congressional leaders. Since the WPR does not designate who is to be consulted, there is sufficient flexibility in the requirements to tailor the scope of consultation to the exigencies of a particular crisis.

Finally, section 3 has been circumvented in the past by merely informing congressmen of a decision that has already been made, rather than consulting them on a pending decision.[80] Following the Mayaguez operation, the Legal Advisor to the State Department contended that section 3 had been complied with because congressional leaders had been informed of the President's decision and their comments had been relayed to the President.[81] This interpretation of "consultation" is inconsistent with the legislative history of the WPR.[82]

Eight years under the WPR has resulted in five reports pursuant to section 4, but no instances of true consultation pursuant to section 3. Clearly, the WPR cannot "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostili-

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78 President Ford ordered the rescue of the Mayaguez crewmen 57 hours after he learned of the ship's seizure. *War Powers Hearings*, *supra* note 75, at 105-07. Zutz concludes that consultation was clearly impossible in this amount of time. Zutz, *supra* note 9, at 465. Two and a half days can be a very short period of time in the management of a crisis. Advisors must be consulted, intelligence reports must be absorbed, and the situation must be closely monitored. Whether or not consultation is possible depends on the unique facts of the case. President Ford had a plausible argument that the need for immediate action precluded consultation. Conversely, President Carter clearly had time to consult Congress before the hostage-rescue attempt, which was five months after the seizure of the embassy.

79 Senator Glenn supported President Carter's refusal to consult Congress before the hostage-rescue attempt because of the need for secrecy, commenting that "If I were on that raid, I wouldn't want it all over Capitol Hill." N.Y. Times, Apr. 27, 1980, at A11, col. 4.

80 *See supra* note 75.

81 *War Powers Hearings*, *supra* note 75, at 77-79 (statement of Monroe Leigh, Legal Advisor to the Department of State).

82 *See supra* note 75.

ties"[83] unless section 3 is fully enforced. The question becomes whether a collective judgment is desirable in all circumstances, and, if so, whether Congress can enforce section 3 in order to ensure that the decision to commit American armed forces to combat is made collectively.[84]

The WPR and the constitutional provision giving Congress alone the power to declare war embody the same policy of giving to the most representative branch of government the power to decide to commit the nation's people and resources to war. However, wars are no longer the relatively slow-moving affairs they were in the eighteenth century. Brief skirmishes can be of great strategic or political significance, and even major confrontations may be concluded in a matter of days.[85] Acute crises must be dealt with initially by the President, supported by a communications, intelligence, and advisory system that is designed for crisis management. The deliberative decision-making processes of Congress are ill-suited to tailoring a response quickly and decisively.[86]

Prolonged engagements do allow Congress to make its will known before hostilities end, and Congress has usually acted in such cases.[87] However, the critical point in the war-making decision — and the focus of sections 3 and 4 of the WPR — is the initial introduction of troops into hostilities or into nations where a conflict is expected. Congress must participate at that point if it is to be a full partner in the exercise of war powers.

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83 Section 2(a), 50 U.S.C. § 1541(a) (1976).

84 For a discussion of enforceability, see *infra* text accompanying notes 96-110.

85 For example, the Six-Day War between Egypt and Israel in 1967 was strategically and politically important to the region and to the world.

86 Legislative decisionmaking lacks not only speed, but also decisiveness and flexibility. Presidential decisions, particularly regarding military actions, are usually supported throughout the Executive Branch, at least while they are still operative. This decisiveness galvanizes public support, gives our allies confidence in our actions, and convinces our opponents of our resolve. The airing of dissenting views and decision-making by compromise in Congress, however salutary, undermines decisiveness. The President's flexibility in monitoring and responding to changing circumstances allows him to tailor American involvement to the situation, a capability that Congress does not possess.

87 The prolonged involvement in Vietnam, for example, gave Congress time to approve the 1961-1962 build-up of American forces with the 1964 Gulf of Tonkin Resolution (see *supra* note 5), and to repeal its approval in 1970, although American involvement did not end until January 1973.

Yet congressional involvement at that point sacrifices speed, decisiveness, and, most important, flexibility.[88]

One solution to this dilemma has evolved over the course of history. The President has assumed the authority to take military action that he deems necessary, and Congress has acted only when it becomes apparent that a major national commitment was involved. Of the 192 instances of hostilities between 1789 and 1973 not covered by a declaration of war, the vast majority involved only a few ships or a company of Marines. Congress has considered minor police actions and "shows of strength" to be within executive discretion. When a minor commitment escalated into a significant involvement, however, as it did in Vietnam, Congress has stepped in to express its will. Thus, the President's unique capacity for action has been complemented by congressional deliberation on operations involving a large-scale moral, fiscal, or physical commitment.

The fact that an historical balance of war powers developed and functioned without major objection for almost two centuries cannot be ignored, notwithstanding the Constitution. Perhaps it was wise for Congress to acquiesce in the de facto balance, reserving its participation for the more important military actions, such as the two World Wars, the War of 1812,[89] and Vietnam.[90] Even if this balance of war powers was inconsistent with constitutional doctrine, was it desirable to destroy it in the wake of one unpopular war?

The historical "solution," though perhaps more workable than the "constitutional" scheme as interpreted by Congress in the WPR, had its flaws. First, Congress's judgment concerning on-going military actions was inevitably affected by the fact that the initial decision to commit American troops had already been made. Whether to get involved in hostilities is an entirely dif-

88 President Ford requested authorization for the evacuation of Saigon in 1975. Congress was too slow and indecisive to meet the crisis with legislation. After the operation was conducted on Ford's own authority, Congress rejected the legislation as moot. Spong, *supra* note 8, at 851-54.

89 Other declared wars were the Mexican-American War (1846-1848) and the Spanish-American War (1898). Emerson, *supra* note 5, at 111.

90 Other involvements in hostilities or imminent hostilities that were approved by joint resolutions were the naval quarantine of Cuba (1962), the support of the Lebanese government during a period of civil unrest (1957), and the defense of Formosa (1955). *See supra* note 35.

ferent question from whether to withdraw from on-going hostilities. Congress has never ordered the President to terminate hostilities,[91] yet it is unlikely that in all 192 cases Congress would have agreed with the President's decision to become militarily involved in the first place.

Moreover, the volatility of the modern world may require increased congressional involvement in decisions concerning the use of the military. A small confrontation can quickly escalate into a major commitment or worse: a nuclear war. Since even the least significant military actions create a substantial risk of severe consequences for the nation, the decision to use military force should be left to Congress. Of course, the speed at which hostilities can escalate also makes legislative decisionmaking impractical and burdensome, so an optimum balance must be struck.

The optimum balance of war powers lies somewhere between the almost total power held by the President until 1973 and the unnecessarily constrained executive power that the WPR seeks to effect. Specifically, the consultation requirement of section 3 burdens the executive decisionmaking process without a significant, countervailing increase in congressional participation.[92] Moreover, since section 3 can be easily circumvented,[93] a less burdensome, more enforceable provision would be preferable.

For example, section 3 could be amended to require consultation with specific congressional leaders or committee chairmen at least forty-eight hours prior to the introduction of American forces into hostilities. This provision would have several advantages over the current section 3. By specifying the persons to be consulted and the required interval between consultation and the initiation of military action,[94] the proposed provision would

91 The repeal of the Gulf of Tonkin Resolution in 1970 may have been an order to terminate hostilities, but it was not enforced.

92 Since Congress cannot ensure that the President will withhold his final decision pending consultation, any resulting "consultation" will often be superfluous because the President will have made up his mind already, as occurred in the Mayaguez and hostage-rescue operations.

93 *See supra* text accompanying notes 76-82.

94 If consultation did not occur before the specified interval, any ensuing consultation or report would have to include a statement of the reasons justifying immediate military action. The proposed section 3 might also provide for consultation by Administration officials other than the President when events made it impossible for the President to comply personally. A statement of justification for the President's absence would be required.

enhance enforceability by making it easier both for the President to ascertain what he must do to comply and for Congress to determine when a violation has occurred. Standard security procedures could be established if the persons who were to be consulted were known before a crisis developed. The forty-eight hour interval would ensure that congressional leaders had sufficient information at an early date to determine whether immediate action by the full Congress was warranted. Congress could then check egregious misuses of the armed forces before or in the initial stages of an operation. At the same time, congressional leaders would be free to permit the execution of minor operations that did not warrant legislative action and that might become overblown if subject to open scrutiny by the full Congress. Close, but selective, scrutiny of proposed operations by specified congressional representatives would be a desirable compromise between the scheme described in the WPR and the scheme that has in fact existed.[95]

The balance of war powers that the WPR described is at odds with the expectations of the Executive Branch, the public, and many legislators; the realities of history; and the demands of the modern world. The President is widely expected to be the nation's leader and decision maker for military affairs, whether the military is responding to a crisis or protecting American interests. The Vietnam war produced a backlash against excessive presidential authority, but the WPR carried that reaction too far.

Recent examples of noncompliance with the WPR suggest that it has not achieved the balance that its terms purport to describe. The resolution is less a proscriptive statute than an instrument in the political tug of war between Congress and the President. Enforceability will be one of the issues in the political struggle to reach a stable balance of war powers, a struggle that will undoubtedly continue whether or not the WPR is amended.

Enforceability is essential to the balance of war powers, whether the scheme that Congress seeks to enforce is constitutional or statutory. The historical assumption of war-making powers by the Executive and the alleged violations of the WPR

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95 This proposal and its advantages and disadvantages are discussed more fully in section C, entitled "A Proposal." *See infra* text accompanying notes 198-203.

by Presidents Nixon, Ford, Carter, and Reagan[96] have been immune from legal redress due to the political-question doctrine.[97] It is likely that the courts will maintain their reluctance to become involved in political disputes between the other two branches of government over the exercise of war powers.

The only mode of enforcement available to Congress is political confrontation and pressure. However, Congress's desire and ability to confront the President is inevitably undermined by the tendency of the public to rally behind the President and the armed forces in times of conflict.[98] After the successful rescue of the Mayaguez crew, some Congressmen were more interested in publicly praising the President than in pointing out his section 3 violation — a task that was left to a few congressional leaders.[99] Thus, regardless of the provisions of the Constitution and the WPR, the President, as Commander-in-Chief, retains de facto authority to use military force as long as Congress fails to oppose his actions.

If Congress should ever want to confront the President over alleged executive usurption of the war powers, it does have available to it several methods of forcing compliance through political confrontation. One extreme enforcement measure is impeachment. Though impeachment would certainly be unwise for real emergencies such as the Cuban Missile Crisis, it would have been a plausible way to stop a lengthy and costly involvement like the Vietnam War. The mere initiation of impeachment proceedings would probably force compliance with the WPR, so that actual removal from office would be unnecessary. However, the utility of impeachment as an enforcement measure would be limited to egregious violations of the WPR, for it is

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96 Nixon's refusal to make a section 4 report on the Cyprus evacuation in 1974 was branded a violation of the WPR by Senator Eagleton. Spong, *supra* note 8, at 849. Ford's notification of congressional leaders at the time the Mayaguez operation began was deemed a violation of section 3 by congressmen and commentators alike. Zutz, *supra* note 9, at 465, 467-69, 472. Carter's failure to consult Congress prior to the hostage-rescue attempt was considered a section 3 violation by some legislators, but not others. *See* N.Y. Times, Apr. 27, 1980, at A17, col. 1. Finally, Reagan's build-up of military advisers in El Salvador in March, 1981, unaccompanied by a report under sections 4(a)(2)-(3), was considered a possible violation of the WPR by some congressmen. *See* NEWSWEEK, Mar. 16, 1981, at 38.

97 *See supra* note 8 and accompanying text.

98 *See supra* note 9 and accompanying text.

99 Zutz, *supra* note 9, at 476-77.

too extreme a sanction for the common violations that have typically occurred.[100]

Another means of enforcing the WPR is controlling appropriations. Congress can pass a resolution barring the use of funds in a particular conflict.[101] However, the legislative process is slow, and many military involvements, such as the Mayaguez and Iranian rescue operations, end before Congress has time to act. The President may veto the cut-off of funds for his operation, sending the legislation back to Congress for an attempted veto override.[102] In addition, manipulation of appropriations may be an ineffective as well as a cumbersome method for enforcing the WPR, for many Congressmen who oppose involvement may "hesitate to withdraw the funds which support U.S. troops once American prestige is committed to the battlefield."[103]

In the case of an on-going conflict, Congress can always pass an act banning further involvement and ordering the withdrawal of American forces. The President would clearly have no constitutional basis for his actions at that point. Presumably the President would not ignore an act of Congress terminating involvement,[104] for such an action would provide grounds for the initiation of impeachment proceedings. Public opinion would be an important factor in the resolution of this type of political confrontation, but it is unlikely that Congress would pass an act ordering withdrawal in the first place unless its effort had broad public support.

Such measures would be ineffective for the common violations of the WPR that involve the minor application of force,

100 See *supra* note 51 for a list of possible WPR violations.

101 In 1973, Congress passed a bill (31 U.S.C. § 655 (1976)) ending the use of appropriations for the bombing of Cambodia. However, to avoid a veto of the bill, Congress made the cut-off date 45 days after the passage of the bill. The threat of a general cut-off of funds to the government was also effective. For a thorough discussion of this confrontation, see Eagleton, *The August 15 Compromise and the War Powers of Congress*, 18 ST. LOUIS U.L.J. 1 (1973).

102 Senator Eagleton, writing about the cut-off of funds for bombing in Cambodia, asserted that "[s]uch confrontations should not occur within our system. Where reason and respect for the Constitution prevail there is simply no necessity for conflict." *Id.* at 5. However, the President will invariably have a good-faith belief that his actions are necessary and that congressional meddling is unwarranted.

103 Zutz, *supra* note 9, at 474.

104 To ignore Congress's expression of its will would be both unconstitutional and contrary to The Prize Cases, 67 U.S. (2 Black) 635 (1863). *See also* King and Leavens, *supra* note 7, at 66-68.

because of the lack of public interest in technical violations of the WPR and the short-lived nature of the military involvement. One commentator has written:

> The President's awareness of congressional oversight is particularly vital to the enforcement of section 3 during short emergencies such as the Mayaguez affair, when lack of both time and information are likely to prevent an outcry demanding compliance. In such circumstances the President must know from prior experience that neither Congress nor the public will quietly tolerate violation of the Resolution, and that he will be called upon to account for any failure to comply with section 3.[105]

Congress's only alternative is to bar American involvement prospectively, as it sees the likelihood of involvement developing.[106] This approach will often be prohibitively inflexible, for Congress will seldom want to say that military involvement in a particular region will not be permitted regardless of the circumstances.[107]

The greatest stumbling block to enforcing the WPR is the ambiguity of its requirements. Enforcing the terms of the WPR will remain an arduous task until Congress clarifies them and develops the resolve to insist on strict compliance.[108] Sustained congressional and public vigilance in the enforcement of the WPR has not materialized. The WPR cannot achieve its purpose if it can be enforced only against the most unpopular uses of the armed forces, such as the war in Vietnam, which initially led to its passage. In short, it is easier to call for congressional and public vigilance than it is to produce it.

The enforceability issue is also inseparable from the desirability issue, because popular support is needed to spur Congress into enforcement action. If neither Congress nor the public finds the executive use of military force objectionable enough to re-

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105 Zutz, *supra* note 9, at 478.

106 On the very day of the hostage-rescue attempt in 1980, the Senate Foreign Relations Committee sent President Carter a letter invoking section 3 of the WPR. The letter requested that Carter consult Congress before any military action, particularly the naval blockage of Iran that Carter had been considering. N.Y. Times, Apr. 25, 1980, at A1, col. 6. A congressional resolution could have been used to prohibit any military action. Indeed, in 1976, legislation passed pursuant to the WPR was used to forbid intervention in Angola. *See* N.Y. Times, Dec. 20, 1975, at A1, col. 1; N.Y. Times, Jan. 18, 1976, at A18, col. 5; N.Y. Times, Jan. 28, 1976, at A1, col. 8.

107 Prospective congressional action also is unlikely in light of Congress's tendency to take a stand only when a safe position becomes apparent.

108 *See* Zutz, *supra* note 9, at 475-78.

strict it, then perhaps some degree of discretion is desirable. During eight years of experience under the WPR, violations of the resolution have provoked strong reactions only from those Congressmen who either expected to be consulted personally[109] or had a particular interest in enforcement.[110] Perhaps this political accommodation is in the nation's interest, even if it is inconsistent with constitutional theory.

The second major problem with the WPR is its failure to encompass so-called "covert wars." This "paramilitary loophole" was sharply criticized by Senator Eagleton during the floor debate on the WPR.[111] The Senator proposed an amendment to bring civilian combatants and "regular or irregular foreign forces" paid by the United States within the provisions of the WPR.[112] Arguing for the amendment, he said that

> What we are trying to do is refurbish the process by which America goes to war — trying to restructure it, so that it is no longer the decision of one man who happens to occupy 1600 Pennsylvania Avenue. And so that when Americans, *whether wearing a uniform or not*, are sent into hostile situations around the world, Congress is to see that the U.S. Congress, under its constitutional mandate, will share and participate in that decisionmaking process — the process to determine how, where, and when we go to war.[113]

Although sympathetic to Senator Eagleton's goals, Senators Muskie and Javits opposed his "CIA Amendment" because the amendment might jeopardize the passage of the WPR or the override of the inevitable presidential veto, the achievements of the WPR were deemed "historic" and urgent even without the amendment, and the CIA problem was considered important enough to deserve careful attention as separate legislation. It was believed that congressional oversight of intelligence activities required a comprehensive approach, covering a broad range

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109 For example, Senator Jackson, who certainly would have been consulted under section 3, condemned President Carter's failure to comply with section 3 before the hostage-rescue attempt. N.Y. Times, Apr. 26, 1980, at A11, col. 4.

110 For example, Senator Eagleton, a vigilant critic of each of the alleged WPR violations, has had a particular interest in war powers legislation from the start. He has written several law-review articles on the subject, and was a sponsor of the Senate version of the WPR.

111 *See* 119 CONG. REC. 25,079-86 (1973).

112 *Id.* at 25,079.

113 *Id.* at 25,080 (emphasis added).

of activities beyond the involvement of the intelligence community in hostilities.[114] Even Senator Muskie noted that separate legislation and a more thorough review of all CIA activities were needed to bring about the desired congressional control over "paramilitary activities of the Central Intelligence Agency."[115] The following section deals with the steps that were ultimately taken in that direction.

## II. TITLE V–ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

Shortly after Congress imposed the 1973 restraints on executive war powers, it promulgated an altogether different set of restrictions on intelligence activities, embodied in the Hughes-Ryan Amendment of 1974.[116] Before 1974, the CIA functioned without congressional oversight or a statutory charter, guided solely by the broad definition of its mission in the National Security Act of 1947.[117] Like the WPR, the Hughes-Ryan Amendment was a product of the post-Vietnam, post-Watergate reaction against seemingly unchecked executive power. The investigations of the Church Committee (the Senate Select Committee to Study Government Operations With Respect to Intelligence Activities) revealed the intelligence community's involvement in domestic spying, plots to assassinate foreign leaders, the use of journalists, academics, and clergymen in intelligence operations, and other activities perceived to be abuses of authority. In an effort to curb such abuses, Congress passed the Hughes-Ryan Amendment, prohibiting the expenditure of funds for any CIA covert operation until the President reported, "in a timely fashion, a description and scope of such operation to the appropriate committees of Congress."[118]

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114 *Id.* (letter from Sen. Stennis read to the Senate by Sen. Muskie).

115 *Id.* at 25,081 (statement of Sen. Muskie).

116 *See* 22 U.S.C. § 2422 (1976). For text of the Hughes-Ryan Amendment, see Appendix C.

117 50 U.S.C. §§ 401-405 (1980). The CIA was established by the National Security Act of 1947 "to correlate and evaluate intelligence relating to the national security," 50 U.S.C. § 403(d)(3) (1976), and to "perform such other functions and duties relating to intelligence affecting the national security as the National Security Council may from time to time direct." *Id.* § 403(d)(5).

118 "Covert operations" are activities that a nation wants to conduct without its involvement being known or apparent. These activities include everything from the

The Hughes-Ryan Amendment was historic because it was the first statute to provide for congressional oversight of the United States intelligence community. However, it was not the final word on intelligence oversight. In 1978, the Carter Administration issued an executive order requiring notification of the House and Senate Intelligence Committees in circumstances arguably broader than those covered by the Hughes-Ryan Amendment.[119] Despite the comprehensive restrictions placed on the intelligence community by Carter's Executive Order 12,036, in 1980 Congress began consideration of S. 2284, a broad intelligence charter which included new standards and procedures for congressional oversight.[120]

For three years before 1980, the Senate Select Committee on Intelligence[121] had been working on a draft of charter legislation, but had made little progress because of disputes with the Carter Administration over specific provisions. However, the fall of the Shah of Iran and the Soviet invasion of Afghanistan, both widely viewed as intelligence failures, gave impetus to the charter legislation effort in a manner favorable to the Executive. The strict-restraint psychology that had prevailed following Watergate, Vietnam, and the Church Committee investigation gave way to an "atmosphere in Washington conducive to a harder line on national security issues."[122] The Administration and the Intelligence Committee leadership felt that Congress might be receptive to a new effort to reorganize the intelligence community.

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indoctrination of political cell groups in Italy to the alleged attempt to assassinate Salvador Allende, and from the supply of guns to anti-communists in Angola to the so-called "secret war" in Laos. Covert operations do not encompass normal intelligence-gathering operations.

119 Exec. Order 12,036, 43 Fed. Reg. 3674 (1978). This comprehensive piece of executive self-regulation contained most of the issues and much of the language of S. 2284, the CIA charter bill that was introduced on February 8, 1980. Title V, the few sections of S. 2284 relating to congressional oversight, fully incorporated the corresponding sections in Executive Order 12,036. Why did the Carter Administration find it politically desirable to oppose many of the provisions of S. 2284 adopted almost verbatim from Executive Order 12,036? *See infra* notes 131-48 and accompanying text.

120 S. 2284, 96th Cong., 2d Sess. (1980).

121 The Senate Select Committee was established in 1976. S. Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 14,673 (1976). Its purpose was to provide centralized oversight of the intelligence community, in contrast to the previous system in which numerous committees gave only partial attention to intelligence matters.

122 Felton, *Intelligence Charter--Disputes Emerge Again on Key Issues*, 38 CONG. Q. 537 (1980).

The Hughes-Ryan Amendment had been under attack from two sides before the 1980 initiative. The Carter Administration termed the requirements "unwarranted restraints," and one Congressman stated that they "unduly hampered the ability of the United States to effectively conduct foreign policy."[123] These critics also objected to allowing intelligence secrets to be disseminated to the eight congressional committees (and their staffs) deemed "appropriate" under the Amendment. On the other hand, many critics believed that the Amendment was too permissive because it allowed the President to withhold notification until after an operation was completed.

Enactment of the Senate Intelligence Committee's charter — a comprehensive 172-page document — was delayed indefinitely, though the Committee asserted that it remained "fully committed to carrying that enterprise forward to completion" as separate legislation.[124] The Committee instead focused on the two-page congressional oversight provisions of S. 2284. As amended by the Conference Committee, the oversight provisions (Title V) were included in the Intelligence Authorization Act For Fiscal Year 1981 as an amendment to the National Security Act of 1947.[125]

The failure of the comprehensive charter may have been due to the squabbling of special interest groups,[126] the shortness of the legislative year,[127] or the imminence of the 1980 elections.[128] In any event, the provision that did pass — Title V — created a framework for oversight that was "at once more limited and more encompassing" than the Hughes-Ryan Amendment:

> more limited in that reports to Congress under the bill would go to only the two intelligence committees; but more encompassing in that the bill would apply to special activities con-

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123 *Id.* (statement of Rep. Robert McClory).

124 S. REP. No. 730, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4194.

125 *See supra* note 117.

126 *National Intelligence Act of 1980: Hearings Before the Senate Select Committee on Intelligence*, 96th Cong., 2d Sess. 9 (1980) (statement of Graham Allison, Dean of Kennedy School of Government, Harvard University) [hereinafter cited as *National Intelligence Hearings*].

127 *Id.*

128 Private statement of William G. Miller, Senate Select Committee on Intelligence. Mr. Miller further believes that action on charter legislation is several years away at least.

> ducted by any agency, not just the CIA, and prior notification to Congress would, for the first time, be required by statute.[129]

Title V includes almost verbatim the provisions in Executive Order 12,036 for congressional oversight, as well as some additional provisions limiting disclosure under certain circumstances.[130] Oddly enough, the Carter Administration opposed key provisions of Title V identical to those in its own regulations because the President did not want to give those restraints the force of law.[131]

The oversight provisions of S. 2284 were the result of a cooperative venture among the Intelligence Committees, the intelligence community, and the Carter Administration.[132] Based on the parties' previous four years of experience, the Intelligence Committees and the Executive Branch developed procedures to keep the committees as fully informed as possible consistent with ensuring that "sensitive information is securely handled so that the interests of the United States are protected."[133]

Although Administration and intelligence officials, including two Directors of Central Intelligence,[134] supported the concept

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129 *National Intelligence Hearings*, *supra* note 126, at 4 (statement of Daniel J. Murphy, Admiral, U.S.N. (Ret.), Deputy Undersecretary of Defense).

130 *See supra* note 119. For text of the oversight provisions in Executive Order 12,036, see Appendix D. *Cf.* text of Title V, Appendix B.

131 The Administration's key witness before the Senate Intelligence Committee was Admiral Stansfield Turner, Director of Central Intelligence ("DCI"). *National Intelligence Hearings*, *supra* note 126, at 17 (statement of DCI Admiral Stansfield Turner).

132 *Id.* at 16. The "intelligence community" includes "the Director of Central Intelligence and the heads of all departments, agencies and other entities of the United States involved in intelligence activities." S. 2284, 96th Cong., 2d Sess. § 501(a) (1980).

133 H.R. REP. No. 1350, 96th Cong., 2d Sess. 15 (1980).

134 DCI Admiral Stansfield Turner and former DCI William Colby heartily endorsed a charter to authenticate and to establish guidelines for the work done by the CIA. As Mr. Colby stated:

> [The Charter] will set up procedures for different people who have to be consulted and take responsibility, [a] novel concept since the old ideas was that nobody was responsible for intelligence. The President could deny it, the spy could be disowned, and you couldn't prove it to the contrary; that was the old theory: plausible denial. But now two congressional committees are seriously involved in responsibility under the separation of powers, knowing and keeping the secrets and exerting Congress' full constitutional role.

Lecture by William Colby to 1980 Seminar on Command, Control, Communications, and Intelligence, Kennedy School of Government, Harvard University (Mar. 18, 1980); *see also National Intelligence Hearings*, *supra* note 126, at 17 (statement of DCI Admiral Stansfield Turner).

of a charter containing congressional oversight provisions, they opposed several of the requirements of Title V. Specifically, they objected to (1) the absence of a provision for waiver in times of war, (2) the failure specifically to mention the duty of the Director of Central Intelligence ("DCI") to protect intelligence sources and methods, and (3) the prior-notification requirement.[135] The wartime waiver objection never developed into a divisive issue, though a Defense Department spokesman expressed particular concern over the matter.[136] The Senate Intelligence Committee inserted the desired statement of the DCI's duty to protect sources and methods, thus satisfying the Administration on that issue.[137] However, the prior notification dispute was not so easily resolved.

S. 2284 requires prior notification to the Intelligence Committees of "significant anticipated intelligence activities." The Senate Intelligence Committee report contains the following definition:

> An anticipated activity should be considered significant if it has policy implications. This would include, for example, activities which are particularly costly financially, as well as those which are not necessarily costly, but which have . . . [significant] potential for affecting this country's diplomatic, political, or military relations with other countries or groups . . . . It excludes day-to-day implementation of previously adopted policies or programs.[138]

Title V imposes four duties on Executive Branch officials: (1) to keep the Intelligence Committees "fully and currently informed" of intelligence activities; (2) to provide prior notification of "significant anticipated intelligence activities," chiefly covert operations; (3) to furnish any information or materials requested by the Intelligence Committees concerning intelligence activities; and (4) to "report in a timely fashion" on any illegal intelligence activities or significant intelligence failures.

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135 *National Intelligence Hearings*, *supra* note 126, at 16-18 (statement of DCI Admiral Stansfield Turner).

136 *Id.* at 70-71 (statement of Admiral Daniel J. Murphy, Undersecretary of Defense).

137 Title V requires that the DCI and other intelligence officials comply with its provisions "to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods." S. 2284, 96th Cong., 2d Sess. § 501(a) (1980).

138 *Id.* § 501(a)(1).

Covert operations are within the definition of "significant anticipated intelligence activities," while intelligence collection and counterintelligence activities are sometimes included, depending on the facts of each case.[139] Any activities not subject to the prior-notification requirement are covered by the requirement that the Intelligence Committees be kept "fully and currently informed."

Title V limits the prior-notification requirement by providing for notice to only eight congressional leaders when "extraordinary circumstances affecting vital interests of the United States" exist.[140] Title V also states that the prior-notification requirement does not require the approval of the Committees as a "condition precedent to the initiation of any such anticipated intelligence activity."[141] Finally, it directs the establishment of security procedures to "protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods" furnished to the Committees.[142]

Admiral Turner, DCI and spokesman for the Carter Administration on Title V, asserted that the prior-notification requirement would "reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy."[143] While an identical requirement had been imposed by Executive Order 12,036 in 1978, Turner believed that giving the regulation the force of law would be an "excessive intrusion by the Congress into the President's exercise of his powers under the Constitution."[144] Moreover, Turner asserted that "[w]e must also recognize that rigid statutory requirements requiring full and prior congressional access to intelligence information will have an

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139 S. REP. No. 730, *supra* note 124, at 3.

140 *Id.* at 7-9.

141 S. 2284, 96th Cong., 2d Sess. § 501(a)(1)(B) (1980). This section specifies the eight leaders as "the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate."

142 *Id.* § 501(a)(1)(A).

143 *Id.* § 501(d).

144 *National Intelligence Hearings*, *supra* note 126, at 17 (statement of DCI Admiral Stansfield Turner).

inhibiting effect upon the willingness of individuals and organizations to cooperate with our country."[145]

According to Turner, the Administration supported a continuation of the "existing oversight arrangements [of the Hughes-Ryan Amendment] by requiring that the intelligence committees be kept fully and currently informed of the activities of the intelligence community."[146] He argued:

> A strong system of oversight and accountability already exists and is functioning effectively . . . Executive Order 12,036 and the Attorney General's guidelines which have been issued pursuant to it set forth rigorous standards of conduct for intelligence activities. The proper execution of the Executive Order and the Attorney General's guidelines is subject to congressional oversight.[147]

Admiral Turner's enunciation of the Administration's views on Title V did not go unopposed. One witness before the Senate Intelligence Committee noted that the Committees would have no veto over planned operations; therefore "to remove prior notification would be in quite foreseeable circumstances to nullify the Congress' role in these matters completely."[148] The American Civil Liberties Union (ACLU) urged the Senate Intelligence Committee to allow only those operations that were "essential" to national security and to expand the category of "significant activities" requiring prior notification.[149]

It was the Administration, not the ACLU, which effected changes in the congressional oversight provisions. The Senate Intelligence Committee did not withdraw the prior-notification requirement. However, the President has two options in situations requiring extreme speed or secrecy. First, section 501(a)(1)(B) of Title V permits limited notice to eight congressional leaders when "it is essential . . . to meet extraordinary circumstances affecting vital interests of the United States."[150]

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145 *Id.*

146 *Id.* Turner also stated:

> There are clearly situations in which I personally would not ask an individual to accept such risks to his welfare or place the reputation of the United States on the line if I were required to report such intention to more members of the Congress and their staffs than I would permit persons within the CIA to be privy to this information.

147 *Id.* at 8-9.

148 *Id.* at 19.

149 *Id.* at 505 (statement of E. Drexel Godfrey, Jr.).

150 *Id.* at 145-205 (statement of Jerry Berman and Morton Halperin).

Second, section 501(b) of Title V allows the President to act without prior notice if he reports on the operation "in a timely fashion," stating the reasons for not giving prior notice.[151]

The Senate Intelligence Committee's position on the prior-notice issue balanced the President's desire for flexibility in dealing with fast-moving crises and Congress's demand for a role in authorizing intelligence activities. Though the Committees' approval is not needed prior to initiating an operation, consultation inevitably results in different, and possibly better, decisions concerning intelligence activities.[152]

Moreover, the exceptions to the prior-notification requirement — sections 501(a)(1)(B) and 501(b) — are not undesirable. While these provisions give some leeway to the Executive, only section 501(b) allows prior notice to be dispensed with completely. In addition, there are two factors that lessen the likelihood that the provision will be abused. First, section 501(b) requires the President himself to justify any failure to give prior notice. Presidents usually prefer not to be too closely associated with intelligence activities, particularly intelligence failures, and they never like to justify executive decisions to Congress. Therefore, it is likely that prior notice will not be dispensed with as lightly as it would be if, for example, the DCI were responsible for satisfying the Intelligence Committees. Second, Title V's legislative history indicates that the exceptions apply only in "extraordinary circumstances."[153] An example of such a circumstance would be where the President learned late at night of an "opportunity to do something of vast importance," de-

151 S. 2284, 96th Cong., 2d Sess. § 501(b) (1980). Section 501(b) was not present in the initial draft of S. 2284 or in Executive Order 12,036. Such a provision was not necessary in Executive Order 12,036 because enforcement of that self-imposed regulation could be waived in extraordinary circumstances.

152 *Id.* § 501(b). Section 501(b) applies only to "intelligence activities intended solely for obtaining necessary intelligence." Certain sensitive, intelligence-gathering operations will require prior notice under section 501(a), but failure to provide prior notice will trigger section 501(b) only for covert foreign operations. Though the President will not have to report on intelligence-gathering operations when prior notice is not given, the responsible intelligence official will still have to keep the committees "fully and currently informed" on the operation under Section 501(b).

153 The Senate Report accompanying S. 2284 cited the testimony of DCI Admiral Turner: " 'the actions of both [intelligence] committees in reviewing these covert action findings [have] influenced the way in which we have carried them out.' " He said further that the influence had been " 'absolutely' beneficial." S. REP. No. 730, *supra* note 124, at 8. The report also noted former DCI William Colby's observation that consultation " 'enables the Executive to get a sense of congressional reaction and avoid the rather clamorous repudiation which has occurred in certain cases . . . and I think that is a helpful device.' " *Id.*

manding an immediate decision.[154] The legislative history emphasizes that only extreme situations will warrant the President's noncompliance with the prior-notification requirement, and that each case of noncompliance will be carefully reviewed.[155]

Whether or not the prior-notice exceptions will prove to be loopholes that will be exploited by the Executive remains to be seen. However, it is more difficult to monitor the effectiveness of the congressional oversight provisions on intelligence activities than to monitor compliance with the WPR, because intelligence activities are necessarily secret and the Intelligence Committees function under strict security procedures. The public will ordinarily not be informed of Title V compliance disputes, due to the sensitivity of the activities involved. Therefore, evaluation of the prior-notification requirement and its exceptions will continue to be the duty of the Intelligence Committees.

The same political factors affecting the enforceability of the WPR affect the enforcement of Title V. The courts will probably find that compliance disputes are nonjusticiable political questions; appropriation cut-offs will be too cumbersome a method of forcing compliance; and impeachment proceedings will be too drastic a measure for dealing with ordinary violations. Again, enforcement will depend on the ability of congressional leaders to mobilize Congress and the public against the President's defiance of the law. However, one factor that decreases the likelihood that such political confrontations will occur with Title V is the manner in which the law evolved and was passed.

The adversarial and sometimes bitter relationship between Congress and the Executive Branch with respect to the passage of the WPR foreshadowed the disputes that occured after it became law. Congress's view of its constitutional role in war-making was diametrically opposed to the President's view. With a political environment in 1973 that was not conducive to com-

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154 *Id.* at 12. Referring to section 501(a)(1)(B), the Senate Report states: "The purpose of this limiting prior notice in extraordinary circumstances is to preserve the secrecy necessary for very sensitive cases, while providing the President with advance consultation with the leaders in Congress and [those] who have special expertise and responsibility in intelligence matters." *Id.* at 10. The description of section 501(b) also refers to "rare extraordinary circumstances."

155 *Id.* at 9. This example, cited in the Senate Report, was suggested by former DCI William Colby in testimony before the Senate Intelligence Committee.

promise, it was not surprising that Congress enacted its own theory of war powers over the protestations and veto of the President.

The evolution and passage of Title V, on the other hand, was marked by consultation, cooperation, and compromise between Congress and the Executive Branch. The Senate Report on Title V stated that, "The Executive branch and the intelligence oversight committees have developed over the last four years a *practical* relationship based on comity and mutual understanding, without confrontation. The purpose of Section 501 is to carry this working relationship forward into statute."[156] The cooperation that led to the passage of Title V was further evidenced by the positive attitudes of the intelligence officials who testified before the Senate Select Committee,[157] the receptiveness of the Committee to the Administration's prior-notice objections, and the Committee's adoption of the concepts embodied in Executive Order 12,036.[158] While the WPR was the product of Congress's desire to restrain the President, Title V was the result of a cooperative perspective. This "partnership" between Congress and the Executive Branch concerning the passage of Title V provides a foundation for maintaining constructive relations between the two branches of government under the act.

Perhaps the lack of constitutional doctrine regarding intelligence matters facilitated the development of this "practical relationship."[159] Certainly, the clash of constitutional theories concerning the balance of war powers did little to promote cooperation and compromise in the WPR. Noting that an accommodation must be made between constitutional theory and practice, the Senate Intelligence Committee wrote: "The pream-

156 "The further requirement of a statement of the President's reasons for not giving prior notice is intended to permit a thorough assessment by the oversight committees as to whether the President had valid grounds for withholding prior notice and whether legislative measures are required to prevent or limit such action in the future." *Id.* at 12.

157 *Id.* at 5 (emphasis added).

158 *See supra* note 134 (statements of Admiral Turner and Mr. Colby).

159 Much of Title V consists of language identical to that of Executive Order 12,036. Moreover, Administration lawyers worked with congressional aides on the language of section 501(e) — a provision that was inserted by the Conference Committee to resolve a dispute within that body. 38 CONG. Q. 2875 (1980). In short, the Administration's views and language were accommodated by the committees whenever possible throughout the legislative process.

bular clause referring to authorities under the Constitution is an indication that a broad understanding of these matters concerning intelligence activities can be worked out in a practical manner, even if the particular exercise of the constitutional authorities of the two branches cannot be predicted in advance."[160] Thus, the balance of authority that had been developed over time was not subordinated to an ancient, rigid balance of authority mandated by the Constitution, as was the case with the balance of war powers.

Congress's willingness to compromise in Title V was considered a sell-out by those groups urging even stricter oversight provisions.[161] However, it would be unfair to say that Congress "knuckled under" to executive pressure. Rather, the Senate Intelligence Committee legislated from the perspective that rigid restraints and an adversarial relationship with the Executive Branch would not be in the nation's best interest.

Title V not only makes cooperation and compliance more likely, but also reflects the view of Congress and the public concerning the foreign-policy needs of the United States. These needs include an efficient intelligence community not plagued by morale problems, a foreign policy unhampered by unwarranted restraints, and a President with the authority and the flexibility to handle fast-moving world situations. They include as well a thorough but secure system of congressional oversight to provide valuable input into intelligence decisions and to give responsibility to the most representative body of government. Title V embodies Congress's view of the best way to meet those needs.

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160 The constitutional basis for the requirements of Title V is not enunciated in the legislative history. The Senate Report states:

> There is no mention in the Constitution of intelligence activities. Whatever constitutional authorities may exist must follow from other constitutionally conferred duties [of the two branches].
>
> Those powers concerning national security and foreign policy are in a "zone of twilight" in which the President and Congress share authority whose distribution is uncertain.

S. REP. No. 730, *supra* note 124, at 6, 9 (citing United States v. American Tel. & Tel. Co., 567 F.2d 121, 128 (D.C. Cir. 1977); and Mr. Justice Jackson's concurring opinion in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952)). The legislative history suggests that Title V is based less on constitutional theory than on the practical needs and desires of both branches of government.

161 *Id.* at 9.

## III. The Legislative Scheme

The current legislative scheme for congressional oversight of military and paramilitary operations is characterized by the contrast between the provisions of the WPR and Title V and the failure of both of them adequately to define the limits on permissible paramilitary operations.

### A. *Contrasting Provisions of the War Powers Resolution and Title V*

The language of Title V makes it obvious that no interrelationship with the WPR was intended. Not only is the language different, but the requirements of Title V are less restrictive than those of the WPR.[162] Thus, the President has an incentive to tailor involvements in hostilities so that they fall within the terms of Title V rather than the WPR. The President would not avoid congressional oversight altogether by introducing civilian rather than military personnel into hostilities, but he could lessen the degree of congressional involvement, while achieving the same objectives and incurring the same risks.

The requirements of Title V and the WPR differ on whether congressional approval is required for proposed actions, on when and how consultation with Congress is to occur, and on when and how formal reports to Congress must be made. Congressional approval of intelligence activities is not required explicitly by Title V.[163] The WPR, on the other hand, states that the introduction of armed forces into hostilities requires congressional approval through a declaration of war or "specific statutory authorization" unless its purpose is to meet an attack upon American territory or armed forces.[164] The approval requirement of the WPR reflects Congress's view of the pre-existing constitutional scheme for allocating war powers between

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162 Several commentators have suggested that the absence of a prior-notice requirement would eliminate congressional participation in the oversight of intelligence activities. *National Intelligence Hearings*, *supra* note 126, at 505 (statement of E. Drexel Godfrey, Jr.). The exceptions to the prior-notice requirement might also be viewed as a surrender to the Administration's position.

163 S. 2284, 96th Cong., 2d Sess. § 501(a)(1)(A) (1980).

164 Section 2(c), 50 U.S.C. § 1541(c) (1976).

the legislative and executive branches of government. However, the substantive effect of the requirement has been questioned because it is in the prefatory section titled "Purpose and Policy."[165] Indeed, actual practice under the WPR indicates that its explicitly substantive provisions, particularly sections 3, 4, and 5, are the exclusive guidelines for judging presidential actions. If section 2 is treated as non-binding, then prior approval is unnecessary for military operations, and only subsequent approval — within sixty days — is required.[166] Thus, in practice, it seems that neither Act imposes an unavoidable prior-approval requirement.

The sixty-day subsequent-approval requirement of the WPR still constitutes a significant constraint on executive action that is absent in Title V. Although Congress can force the discontinuance of an intelligence operation after its initiation, the termination provision in the WPR is automatic and therefore not subject to the difficulties of marshaling congressional support to confront the President. Moreover, the WPR explicitly acknowledges the concurrent resolution as a mechanism by which Congress can force the termination of an operation, enhancing the effectiveness and likelihood of use of that mechanism. No such recognized mechanism exists for forcing the termination of intelligence activities.

Consultation with Congress is required under section 3 of the WPR "in every possible instance" prior to the introduction of American armed forces into hostilities. Similarly, Title V requires prior notice to the Intelligence Committees of "significant anticipated intelligence activities." While there is some dispute as to what "consultation" entails,[167] the section 3 consultation provision is roughly equivalent to the Title V requirement that the Committees be kept "fully and currently informed." Both provisions require that a limited number of congressmen be

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165 See *supra* text accompanying notes 44-48 for a discussion of the uncertain legal effect of the "purpose and policy" preface of section 2.

166 The requirement of "subsequent Congressional approval" in section 3 of the WPR is an automatic, post hoc veto that becomes effective after 60 days, or sooner if Congress disapproves the President's action by concurrent resolution. In both cases, the action must be terminated if Congress does not approve it.

167 Ford Administration officials thought "consultation" meant simply notification of impending action, but the legislative history accompanying section 3 indicates that it means much more. *See supra* note 75.

informed of the scope and nature of the proposed operation and given some opportunity to express their views.[168] Neither provision gives these members of Congress any veto power.

However, the consultation provisions of the two laws differ in one important respect. Title V requires consultation between officials of the intelligence community and the permanent Intelligence Committees — two groups with an ongoing relationship and established security procedures. The WPR, on the other hand, does not specify which members of Congress must be consulted by the President. Since the President cannot consult each congressman or the Congress as a whole prior to all military operations, he must choose which congressional leaders to consult. Since American involvement in hostilities tends to be sporadic, consultations under the WPR most likely will be one-shot affairs, with little opportunity for the participants to build a working relationship. The President might well prefer to invoke Title V so as to deal with a more familiar, predictable consultation mechanism. The President might see an advantage in consulting congressmen with whom his administration has had a chance to develop a relatively non-adversarial, working relationship.[169]

Formal presidential reports to Congress are required by both acts, but in very different circumstances. The WPR requires the President to report to Congress on any significant use of the armed forces, even if hostilities are not imminent.[170] Conversely, although intelligence officials must keep the Intelligence Committees informed of all intelligence activities, the President is only required to report to the Committees when prior notice is not given regarding a covert operation in a foreign country.[171] By choosing to comply with Title V, the President can limit his audience to only two congressional committees rather than the

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168 Title V explicitly requires the notification of the Intelligence Committees. The opportunity to respond to proposed operations is only implied, but it has been the accepted practice. The WPR does not explicitly limit the number of congressmen who must be consulted, but that understanding has been adopted by both branches. The legislative history of the Act states that the Executive has the duty to seek advice and opinions through consultation.

169 There is even a danger that the Intelligence Committees will develop a vested interest in the intelligence activities that they are supposed to regulate.

170 Section 5 of the WPR lists the types of actions that are subject to its reporting requirements.

171 S. 2284, 96th Cong., 2d Sess. § 501(b) (1980).

entire Congress.[172] Moreover, the security procedures observed by the Committees ensure that unintentional disclosures will not occur. Thus, the Executive may have more freedom to act abroad under Title V because adverse public reactions and political consequences can be avoided by waging war through covert operations that are disclosed only to the Intelligence Committees.

In short, Title V has less burdensome approval, consultation, and reporting requirements than the WPR. Therefore the Executive has an incentive to devise covert intelligence operations that can achieve the same goals as a military operation.

### B. *The Paramilitary Loophole*

The differences between the acts are relevant whenever there is ambiguity as to whether Title V, or the WPR, or both apply to a given situation. Title V applies if there are "intelligence activities," while the WPR is relevant only if military personnel are involved. However, the question of which act applies to a given operation is complex and as yet untested.

Senator Eagleton, one of the original sponsors of the WPR, opposed the final version of the bill because it failed to ensure congressional involvement in all war-initiating decisions. Specifically, it failed to restrict covert hostilities or covert operations that might reasonably lead to hostilities. Many of Senator Eagleton's remarks on his proposed "CIA Amendment" are equally relevant to Title V and the WPR:

> To anyone engaged in a combat operation, it is irrelevant whether they are members of the Armed Forces, military advisers, civilian advisers, or hired mercenaries.
>
> . . . .
>
> Wars do not always begin with the dispatch of troops. They begin with more subtle investments . . . of dollars and advisers and civilian personnel.
>
> . . . .
>
> What payroll you are on is really secondary; whether you get it from the Pentagon or whether you become a member of the Armed Forces, the end result is the same: Americans

172 Reports to Congress under the WPR are transmitted to the entire body through the Speaker of the House and the President pro tempore of the Senate. *Id.* § 4.

> are exposed to the risk of war. And as they are exposed to the risk of war, the country then makes a commitment to war.[173]

As Senator Eagleton suggests, the argument for treating covert intelligence operations under the same standard as military operations is that both create a risk of war. Therefore, it is argued that Congress should participate in both types of "war-risking" decisions.

Covert operations are certainly not the only non-military actions that can create a risk of war. For example, the President has the authority to impose an embargo or to sell arms to a nation at war, despite the risks created by these actions. Nonetheless, though economic and diplomatic measures can be coercive and destabilizing, they are generally considered to be less violative of a nation's sovereignty than covert operations. Whether or not a rational distinction separates the two measures, unspoken international standards treat the former as legitimate and the latter as an improper assault on a nation's independence.[174] Thus, the WPR's failure to encompass covert operations cannot be dismissed simply because covert operations are not the only non-military actions that can create a risk of war.

Senator Eagleton cited American involvement in Southeast Asia as an example of the dangers of covert operations. Prior to the 1964 Gulf of Tonkin Resolution,[175] President Johnson allegedly authorized extensive covert military operations under the code name "Operation Plan 34A," which was a provocation strategy designed to provide "a pretext for bombing North Vietnam."[176] Moreover, not only were intelligence activities purportedly used to "hoodwink" Congress into authorizing war,[177] but they were also used to actually conduct a "secret war" in Laos.[178] Finally, civilians, including former military personnel,

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173 119 CONG. REC. 25,079-80 (1973).

174 Covert interference in a nation's affairs is generally considered an affront to that nation's independence regardless of whether it aids the government or an anti-government group.

175 *See supra* note 33.

176 119 CONG. REC. 25,080 (1973).

177 *Id.*

178 In 1961, three years before any official American involvement in Laos, the CIA began to "organize and advise Meo tribesmen in Laos." Civilian pilots under contract

allegedly were under contract to the United States government following the American withdrawal from Vietnam to perform military and paramilitary operations in the absence of American troops.[179] American actions in Southeast Asia are certainly not the only examples of covert operations that might be labeled as "war-making" or "war-risking."[180] Covert operations can be used for a variety of purposes either before, during, or after official involvement in hostilities. Senator Eagleton felt that without legislation governing intelligence activities, "the potential for use of covert civilian forces by a President to achieve military objectives [was] restricted only by the imagination of man."[181] Congressional involvement pursuant to the WPR would be triggered only when combat troops were introduced, which could be long after the United States became involved.

Legislation ensuring congressional oversight of the full range of intelligence activities, including the Hughes-Ryan Amendment in 1974 and Title V in 1980, does not directly address the "paramilitary loophole" described by Senator Eagleton. Title V did not complete a unified legislative scheme governing all types of American involvement in hostilities. Rather, it created a scheme separate from the WPR to govern all intelligence activities, even those that would be covered by the WPR if performed by military personnel.

The attempted rescue of the hostages in Iran demonstrates the difficulty of the problem. The dispatch of American forces into Iranian territory probably should have been preceded by consultation under the WPR, particularly since the prelaunching of fighter-bombers made it clear that hostilities were anticipated.[182] But the WPR might not have been triggered if CIA personnel had attempted the rescue.[183] The involvement of mil-

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to CIA-associated Air America also participated with the Royal Laotian Air Force in extensive air operations against the Pathet Lao. *Id.*

179 119 CONG. REC. 25,083 (1973) (Sen. Eagleton quoting passages from an article by Fred Branfman from the May 1973 HARPER'S magazine).

180 The Bay of Pigs invasion, for example, was arguably a covert American attack on Cuba. As such, it was a case of executive war-making that lacked congressional authorization and created a high risk of war. Similarly, in 1954, a small force that was organized and equipped by the CIA invaded Guatemala, which was then ruled by a left-wing junta. *See* R. SCHNEIDER, COMMUNISM IN GUATEMALA 311 (1958).

181 119 CONG. REC. 25,080 (1973) (statement of Sen. Eagleton).

182 *See supra* note 77.

183 Indeed, an unknown number of paramilitary agents infiltrated Teheran posing as European businessmen to assist in the hostage-rescue attempt. These agents bought a

itary air support could well affect the answer to that question. The possible variations on the historical scenario are almost endless, as are the questions they raise. What if the military's support of the operation involved merely training and equipping CIA personnel? What if the helicopter pilots were the only military personnel involved? Would it matter whether they flew into Teheran or merely dropped the CIA personnel into a desert staging area? What if military aircraft flown by military pilots picked up CIA personnel who had infiltrated Teheran individually, performed the operation, and then fled to a desert rendezvous point? Would it matter whether the civilians performing the mission were American or foreign? As these hypotheticals suggest, the factors to consider in determining whether Title V or the WPR will apply include (1) the identities of the participants — military or non-military, (2) the nature and scope of the military's involvement, and most importantly, (3) the exposure or risk of exposure of military personnel to hostilities.

The President can manipulate these factors and devise operational plans that trigger Title V rather than the WPR.[184] An operation conceived, developed, and carried out without the involvement of military personnel will clearly by-pass the requirements of the WPR. However, it is unlikely that significant paramilitary operations currently could be conducted by civilian intelligence personnel without some degree of military support. The civilian intelligence community relies too heavily on the military intelligence services, and eliminating this dependence

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warehouse to serve as the final staging area for the assault on the embassy. The infiltrators, who quietly slipped out of Iran after the aborted attempt, included members of a Special Forces unit stationed in Europe. N.Y. Times, Apr. 30, 1980, at A1, col. 4. Though military personnel conducted this covert operation, thus arguably invoking the requirements of the WPR, it could have been conducted solely by civilian agents.

184 It is also possible to trigger both acts at once, because the scope of Title V is determined by the nature of the activities involved (intelligence activities) and the scope of the WPR is determined by the identities of the participants (military personnel). For example, a plan for the covert bombing of Salvadoran guerrilla forces by military personnel working under CIA direction would arguably trigger the prior-notice requirement of Title V governing significant anticipated intelligence activities and the prior consultation requirement of the WPR (section 3) governing the introduction of American armed forces into hostilities. Even if the plan called for covert reconnaissance rather than bombing missions by combat aircraft, the reporting requirement of the WPR (section 4) would probably apply. The resulting dilemma is that a covert operation is not very useful if it must be formally reported to Congress within 48 hours.

would require a dramatic expansion of the CIA's physical capabilities.[185]

Whether either or both of the Acts will apply in a given situation will continue to depend on the exact scope and nature of the military involvement in question. That involvement will be subject to a broad range of characterizations and interpretations, which directly affects the enforceability of the WPR in cases involving both military and civilian personnel. In addition, the President is free to *choose* the Act with which he will comply, thus forcing Congress to show insufficient compliance rather than total noncompliance. For example, when Congress was not consulted prior to the hostage-rescue attempt, President Carter defused much of the ensuing criticism of his alleged noncompliance with the WPR by characterizing the operation as a "humanitarian mission."[186] Similarly, it could be argued that only Title V applies to a given operation because the involvement of military personnel was limited in some manner. While Congress may not accept the President's characterization of the facts, the existence of that characterization can make it difficult to oppose the operation. Some members of Congress and the public will embrace any arguable basis for supporting the President,[187] and the complex manner in which the two Acts overlap ensures that an arguable basis will usually be available. Moreover, the President's compliance with one statute (Title V)

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185 The CIA probably could not conduct significant paramilitary operations without military support. In 1973, Senator Javits believed that while the CIA might have some "clandestine agents with rifles and pistols engaging in dirty tricks . . . there is no capability of appreciable military action that would amount to war." 119 CONG. REC. 25,082 (1973). As soon as combat forces are employed, he noted, the WPR will be triggered. While the CIA's physical assets include military materials, it is unlikely that the agency possesses the wide variety of capabilities that would be required to accomplish an unforeseeable range of military objectives without involving the American military. Since it has always been able to co-opt military personnel and equipment, the CIA has had little incentive to develop its own capabilities. Only a presidential directive to create the capability to bypass the WPR would provide that incentive. Such a blatant move would undoubtedly spur Congress to take corrective action in the provisions of the WPR.

186 Senator Byrd, for example, was furious over President Carter's failure to consult congressional leaders. N.Y. Times, Apr. 26, 1980, at A11, col. 1. The next day, however, Byrd concluded that there was no violation of the WPR because no aggressive acts against Iran were intended. N.Y. Times, Apr. 27, 1980, at A17, col. 1.

187 Even after President Nixon's resignation, polls showed that some 25% of the American people still believed that he was completely innocent. The desire to support the President is usually even stronger in foreign affairs (*see supra* note 9 and accompanying text) and the egregiousness of the President's actions is usually less obvious.

will reduce public and congressional outrage, even if the more lenient law were chosen deliberately, since some level of congressional involvement was achieved. Thus, the President may be able to order a covert paramilitary operation with significant involvement by American armed forces, comply only with the provisions of Title V, and still avoid a confrontation over compliance with the WPR.

The basic question about the scheme set up by Title V and the WPR is whether it is desirable. Did Congress have a reason for not closing the paramilitary loophole? Perhaps so. Congressional action on Title V reflected the re-emerging national view that executive freedom of action is essential for protection of America's vital interests. The intelligence community's extensive covert operations — such as the "secret war" in Laos — were widely criticized in 1973. But in 1980, it was not the CIA's performance, but its inability to perform, that was the focus of criticism.[188] Events in Iran, Afghanistan, and elsewhere buttressed the argument that there is a legitimate need to conceal American involvement in certain hostilities. Yet the reporting requirement of the WPR would make clandestine involvement impossible. It is therefore not surprising that Congress did not intermesh the provisions of Title V and the WPR.[189] The absence in either the WPR or Title V of a provision subjecting paramilitary intelligence activities to the requirements of the WPR gives the President greater flexibility in protecting the nation's interests.

The reasons given so far for congressional tolerance of the "paramilitary loophole" have been political rather than constitutional. The balance between executive and congressional power over intelligence matters is not determined by explicit constitutional provisions,[190] so political factors have played a

188 James Schlesinger, a former Director of Central Intelligence, and Graham Allison, Dean of the Kennedy School of Government at Harvard, assert that the problem with the intelligence community is its performance, not its abuses. *National Intelligence Hearings*, *supra* note 126.

189 The Acts fail to complement each other because of the way Title V developed. After two years of minimal progress on the bill, the events in Iran and Afghanistan prodded the Congress into action. However, those events increased the political leverage of the Administration, not that of the strict-restraint advocates. Title V was a significant legislative accomplishment resulting from realistic political compromises, but it was not an interlocking legislative work of art.

190 *See supra* notes 160-61 and accompanying text.

weighty role in the evolution of Title V. The WPR, on the other hand, explicitly is based on a constitutionally mandated balance of war powers that cannot be altered by accepted practice or political exigencies.[191] If intelligence activities amount to war-making, they too should be governed by constitutional principles, perhaps as embodied in the WPR. Nonetheless, the terms of Title V do not provide for such treatment of covert war-making. Although the WPR need not be triggered for constitutional requirements to be invoked, the WPR thus far has been virtually pre-emptive regarding war-powers issues.[192] Perhaps recognizing that large-scale, covert military operations would be impossible if the constitutional requirement of congressional authorization were imposed by Title V,[193] Congress treated such operations in the same way as intelligence activities that do not involve hostilities.

If the Constitution requires congressional authorization for any action involving hostilities or imminent hostilities, a unified legislative scheme would be necessary. The existing dual scheme could be justified by distinguishing, on the basis of custom and tradition, actions involving American armed forces from covert paramilitary operations.

The only argument justifying different constitutional treatment of paramilitary operations under these circumstances is that such operations carry a lesser risk of full-scale war.[194] The threat or use of military force by one nation against another puts the national honor and credibility of both countries at stake. With covert operations, the risk of war may be lessened by the absence of a frontal assault on a nation's integrity. While mem-

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191 *See supra* note 31 and accompanying text.

192 The WPR may embody constitutional doctrine only for the armed forces, leaving traditional constitutional analysis to deal with non-military war-making. However, this theory has not been advanced by Congress. Moreover, exclusive focus has been placed on the WPR in dealing with war powers questions, while the underlying constitutional theory has received little attention.

193 Congressional authorization, as a constitutional matter, must involve action by both houses of Congress. *See supra* text accompanying notes 33-41. The authority to wage war cannot be given by a few congressional committees. Yet effective protection of sensitive information concerning covert operations necessitates that participation be limited to small groups.

194 This argument assumes that the constitutional requirement of congressional authorization is triggered not by any involvement in hostilities at any level, but by involvement in hostilities that create a risk of full-scale war. Thus, if the risk is lessened sufficiently, the requirement might not apply to a given operation. *See supra* note 12.

bers of the international community generally tolerate the presence of hostile intelligence agents within their borders, they vigorously denounce the presence of hostile troops as an affront to their sovereignty. For example, agents captured while engaged in sabotage will simply be arrested or deported and the foreign nation will be denounced, whereas an attack by foreign military units will more likely lead to war. Even if the targeted nation is aware of the involvement of American intelligence, its interest in avoiding an open military confrontation with the United States might often induce it merely to respond in kind. In this way, a covert operation gives the foreign nation the option not to escalate the confrontation into actual war.

These distinctions in international attitude and risk of war between covert operations and military attacks could disappear if intelligence personnel conducted an operation on the same scale as a military attack. While it is doubtful that the intelligence community has the present capacity to conduct a naval bombardment or to launch a large-scale invasion, the capacity for lesser but significant operations could be developed, acquired, or purchased.

Speculation as to what "might" happen in "some" cases is thin support for distinctions that carry constitutional consequences. The political justifications for the dual legislative scheme may not legitimately exempt paramilitary operations from the requirements of the constitutional doctrine of war powers. A legislative scheme that conflicts with the Constitution is not satisfactory. The problem with this conclusion is that the constitutional conflict is brought to light by Title V, an act at once more effective and less objectionable to the Executive Branch than the WPR.[195]

The military decision-making process has not been affected very much by the WPR. The President continues to make independent judgments on when and how to use military force, complying only with the WPR's reporting requirement.[196] While

195 A constitutional amendment could be drafted to remove the conflict in Title V, but the likelihood of its ratification would be very slim.

196 After eight years under the WPR, the President has never consulted with Congress before initiating a military operation. In the one instance where the President sought prior authorization for an operation, the evacuation of Saigon in 1975, Congress moved so slowly that the President had to order the mission to proceed. The mission was completed before Congress could act. *See supra* note 88.

this de facto balance of war powers may be advantageous, given the need for quick, decisive action in international affairs, it is preferable not to have law and reality at odds. Each time the President uses the armed forces without consulting Congress, the Executive's authority to act is publicly brought into question and the nation's foreign policy suffers from the appearance of disunity. The WPR was intended to produce the opposite result, to ensure that American actions abroad would be strengthened by a singleness of congressional and executive purpose and a sharing of responsibility for the underlying decisions. This goal can be achieved only if the WPR and the de facto balance of war powers are reconciled.

### C. *A Proposal*

The problems of noncompliance with the WPR and the "paramilitary loophole" might be resolved if presidential attitudes and the terms of the WPR change. Changing the latter might result in a change in both because (1) the terms of the WPR are ambiguous, irrespective of presidential intransigence and (2) the system embodied in Title V demonstrates the feasibility of a cooperative relationship between Congress and the Executive Branch.

The WPR is too vague and therefore too demanding. The traditional, de facto balance of war powers has resulted in insufficient congressional involvement, but the balance established by the WPR provides for increased involvement through procedures unpalatable to the President, particularly in a crisis. For example, the section 3 consultation requirement provides for a moderate, reasonable level of congressional involvement. Consultation must occur only if it is "possible" under the circumstances, and the President need only consult a reasonable number of congressional leaders.[197] However, the Act does not specify who must be consulted nor does it establish security procedures to guarantee the secrecy of sensitive information. In addition, section 3 provides no guidelines for when consultation

197 The WPR does not explicitly limit the number of congressmen who must be consulted, but such a limitation is implicit in the requirement. Moreover, congressional leaders seem to concur in this interpretation of section 3.

is justifiably not possible. When contemplating a military operation, the President will often prefer to dispense with consultation altogether and let his lawyers justify the decision later, rather than become bogged down with questions of how to comply with the WPR and whether Congress will find such compliance sufficient. Because the WPR lacks specificity and concreteness, it demands too much; and because it demands too much, it gets nothing.

Title V provides a useful model for reshaping the process by which war-making decisions are made. The WPR could establish meaningful sharing of responsibility for such decisions if it were less vague and, consequently, less intrusive from the President's perspective. For example, the consultation requirement, which has been the focus of most noncompliance disputes, should specify exactly who must be consulted before the introduction of armed forces into hostilities. The provision could specify existing committees such as the Foreign Affairs Committees, new committees created expressly to consult with the President on proposed military operations,[198] or a list of congressional leaders chosen on the basis of authority or expertise.[199] In any event, the specified committees could meet periodically, independently and with the President, even when there is no current crisis, in order to encourage the development of a cooperative, consultative relationship.[200] Such standing committees would be able to monitor the escalation of minor involvements and thus foresee when various WPR requirements might be triggered.[201]

198 This arrangement would be similar to the provisions in Title V for dealing with the Senate and House Intelligence Committees.

199 This scheme would be similar to the procedure in Title V for limited prior-notice to the Speaker and minority leader of the House, the majority and minority leaders of the Senate, and the chairmen and ranking minority members of the Intelligence Committees. S. 2284, 96th Cong., 2d Sess. § 501(a)(1)(B) (1980).

200 The problem with war-making decisions, as distinguished from decisions concerning intelligence activities, is that they tend to be occur sporadically. Brief, intensive consultations during crises that may be years apart are not conducive to the development of a productive, ongoing relationship. Requiring periodic meetings would alleviate this problem and keep the members of Congress informed on *potential* areas of hostilities. The objective is to develop the ongoing relationship of consultation and information-giving that exists between the Intelligence Committees and the Executive Branch under Title V.

201 Under the current provisions of the WPR, no such official monitoring occurs until the initial report or consultation takes place. After that, the President must report on the status of the American involvement at least every six months. However, the President makes the initial determination that a report or consultation is required under

Moreover, the Act could require that formal security procedures be functional at all times, so that the President could responsibly communicate the necessary sensitive information in a crisis. Finally, the Act could recognize the President's freedom to act on his own judgment when necessary, suggest guidelines for when such independent action would be justified, and establish procedures under which the President would have to justify his decisions to Congress.[202]

This system, like the system embodied in Title V, represents a compromise between the theory of congressional authorization and the practical realities of presidential decision-making in a fast-moving world. The likelihood of presidential compliance with the consultation provision might increase if the President were faced with a clearly defined requirement rather than a vague, potentially overly intrusive restraint. The President would not have to waste time trying to determine what his duty is or what Congress will think it is. The proposed requirement might prove both easier to comply with and more difficult to circumvent, since specific provisions allow less room for inventive arguments justifying noncompliance. The system would promote trust and cooperation between the President and the specified congressional representatives, while protecting sensitive information and minimizing intrusions into the executive decision-making process. The relatively smooth development and functioning of the intelligence oversight system embodied in Title V suggests that similar results could be reached for the oversight of war powers.

One inevitable result of the proposed system would be that the congressional representatives specified for consultation would have both heavy responsibilities and significant political leverage. The responsibilities would arise from their role as surrogate decision-makers for the Congress as a whole on ques-

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the Act. Congress can, of course, consider and act on a given situation on its own initiative, but the WPR itself does not provide for congressional action prior to a report or consultation. Under the proposed system, the committees would be able to monitor American involvement in a region almost continuously before and during the actual outbreak of serious hostilities.

202 Other provisions of the WPR could be improved as well. These suggestions focus on section 3 because it has been the focus of all the noncompliance controversies. The other controversial provision, section 5, is yet to be tested, so its practical shortcomings are not as clearly apparent.

tions of war. The leverage would result from their special influence over presidential decisions. The representatives would not have the constitutional power to authorize war, for that is the exclusive power of Congress as a whole. However, they would have the power to require the President to obtain full congressional authorization before initiating a proposed operation. Under the proposed system, the representatives would not only express their views on potential military operations carrying a risk of war, but they would also determine whether planned hostilities amounted to full-scale war, thus requiring authorization by the full Congress. The power to refer the question to Congress would give them political leverage over the President and would ensure careful consideration of their views by the President.

A reformation of the WPR in light of Title V would also place paramilitary operations under the same standards as military operations. The committees specified in the WPR and the Intelligence Committees would consult with the Executive Branch whenever possible before an operation and screen out operations that amounted to war. Operations of this type would be referred to the full Congress for expedited consideration and action. A declaration of war or specific statutory authorization would be required.[203]

The proposed scheme would be both effective and enforceable, guaranteeing significantly increased involvement by the specified committees in war-making decisions. However, the proposal would draw criticism from two sides.

First, advocates of strict restraints on the President would consider the proposed scheme unconstitutional because it would statutorily recognize the President's de facto authority to use limited force without congressional authorization. They would argue that no matter what practical and historical reasons might exist in favor of recognizing this de facto balance of war powers, constitutional provisions cannot be altered without a constitutional amendment. However, it would be extremely difficult and

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203 The WPR currently contains a provision for expedited consideration of joint and concurrent resolutions introduced pursuant to section 5 in order to terminate, extend, or authorize the use of American armed forces during the allowed 60-day period. Sections 6-7, 50 U.S.C. §§ 1545-1546.

probably unwise[204] to amend the Constitution to remove any such inconsistencies.

If constitutional doctrine cannot accommodate the recognition of the de facto balance of power, the constitutional conflict could simply be allowed to continue as it has for the past two hundred years. Of course, aside from the philosophical problem of ignoring a possible constitutional conflict, the proposal might be challenged in court, since it would codify the alleged constitutional conflict that had previously simply been ignored or tolerated. The political-question doctrine, which rendered constitutional violations under the WPR nonjusticiable, may not extend to unconstitutional legislation.[205] Thus, the effort to effect a moderate compromise in the statutory provisions governing war powers might fail altogether if the courts interpreted the constitutional balance of war powers to conflict with the new provisions.

One possible solution to this dilemma is to adopt the interpretation that Congress's exclusive power to declare war governs only major conflicts, not every conceivable use of military or paramilitary force. Some commentators have suggested that Congress's constitutional power extends only to conflicts involving serious moral or political consequences, or involving major commitments of personnel, money, and equipment.[206] This interpretation would neatly fit the proposed two-level system of congressional oversight and authorization. However, other experts have asserted that the constitutional provision embraces all uses of the armed forces except in the defense of the nation against sudden attack.[207] Of course, if Congress enacted a scheme such as the one proposed here, it could also

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204 A constitutional amendment shifting some of the power to authorize the use of the armed forces to the President would be inadvisable because it might lead to abuses by the Executive Branch. Although the present balance of *political* power might prevent such abuses, that balance cannot be guaranteed in the future. Congress should retain the power to influence the balance of war powers.

205 The full implications of the political-question doctrine are beyond the scope of this Article.

206 King and Leavens, *supra* note 7; Note, *supra* note 4. King and Leavens argue that lesser involvements are in a gray area where the President and Congress share power, so that political strength determines how decisions will be made. *See supra* note 12. The scheme proposed in this Article would constitute a political compromise between the two branches on how to share war-making authority within that twilight zone of power.

207 *See supra* text accompanying note 26 (statement of Sen. Ervin).

amend its interpretation of the constitutional balance of war powers, as expressed in section 2, to accommodate the new scheme.

The question of when congressional authorization is constitutionally required before an operation commences has yet to be conclusively answered, section 2 of the WPR notwithstanding. The conflict caused by the desire to enact a workable balance of war powers and the need to fit it into the constitutional scheme may present the most difficult challenge of all.

The second objection to the proposed scheme is that it overly restricts the President's range of foreign-policy options. Specifically, it would discourage "secret wars," for such intelligence operations could be referred by the designated committees to the full Congress for consideration. Clearly, the operations would no longer be "secret." Many critics would undoubtedly applaud this result, believing that there is no justification for a secret war under any circumstances. However, it might be argued that Title V implicitly acknowledges the legitimacy of clandestine paramilitary operations by not sanctioning them or bringing them under the terms of the WPR. Assuming that Congress wanted to retain the paramilitary option, it could provide for an exception to the requirement that the committees refer to Congress those operations that are the equivalent of full-scale war. For example, the Intelligence Committees might be empowered to authorize such an operation only if the operation and the need for secrecy were essential to the vital interests of the nation. However, an exception that explicitly permitted the Intelligence Committees to authorize "war" would probably be unconstitutional under almost any theory of the balance of war powers. It would encroach upon Congress's sphere of exclusive power, for Congress cannot delegate its war-making duties to congressional committees.

## CONCLUSION

The experience thus far under the WPR suggests that Congress should reassess the statutorily mandated balance of war powers. The existing provisions are vague and virtually unenforceable, thus discouraging presidential compliance and coop-

eration. Congressional involvement in decisions concerning the use of American armed forces has been minimal and after the fact. It may not be possible to make the WPR an effective piece of legislation by simply redefining terms and replacing vague requirements with specific ones. The circumventions that have occurred reflect a fundamental discomfort on the part of the Executive Branch with the system established under the WPR. If the President does not want to consult with Congress prior to a particular action, he can almost always find a way to defend his failure to do so. Past presidents have justified their military actions by saying that hostilities were not "anticipated" or that the action was a "humanitarian mission." Future presidents will find similar methods of circumventing the WPR, even if its provisions are strengthened through reform measures.

The balance of war powers under the present system depends upon the overall balance of political power between Congress and the President, since the enforcement of the WPR requires political leverage. The basic system embodied in the WPR will continue to depend upon political power despite any efforts to tighten its provisions. If Congress wants to eliminate this confrontational dimension of the war powers "partnership," it will probably have to reform the basic system of consultation and reporting to make it more palatable to the President. Title V may offer an encouraging model for such systemic reform of the WPR. Although it is too early to evaluate the effectiveness of Title V, the experience before and during the passage of that Act gives grounds for optimism.

In both spheres of action abroad, military and intelligence, it is desirable that Congress meaningfully participate in the decision-making process and share responsibility for the resulting decisions. Yet this must be accomplished with due regard for the need to protect sensitive information and to maintain the President's ability to respond swiftly with a broad range of foreign-policy options. We must strive for the optimum balance between decisiveness and collective judgment, with Congress as a fully participating partner.

## APPENDIX A

### WAR POWERS RESOLUTION*

Joint Resolution concerning the war powers of Congress and the President.
*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

### SHORT TITLE

Section 1. This joint resolution may be cited as the "War Powers Resolution".

### PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article 1, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also other powers vested by the Constitution in the Government of the United States, or any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

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* H. J. Res. 542, Pub. L. 93-148, 87 Stat. 555 (1973). For the legislative history of the War Powers Resolution, see 1973 U.S. CODE CONG. & AD. NEWS 2346.

CONSULTATION

Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced —

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

Sec. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

Sec. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration

of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

### Congressional Priority Procedures for Concurrent Resolution

Sec. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on

Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred —

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States

Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular miltary forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged in hostilities.

(d) Nothing in this joint resolution —

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

## Separability Clause

Sec. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

Sec. 10. This joint resolution shall take effect on the date of its enactment.

Passed over Presidential veto Nov. 7, 1973.

## APPENDIX B

CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES

Sec. 407.(a) Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is amended —

(1) by striking out "(a)" before "No funds";

(2) by striking out "and reports, in a timely fashion" and all that follows in subsection (a) and inserting in lieu thereof a period and the following: "Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947."; and

(3) by striking out subsection (b).

(b)(1) The National Security Act of 1947 (50 U.S.C. 401 *et seq.*) is amended by adding at the end thereof the following new title:

**"TITLE V — ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES***

"CONGRESSIONAL OVERSIGHT

"Sec. 501.(a) To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall —

"(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the

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* *See* Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980) (adding "Title V — Accountability for Intelligence Activities" to the National Security Act of 1947, 50 U.S.C. §§ 401-405 (1980)).

House of Representatives (hereinafter in this section referred to as the 'intelligence committees') fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

"(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

"(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

"(b) The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

"(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b).

"(d) The House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

"(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the

grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods."

(2) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

"TITLE V — ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

"Sec. 501. Congressional oversight.".

## APPENDIX C

### THE HUGHES-RYAN AMENDMENT*

§2422. Intelligence activities

LIMITATIONS: PRESIDENTIAL REPORT TO CONGRESS

(a) No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.

MILITARY OPERATIONS EXCEPTION

(b) The provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution.

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* 22 U.S.C. § 2422 (1976).

Pub.L. 87-195, Pt. III, § 662, as added Pub.L. 93-559, § 32, Dec. 30, 1974, 88 Stat. 1804.

## APPENDIX D

### OVERSIGHT PROVISIONS OF EXECUTIVE ORDER 12,036*

3-4. Congressional Intelligence Committees. Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:

3-401. Keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed concerning intelligence activities, including any significant anticipated activities which are the responsibility of, or engaged in, by such department or agency. This requirement does not constitute a condition precedent to the implementation of such intelligence activities;

3-402. Provide any information or document in the possession, custody, or control of the department or agency or person paid by such department or agency, within the jurisdiction of the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate, upon the request of such committee; and

3-403. Report in a timely fashion to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned.

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* 43 Fed. Reg. 3674 (1978).

# COMMENT

## Protecting the FBI's Informants

MARK E. DENNETT*

*"And as of 1981, new rumblings are heard about amending the Act to cut it back in various ways, particularly with respect to such agencies as the FBI and CIA."*[1]

With his usual clarity and incisiveness, Professor Kenneth Culp Davis has noticed an increasing congressional determination to reduce the coverage of the Freedom of Information Act (FOIA)[2] over the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA).[3] Hearings before many different subcommittees have been held since 1977,[4] resulting in a

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1 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:1, at 33 (2d ed. Supp. 1982).

2 5 U.S.C. § 552 (1976).

3 Professor Davis has not been alone in observing this trend. *See, e.g.*, Friendly, *Balancing Citizen's Need to Know and Government's Need to Create Secrets*, N.Y. Times, Dec. 4, 1981, at B7, col. 1; Weiss, *Questions Posed Concerning Reagan Proposal to Restrict Freedom of Information Act*, 39 CONG. Q. 2077 (1981); Weiss, *Security, Police Work Cited by Critics Seeking to Limit Freedom of Information Act*, 39 CONG. Q. 1243 (1981).

4 *Intelligence Reform Act of 1981: Hearings on S. 1273 Before the Senate Select Comm. on Intelligence*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings, Intelligence Reform Act of 1981*]; *The National Intelligence Act of 1980: Hearings on H.R. 6588 Before the Subcomm. on Legislation of the House Select Comm. on Intelligence*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Hearings, National Intelligence Act of 1980*]; *Freedom of Information Act: Central Intelligence Agency Exemptions: Hearings on H.R. 5129, 7055, and 7056 Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Hearings, Central Intelligence Agency Exemptions*]; *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st and 2d Sess. (1979-1980) [hereinafter cited as *Hearings, FBI Oversight*]; *Legislative Charter for the FBI: Hearings on H.R. 5030 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st and 2d Sess. (1979-1980) [hereinafter cited as *Hearings, Charter for the FBI*]; *Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities: Hearings Before the Subcomm. on Legislation of the House Select Comm. on Intelligence*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *Hearings, Impact on Intelligence Activities*]; *FBI Charter Act of 1979, Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. pt. 1 (1979) [hereinafter cited as *Hearings, FBI Charter Act of 1979*]; *Freedom of Information Act: Federal Law Enforcement Implementation: Hearings Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Governmental Operations*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *Hearings, Federal Law Enforcement Implementation*]; *FBI Compliance with the Freedom of Information Act: Hearings Before the Subcomm. on Government Information and Individual Rights of*

flood of bills[5] which seek to restrict the information that these agencies must disclose under the mandate of the FOIA. The most serious attempt at such a restriction is a compromise bill engineered by Senator Orrin Hatch (R-Utah). The bill was approved by the Senate Subcommittee on the Constitution on December 14, 1981, and is presently awaiting action by the full Senate Judiciary Committee.[6] The preliminary success of this bill, coupled with the recent congressional activity, makes it likely that some reform measure limiting the applicability of the FOIA to the FBI and CIA will be acted on by Congress in the near future.

This Comment analyzes the proposed amendment of exemption 7(D) to expand the protection of confidential information given to the FBI by informants.[7] Section I examines the present state of the law concerning protection of confidential information under exemption 7(D).[8] Section II considers the procedural implications of specific proposed congressional amendments of exemption 7(D) that would increase protection of the identity and information of a confidential informant. Section III proposes

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*the House Comm. on Government Operations*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *Hearings, FBI Compliance*]; *Erosion of Law Enforcement Intelligence Capabilities, Public Security, Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. pt. 1 (1977) [hereinafter cited as *Hearings, Erosion of Intelligence Capabilities*].

5 *See infra* notes 50-53.

6 Arieff, *Congress Facing an Unpalatable Diet in 1982*, 40 CONG. Q. 75, 81 (1982); Shribman, *Checking the Meter on the Flow of Data*, N.Y. Times, Feb. 7, 1982, at D4, col. 3; Shribman, *Panel Ends Work on Disclosure Act*, N.Y. Times, Dec. 15, 1981, at A13, col. 1.

7 "Informant" is used in its broad connotation throughout this Comment to describe not only a paid, professional informant, but any entity which gives information to the FBI under an express or reasonably implied assurance of confidence. *See Hearings, FBI Oversight*, *supra* note 4, at 100 (statement of William H. Webster, Director, FBI); *Hearings, The National Intelligence Act of 1980*, *supra* note 4, at 57 (statement of William H. Webster); *Hearings, Federal Law Enforcement Implementation*, *supra* note 4, at 5 (statement of William H. Webster); 120 CONG. REC. 17,034 (1974) (remarks of Sen. Hart, D-Colo.); Lesar v. United States Dep't of Justice, 636 F.2d 472, 484-91 (D.C. Cir. 1980); Church of Scientology v. DEA, 2 GOV'T DISC. SERV. (P-H) ¶ 82,045 (W.D. Tex. July 22, 1981).

8 Exemption 7(D) provides that the FOIA does not apply to

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

5 U.S.C. § 552(b)(7)(D) (1976).

an alternative method of protecting these interests: enacting a separate statute under exemption 3[9] to withhold the material, and leaving the FOIA itself unaltered.

## I. EXEMPTION 7(D) AND THE PROTECTION OF CONFIDENTIAL SOURCES AND INFORMATION

The purpose of both the original Freedom of Information Act, enacted in 1966,[10] and the 1974 amendments[11] has been analyzed exhaustively.[12] It will suffice here to note that the primary purpose of the FOIA is to facilitate disclosure of government records.[13] Exemptions have been construed narrowly in order to effectuate the broad disclosure policy of the Act.[14] During congressional consideration of the 1974 amendments, which

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9 Exemption 3 provides for the withholding of matters that are
specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes a particular criteria for withholding or refers to particular types of matters to be withheld.
5 U.S.C. § 552(b)(3) (1976).

10 Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250.

11 Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

12 *See* H.R. REP. NO. 876, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG & AD. NEWS 6267; S. REP. NO. 854, 93d Cong, 2d Sess. (1974); H.R. CONF. REP. 1380, 93d Cong., 2d Sess. (1974); S. CONF. REP. 1200, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285; H.R. REP. NO. 1497, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418; S. REP. NO. 813, 89th Cong., 1st Sess. (1965); *Hearings, Federal Law Enforcement Implementation*, *supra* note 4, at 1 (statement of Rep. Richardson Preyer, R-N.C.); 120 CONG. REC. 17,015-16, 17,021, 17,034 (1974) (remarks of Sen. Kennedy, D-Mass., Sen Hruska, R-Neb., and Sen. Hart, D-Colo.); *see also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:3, at 313-14 (2d ed. 1978); Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741 (1975); Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951 (1975); Comment, *Developments Under the Freedom of Information Act--1975*, 1976 DUKE L.J. 366, 400 (1976); Comment, *Access to Information? Exemptions from Disclosure Under the Freedom of Information Act and the Privacy Act of 1974*, 13 WILLAMETTE L.J. 135 (1976).

13 H.R. REP. NO. 1497, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2418 (purpose of Act is "to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements."; *see also* Kuehnert v. FBI, 620 F.2d 662, 665 (8th Cir. 1980); Natural Parks and Conservation Association v. Kleppe, 547 F.2d 673, 687 (D.C. Cir. 1976); K. DAVIS, *supra* note 12, § 5:8, at 329 (FOIA is "clear on its face." Nothing in it prohibits disclosure, exemptions only make the Act not applicable).

14 *See* Dep't of the Air Force v. Rose, 425 U.S. 352, 366 (1976); Charlotte-Mecklenburg Hosp. Auth. v. Perry, 571 F.2d 195, 200 (4th Cir. 1978); National Parks and Conservation Ass'n v. Kleppe 547 F.2d 673, 687 (D.C. Cir. 1976).

were designed to correct the perceived inadequacies of the original Act,[15] exemption 7[16] was amended on the floor of the Senate. Although the original exemption 7 sweepingly covered all investigatory files of a law enforcement agency, the revised version placed the burden upon the agency to show that its claimed exemption fell within one of six narrowly specified categories of harm.[17]

Controversy over the application of exemption 7, especially 7(D), continued even after the 1974 amendments were enacted.[18] Inconsistency characterized early judicial treatment of exemption 7(D), due in large part to the convoluted language and ambiguous terminology of the exemption[19] and its confusing, inconclusive legislative history.[20] While some degree of judicial

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15 *See* 120 CONG. REC. 36,870 (1974) (remarks of Sen. Muskie, D-Me.) ("It became evident that loopholes in the 1966 Act were interfering substantially with the public's right to know."); *see also* 120 CONG. REC. 36,872, 36,877-79 (1974) (remarks of Sen. Hruska, R-Neb., Sen. Cranston, D-Cal., and Sen. Robert C. Byrd, D-W. Va.).

16 The complete text of exemption 7 allows the withholding of

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7) (1976).

17 *See* NLRB v. Sears, Roebuck & Co, 421 U.S. 164 (1975); Charlotte-Mecklenberg Hosp. Auth. v. Perry, 571 F.2d 195, 201-02 (4th Cir. 1978); S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 12-13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291; Clark, *supra* note 12, at 750-52.

18 "Much of the case law under (b)(7) is uneasy law because, even though the 1974 version is a great improvement of the 1966 version, the legislative guides are still defective." K. DAVIS, *supra* note 1, § 5:39, at 84; *see also FOIA Exemption Seven: A Postamendment Interpretation*, 14 SUFFOLK L. REV. 202, 204 (1980).

19 *See* Radowich v. United States Attorney, 658 F.2d 957, 960-64 (4th Cir. 1981) (lengthy analysis of possible interpretations which could be placed on the language of exemption 7(D), noting in particular at 961 that the second clause "is awkwardly phrased"); Comment, *The Freedom of Information Act: A Survey of Litigation under the Exemptions*, 48 MISS. L.J. 741, 784, 816-17 (1977); *see also infra* notes 27-35 and accompanying text.

20 Since the 1974 amendment of exemption 7 occurred on the floor of the Senate and was not in the original bills of either house of Congress, the available legislative history is very limited. For the little that exists, see 120 CONG. REC. 17,033-41 (1974) (original introduction of the amendment); S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 12-13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291; 120 CONG. REC. 36,865-82 (1974) (debate concerning conference bill including exemption 7 amendment).

consensus has been reached in recent years, many difficulties remain in the interpretation of exemption 7(D).[21]

First, as the Delaware District Court observed, "Exemption Seven (D) differs from other FOIA exemptions in that its applicability depends not on the specific factual contents of the particular document; instead, the pertinent question is whether the information at issue was furnished by a confidential source during the course of a legitimate criminal law investigation."[22] Because the FBI is clearly a criminal law enforcement agency,[23] the exemption applies only if the source of the information is confidential.[24] During debates accompanying the 1974 amendments, Senator Gary Hart (D-Colo.) explained that "all the FBI has to do is state that the information was furnished by a confidential source and it is exempt."[25] Many courts have employed this language in finding that 7(D) does not require a balancing test, but instead acts as an absolute exemption for *all* material which is derived from a confidential source.[26] Thus, the definition of "confidential source" assumes a critical role in determining the breadth of the exemption.

Many courts construe "source" very broadly. The legislative history of 7(D) suggests that the change from "informer" to "confidential source" was designed to protect private citizens who cooperate with the FBI as well as paid informants.[27] Courts

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21 *Compare infra* note 28 (courts have increasingly allowed institutions to be treated as sources) *with infra* notes 34-36 (courts are divided over the presumption of inferred confidentiality, the amount of proof necessary to justify an agency's withholding information, and even the test that is applicable).

22 Conoco, Inc. v. United States Dep't of Justice, 521 F. Supp. 1301, 1308 (D. Del. 1981); *see also* Lesar v. United States Dep't of Justice, 636 F.2d 472, 492 (D.C. Cir. 1980).

23 S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 12-13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291.

24 The impact of the illegitimacy of a criminal law enforcement investigation on FOIA disclosure is an often disputed question, but is fundamentally outside the scope of this Comment. For an excellent, in-depth analysis of this question, see Note, *FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations*, 65 MINN. L. REV. 1139 (1981); see also the collection of cases in Larouche v. Kelley, 522 F. Supp. 425, 436-37 (S.D.N.Y. 1981).

25 120 CONG. REC. 36,871 (1974) (statement of Sen. Hart, D-Colo.).

26 *See, e.g.*, Radowich v. United States Attorney, 658 F.2d 957, 960-62 (4th Cir. 1981); Lame v United States Dep't of Justice, 654 F.2d 917, 923 (3d Cir. 1981); Sands v. Murphy, 633 F.2d 968, 971 (1st Cir. 1980); Lesar v. United States Dep't of Justice, 636 F.2d 472, 492 n.114 (D.C. Cir. 1980).

27 S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 12-13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291; *see* Lesar v. United States Dep't of Justice, 636 F.2d 472, 489-91 (D.C. Cir. 1980).

have, however, typically extended this interpretation and have recognized sources in a variety of other situations. State and local law enforcement agencies, as well as other institutions, are to be considered "persons" who can qualify as sources.[28] Similarly, distinctions between direct and indirect sources have been held immaterial.[29] Consequently, a "source" under exemption 7(D) is *any* entity which furnishes the FBI with information. The identities of several sources have been protected despite the public availability of the information that they have provided.[30] Additionally, information has been successfully withheld despite public knowledge of the source.[31]

Courts have also adopted a broad reading of confidentiality, stating that information provided is confidential if given "under an express assurance of confidentiality, or in circumstances where such assurance could reasonably be inferred."[32] "Confidential" is not equated with "secret," but rather with "given in trust,"[33] and therefore the crucial element is whether a trust relationship exists between the FBI and the source. In evaluating communications between the FBI and a source, courts often assume that a justified promise of confidentiality exists, rather than analyzing the particular factual situation.[34] In prac-

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28 While the courts have been split on this issue in the past, *see* Dunaway v. Webster, 519 F. Supp. 1059, 1082 (C.D. Cal. 1981) (listing of cases), the courts have increasingly followed the lead of Lesar v. United States Dep't of Justice, 636 F.2d 472, 489-91 (D.C. Cir. 1980), which extensively analyzed the issue and broadly interpreted the statute to include institutional sources. *See, e.g.*, Founding Church of Scientology of Washington, D.C. v. Regan, 2 GOV'T DISC. SERV. (P-H) ¶ 82,103 (D.C. Cir. Dec. 31, 1981); Ochs v. FBI, 2 GOV'T DISC. SERV. (P-H) ¶ 81,705 (D.D.C. July 27, 1981); Abrams v. FBI, 511 F. Supp. 758, 763 (N.D. Ill. 1981).

29 *See* Sands v. Murphy, 633 F.2d 968, 970 (1st Cir. 1980).

30 *See* Nix v. United States, 572 F.2d 998, 1004 (4th Cir. 1978); Moore v. Dep't of the Treasury, 2 GOV'T DISC. SERV. (P-H) ¶ 82,085 (S.D. Ohio June 24, 1981) (identity protected even if information had been disclosed by a nonconfidential source).

31 *See* Radowich v. United States Attorney, 658 F.2d 957, 960 (4th Cir. 1981); Lesar v. United States Dep't of Justice, 636 F.2d 472, 491 (D.C. Cir. 1980) (information protected even if identity of source known, until source waives promise of confidentiality).

32 *See, e.g.*, Radowich v. United States Attorney, 658 F.2d 957, 960 (4th Cir. 1981); Von Tempske v. United States Dep't of Health and Human Services, 2 GOV'T DISC. SERV. (P-H) ¶ 82,091 (W.D. Mo. Nov. 9, 1981); Church of Scientology of Minnesota v. FBI, 2 GOV'T DISC. SERV. (P-H) ¶ 81,124 (D.D.C. Dec. 29, 1980).

33 *See* Radowich v. United States Attorney, 658 F.2d 957, 959 (4th Cir. 1981).

34 *See* Larouche v. Kelley, 522 F. Supp. 425, 439 (S.D.N.Y. 1981) ("[A] promise of confidentiality is presumed in the context of a law enforcement investigation, especially one conducted by the FBI."); Abrams v. FBI, 511 F. Supp. 758, 762 (N.D. Ill. 1981) ("An assurance of confidentiality can be reasonably inferred from any exchange between

tice, FBI affidavits attesting to the legitimacy of the confidential relationship are usually sufficient to protect the information.[35] Thus, the concept of implied confidentiality has been applied very loosely in order to protect most sources that give information to the FBI.

Despite the expansive interpretation that many courts have given to exemption 7(D), the FBI has constantly sought increased protection for its confidential sources. This reaction can be traced to the fact that some courts, less deferential to claims of confidentiality, have read the exemption narrowly based on considerations of language and legislative history. In so doing, they employ a two-tiered analysis in which the informant's identity is analyzed separately from the information that he has provided.[36] By raising the possibility of a narrower reading of the exemption, these cases create a great deal of confusion among the FBI supervisors, field agents, and sources concerning the actual content of the applicable law.[37] In addition, these cases allow unequal adjudicative results that vary due to jurisdictional differences or fine factual distinctions.

This uncertainty and unpredictability in the interpretation of exemption 7(D) jeopardizes the ability of the FBI to gather

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a source and the FBI. . . . A presumption of confidentiality is therefore justified for FBI sources."). *But see* Birnbaum v. United States, 588 F.2d 319, 334 n.29 (2d Cir. 1978) (unlawful intelligence investigation not exempt). Note that this interpretation may be limited to national-security investigations and may not cover criminal investigations.

35 *See* Church of Scientology of Minnesota v. FBI, 2 GOV'T DISC. SERV. (P-H) ¶ 81,124 (D.D.C. Dec. 29, 1980); Ginsberg v. United States Dep't of Justice, 2 GOV'T DISC. SERV. (P-H) ¶ 81,106 (D.D.C. Nov. 26, 1979). *But see* Lame v. United States Dep't of Justice, 654 F.2d 917, 928 (3d Cir. 1981) ("[T]he district court, in order to find that such assurances, express or implied, were given, had to have been furnished with detailed explanations relating to each alleged confidential source." The concurring and dissenting opinion of Judge Dumbauld, however, said at 930-32 that the court's requirements were "unduly and unnecessarily burdensome and impracticable."); National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 605, 680 (D.C. Cir. 1976) (conclusory, generalized allegations insufficient to sustain burden of nondisclosure).

36 *See, e.g.*, Lame v. United States Dep't of Justice, 654 F.2d 917, 923 (3d Cir. 1981); Duffin v. Carlson, 636 F.2d 709, 712 (D.C. Cir. 1980); Playboy Enterprises, Inc. v. United States Dep't of Justice, 516 F. Supp. 233, 246 (D.D.C. 1981); Furr's Cafeteria v. NLRB, 416 F. Supp. 629, 631 (N.D. Tex. 1976); S. CONF. REP. No. 1200, 93d Cong., 2d Sess. 12-13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291; Comment, *Developments Under the Freedom of Information Act--1976*, 1977 DUKE L.J. 532, 552 (1977) (two-tier analysis correct under statute and legislative history).

37 Since some courts have used both tests, the result in factually similar cases may turn on the test used, which is analytically unsound. *Compare* Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980) *with* Duffin v. Carlson, 636 F.2d 709 (D.C. Cir. 1980).

information — an ability which is crucial to effective law enforcement. FBI Director William H. Webster has said that "the main reason we are losing informants [is] confidentiality . . . . The Freedom of Information Act is the primary source of our lack of confidence."[38] Both agents and sources are uncertain as to the ability of the FBI to protect pledged confidences.[39] The FBI has attributed the huge drop in the number of informants over recent years to their fear that any information they give to the FBI will be disclosed.[40] This fear is especially great when criminal elements, especially those of organized crime, pool FOIA requests to determine the identity of an informant.[41]

Another source of fear is the segregation requirement of exemption 7, which mandates disclosure of all reasonably segregable, non-exempt records.[42] The FBI claims that it is extremely difficult to excise the material exempted under 7(D) without revealing the identity of the informant.[43] Additionally, human error in segregating records has led to mistaken releases of information concerning sources.[44] Even when exemption 7(D) is claimed successfully for some materials, the segregation requirement can defeat the protective purpose of the exemption and thus further undermine the source's belief that his confidentiality will be respected.

While the FBI strongly contends that the FOIA is the main reason for the reduction in the number and effectiveness of its informants,[45] the General Accounting Office and some congressmen disagree. They assert that the distrust commonly associated with law enforcement agencies in the aftermath of Watergate is

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38 *Hearings, FBI Oversight, supra* note 4, at 105 (statement of William H. Webster).

39 *Id.*

40 *Id.* at 104.

41 *Hearings, Federal Law Enforcement Implementation, supra* note 4, at 18 (statement of William H. Webster); *Hearings, FBI Oversight, supra* note 4, at 100 (statement of William H. Webster).

42 The statute states: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b)(7) (1976).

43 *Hearings, Federal Law Enforcement Implementation, supra* note 4, at 4, 16-17 (statement of William H. Webster).

44 *Hearings, Erosion of Intelligence Capabilities, supra* note 4, at 12 (statement of Laurence H. Silberman, former Deputy Attorney General, Department of Justice).

45 *Hearings, Federal Law Enforcement Implementation, supra* note 4, at 4, 14 (statement of William H. Webster).

responsible for the decrease in the numbers of informants.[46] Despite the disagreement over causation, however, both sides would agree that "[t]he single most important investigative tool available to law enforcement today is the confidential informant."[47] The importance of confidential sources focuses the question whether the FOIA strikes a proper balance between the competing interests of public disclosure, individual privacy, and effective law enforcement, and if not, what alternatives exist to correct the imbalance.

## II. Proposed FOIA Amendments

In 1977, former Deputy Attorney General Laurence H. Silberman prophesied that, "I am morally convinced that in a few years we will have incidents which will generate such publicity that the Congress will rush to repair the damage that they have already done."[48] The number and variety of congressional proposals to increase protection of confidential sources dramatically attest to the heightened concern over the impact of the FOIA on the effectiveness of federal law enforcement capabilities.[49]

After a series of hearings in 1979, the FBI submitted its own proposals for FOIA reform. These suggestions included a total exemption of files on foreign intelligence, foreign counterintelligence, organized crime, and terrorism; an increase in protection for confidential sources and law enforcement personnel; a moratorium on the release of law enforcement records for seven years after the termination of the investigation, or for longer if

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46 *Id.* at 2, 13 (statements of Rep. Richardson Preyer, R-N.C., and Rep. Robert F. Drinan, R-Mass.).

47 *Id.* at 4 (statement of William H. Webster); *Hearings, Federal Law Enforcement Implementation*, *supra* note 4, at 43 (letter from Rep. Peter H. Kostmayer, D-Pa. to Rep. Richardson Preyer, R-N.C.).

48 *Hearings, Erosion of Intelligence Capabilities*, *supra* note 4, at 12 (statement of Laurence H. Silberman).

49 *See, e.g., Hearings, Federal Law Enforcement Implementation*, *supra* note 4, at 18 (statement of Rep. Caldwell Butler, R-Va.) ("It seems to me, . . . that an intelligent God-fearing potential informant, under these circumstances, would be somewhat inclined, or inhibited, at least, from helping you."); *Hearings, FBI Charter Act of 1979*, *supra* note 4, at 89 (statement of Sen. Orrin Hatch, R-Utah) (FOIA has hurt intelligence gathering capabilities of FBI, which are "way below adequate" and "tremendously deficient").

disclosure would interfere with an ongoing investigation; and an easing of the segregation requirement.[50] While none of the bills introduced followed the FBI's suggestions exactly, each has borrowed from them. H.R. 5129 would exempt all foreign-intelligence records, expand exemption 7(F), include the seven-year moratorium, and prohibit disclosure of any informaton which would interfere with an ongoing criminal investigation.[51] H.R. 7056 would create a new exemption allowing the FBI Director to certify certain information as exempt, and this discretionary certification could not be judicially reviewed.[52] Finally, but most importantly, Senator Hatch's bill (S. 1730), which incorporates elements of an FOIA reform package proposed by the Reagan Administration (S. 1751) and which was recently approved by the Senate Subcommittee on the Constitution, would greatly increase the protection given to confidential sources.[53]

These pending congressional proposals basically misapprehend the nature and function of the exemptions. While it is clear that the exemptions are to be construed narrowly,[54] their thrust is broad.[55] They deal with broad categories of information which have been determined to merit exemption because of either the personal or the governmental interest in maintaining their confidentiality.[56] Using specific amendments to dilute the broad purpose of the exemptions raises serious problems. If the FBI succeeds in obtaining specific protection for its sources, then other agencies, equally burdened by the Act, would probably lobby for their own exemptions.[57] The result would be a sub-

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50 *Hearings, Federal Law Enforcement Implementation*, *supra* note 4, at 122-25 (text of recommendations).

51 *Hearings, Central Intelligence Agency Exemptions*, *supra* note 4, at 6, 7 (text of bill).

52 *Id.* at 16.

53 *See supra* note 5; *see also* 127 CONG. REC. S11,702-13 (daily ed. Oct. 20, 1981) (text of S. 1751); 127 CONG. REC. S11,296-307 (daily ed. Oct. 7, 1981) (text of S. 1730).

54 *See supra* note 10.

55 120 CONG. REC. 17,033 (1974) (remarks of Sen. Hart, D-Colo.) (amendment is "broadly written"); Comment, *supra* note 17, at 786-87 (exemptions encompass a substantial body of information).

56 *See* 120 CONG. REC. 17,016 (1974) (remarks of Sen. Kennedy, D-Mass.) (Act balances disclosure and nondisclosure, "providing protection for information where legitimate justification is present"); 120 CONG. REC. 36,866-67 (1974) (remarks of Sen. Kennedy, D-Mass.) ("We have been most careful to protect privacy and law enforcement interests to the utmost in the bill we passed.").

57 This observation seems evident from the well-documented intransigence of the agencies in disclosing information and their continual battle to eviscerate the FOIA. *See*

stantial erosion in the policy foundation of the FOIA; it would signal a substantial retreat from its original disclosure mandate.

Furthermore, enacting specific amendments to the FOIA would increase its complexity in a way that would greatly exacerbate administrative and judicial costs. Many agencies, including the FBI, already expend a great deal of time and money in responding to FOIA requests.[58] Increasing the complexity of the Act will only strain the already limited resources of the agencies. While the use of blanket exemptions might reduce this problem, it is just as likely that, given the strong public need for disclosure,[59] they would merely channel litigation into new areas, as well as again substantially reducing the Act's scope.

Amendments to the FOIA not only will increase judicial costs due to increased litigation, but will also run the risk of inaccurate interpretation. While some commentators wax enthusiastic about the quality of past judicial interpretations of the FOIA,[60] the 1974 and 1976 amendments were, to some extent, passed to correct inaccurate judicial interpretations of exemptions 1, 3, and 7.[61] In addition, the past inadequate drafting of the FOIA

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H.R. REP. NO. 876, 93d Cong., 2d Sess. 15-24, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6267, 6275-85 (Justice and Defense Departments strongly opposed 1974 amendments); H.R. REP. NO. 1497, 89th Cong., 1st Sess. 5-6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2422-23 (predecessor to FOIA often abused by agencies); 120 CONG. REC. 36,879 (remarks of Sen. Mondale, D-Minn.); Ullmann, *Mum's Not the Word*, N.Y. Times, Dec. 2, 1981, at A31, col. 3 (tendency of bureaucracy to stall if at all possible rather than disclose information to the public).

58 Testimony as to the FOIA costs of the FBI is conflicting and contradictory, but all figures are much higher than the earlier estimates. *See* Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 612 (D.C. Cir. 1976) ($160,000 in 1974, $462,000 in 1975); *Hearings, Federal Law Enforcement Implementation*, *supra* note 4, at 10-11 (statement of William H. Webster) ($8,000,000 to $9,000,000 for Freedom of Information and Privacy Acts in 1978); *Hearings, Erosion of Intelligence Capabilities*, *supra* note 4, at 10 (statement of Laurence H. Silberman) ($13,000,000 in 1977); *Hearings, FBI Compliance*, *supra* note 4, at 3 (statement of Victor Lowe, Director, General Government Division, GAO) ($9,200,000 in 1977); Weiss, *Security, Police Work Cited by Critics Seeking to Limit Freedom of Information Act*, 39 CONG. Q. 1246 (1981) ($10,000,000 in 1980).

59 Interpretation problems will always exist due to the very important values supporting and opposing the disclosure policy of the Act, and the ongoing need to strike a balance between the two. *See* Note, *The Freedom of Information Act (FOIA) on Exemption from Disclosure*, 14 CREIGHTON L. REV. 976, 979 (1981); Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, *supra* note 12, at 985-86.

60 *See* K. DAVIS, *supra* note 1, § 5:1, at 34; K. DAVIS, *supra* note 12, § 5:45. at 444; Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, *supra* note 12, at 985-86; Friendly, *Balancing Citizens' Need to Know and Government's Need to Create Secrets*, N.Y. Times, Dec. 4, 1981, at B7, col. 1.

61 This would seem to indicate that congressional intent concerning the scope of disclosure under the Act has not been as clearly expressed as Congress would believe.

raises serious questions as to whether any new amendments will decrease FOIA application problems.[62] The important values on both sides of FOIA questions could also delay correction of inaccurate interpretations. For the last eight years, the courts have wrestled with interpretive difficulties surrounding the 1974 amendments to exemption 7. Many problems have yet to be satisfactorily solved.[63] At the very least, it is questionable whether the entire process should begin again.

A possible response to this criticism of these bills is that the basic disclosure policy that guided the original enactment of the Act was mistaken and should be ignored or discarded. However, the Reagan Administration[64] and even some of the Act's strongest critics[65] realize that the real problem is to strike a new balance among the concededly important interests at stake. Thus, the congressional deliberations on amending the Act are taking place in a framework that accepts the Act's original purpose and focuses on the balancing of competing values.

Despite their apparent diversity, these proposed bills share a common procedural weakness. They increase the protection given to confidential sources by directly amending the provisions of the FOIA. This method of extending protection to

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*See* H.R. REP. NO. 880, 95th Cong., 1st Sess. 23, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2183, 2204-05 (exemption 3 amended specifically to overrule FAA v. Robertson, 422 U.S. 255 (1972)); S. CONF. REP. 1200, 93d Cong., 2d Sess. 12-13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6290 (exemption 1 amended to override EPA v. Mink, 410 U.S. 73 (1973)); 120 CONG. REC. 17,039-40 (1974) (remarks of Sen. Hart, D-Colo.) (exemption 7 amended to overrule a line of D.C. Circuit cases); *see also infra* note 62.

62 *See* Radowich v. United States Attorney, 658 F.2d 957, 961 (4th Cir. 1981) (second clause of exemption 7(D) "awkwardly phrased"); Epstein v. Resor, 421 F.2d 930, 932 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970); K. DAVIS, *supra* note 1, at 84; Comment, *supra* note 19, at 789, 817.

63 *See supra* note 25.

64 *See* Friendly, *U.S. to Ask Curb on Records Release*, N.Y. Times, Oct. 5, 1981, at B12, col. 1 (Assistant Attorney General Jonathan Rose describes the Administration's planned FOIA changes as "refinements" rather than substantial shifts); Weiss, *Security, Police Work Cited by Critics Seeking to Limit Freedom of Information Act*, 39 CONG. Q. 1243 (Deputy Assistant Attorney General Stephen J. Brognan refers to difficulty of balancing the public's right to know with the government's right to keep secrets as a "Solomon-like problem").

65 *See, e.g., Hearings, Erosion of Intelligence Capabilities*, *supra* note 4, at 1, 12 (statement of Sen. Hatch, R-Utah) (The pendulum has overswung towards disclosure, destroying the intelligence-gathering capabilities of our law enforcement agencies, and allowing crime to increase.); *Hearings, Federal Law Enforcement Implementation*, *supra* note 4, at 37 (statement of Rep. Richardson Preyer, R-N.C.) (need is for clarification of the law, to better harmonize the dual interests of law enforcement and information disclosure).

confidential sources carries with it substantial drawbacks which should be avoided. Irrespective of the substantive policy implications of any particular amendment (which are beyond the scope of this Comment), the procedural effects of directly amending the FOIA would have unintended consequences which would cripple the Act. Congress usually concentrates on the substantive aspects of a law, without being attentive to its full procedural implications, but costly drafting errors can result from procedural as well as from substantive inadequacies. It is a mistake for Congress to be sanguine about alternative proposals, all of which lead to the same outcome by drastically different routes. Thus, Congress should concentrate not only on the proper substantive result, but also attempt to reach that result in a way that minimizes procedural costs. Among the factors Congress should consider are legislative-judicial interaction, harmony between the proposed legislation and present law, and agency difficulties in administering the legislation. By giving adequate attention to procedural factors, Congress will enhance its chances of accomplishing its legislative aims with minimal societal costs to all parties. As Section III of this Comment explains, using a separate statute under exemption 3 could fulfill all the requirements of the proposed bills without their procedural costs.

## III. A Proposed Alternative: Exemption 3

A desirable alternative to amending exemption 7 is enactment of a separate statute prescribing the withholding of information gained from confidential sources by the FBI. It would be specifically designated as an exempting statute under exemption 3 for the purposes of the FOIA. Exemption 7 would not be changed; the FBI could claim both exemptions in appropriate cases. An example of this technique can be found in statutes which allow the CIA to withhold certain kinds of information.[66]

66 These statutes provide that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403(d)(3) (1976); and that "the Agency shall be exempted from . . . the provisions of any other law which require the publication or disclosure of the organizations, functions, names, offical titles, salaries, or numbers of personnel employed by the agency," 50 U.S.C § 403g (1976).

The CIA Director can, within statutorily defined limits, absolutely withhold this information from disclosure. The courts have uniformly read these statutes to be exempting statutes under exemption 3.[67] The only question remaining for the court is whether the information falls within their prohibition.

A similar approach is taken by H.R. 5030, introduced by Rep. Rodino (D-N.J.), with respect to exemption 7 of the FOIA.[68] It would create a new section of the United States Code[69] and would make the Attorney General responsible for protecting the integrity of investigative files and informant confidentiality.[70] Once the Attorney General made the determination that the identity of a confidential informant must be protected, a court would be prohibited from ordering a government lawyer or official of the Justice Department to disclose either the identity of the source or any information which would reveal the identity.[71] While this statute is not specifically designated as an exemption 3 statute for purposes of the FOIA, it is likely that the courts would interpret it as such a statute. Thus, H.R. 5030 can be viewed as a model of the correct type of approach; it would increase the protection given to confidential informants without directly amending the FOIA.

This technique of legislative drafting offers several advantages over direct amending of the Act. It allows the exempting statute to be drafted in a manner that would correspond exactly to the problems faced by the particular agency and the information for which protection is being increased. Congress would also be free to specify any applicable criteria it might want to impose on the agency before it could disclose the information. These considerations illustrate the increased flexibility that Congress would have under this proposal to draft a statute to meet the specific needs of increased protection while avoiding the pitfalls of drafting an exclusion that is broader than necessary. The exemptions would retain their broad purpose and scope, while

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67 *See, e.g.*, Phillippi v. CIA, 655 F.2d 1325, 1329 (D.C. Cir. 1981); Miller v. CIA, 2 GOVT. DISC. SERV. (P-H) ¶ 81,174 (D.D.C. May 6, 1981); Patterson v. CIA, 2 GOV'T DISC. SERV. (P-H) ¶ 81,175 (D.D.C. Feb. 4, 1981).

68 *Hearings, Legislative Charter for the FBI, supra* note 4, at 507, 529 (text of bill).

69 The new section would be codified at 28 U.S.C. § 513a. *See id.*

70 *Id.*

71 *Id.*

a narrow, specific class of material — confidential information given to the FBI by informants — would gain increased protection.

The new statute would not be burdened by previous administrative and judicial interpretations. It could be more easily applied in a straightforward manner based on its language, legislative history, and congressional intent.[72] At the same time, settled interpretations of 7(D) would not be upset, greatly improving the certainty of law in this area. Indeed, with a new statute, there would be a strong likelihood that courts would interpret exemption 7(D) more narrowly, in line with the original congressional intent.[73]

## CONCLUSION

The 7(D) exemption is broad, resting more on judicial leniency than congressional intent. The various proposals which have been suggested in Congress for amending 7(D) carry with them inherent disadvantages because of their nature as FOIA amendments. A preferable method for increased protection of specific types of information is the enactment of a separate withholding statute applicable to the FOIA through exemption 3. In this way, the fundamental purpose of the FOIA can be preserved, and the needs of individual privacy and effective law enforcement can be balanced with as little dilution as possible of the public's legitimate right to disclosure of government information.

*Editor's note: On May 20, 1982, the Senate Judiciary Committee unanimously passed S. 1730. While the provisions exempting terrorism and foreign counterintelligence files from coverage*

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72 These background materials have been cited as particularly important in interpreting the FOIA. *See* Dept. of the Air Force v. Rose, 425 U.S. 352, 365-66 (1976); K. DAVIS, *supra* note 12, § 5:3, at 314.

73 Much of the reasoning behind the broad interpretation of exemption 7(D) has been the important need to protect source confidentiality in extremely delicate situations. With the pressure to protect confidential sources released by a specific exempting statute, it is likely that the narrower, two-tier test would be used more frequently in analyzing exemption 7(D). *See generally* Founding Church of Scientology of Washington, D.C. v. Regan, 2 GOV'T DISC. SERV. (P-H) ¶ 82,103 (D.C. Cir. Dec. 31, 1981) (danger inherent in disclosure separate from law enforcement proceedings); Comment, *supra* note 19, at 808-10.

*under the FOIA were deleted, the provision increasing protection for government informants remains. However it is questionable whether the bill will pass, since some senators are threatening to filibuster, and Representative Glenn English (D-Okla.), Chairman of the House Government Operations Information Subcommittee, will hold hearings on the bill only after the Senate completes action.* See Arieff, 97th Congress Facing Backlog at Mid-Session, *40 CONG. Q. 1315, 1320–21 (1982);* Panel Adopts Compromise FOIA Bill, *40 CONG. Q. 1229 (1982).*

# COMMENT

## THE "MINI" TREND IN MUNICIPAL FINANCE: MINIBONDS

CHRISTINA L. JADACH*

A novel strategy of municipal finance has been attracting increasing attention among local and state authorities. Minibonds — small-denomination securities which states and municipalities sell directly to local investors — may transform municipal credit markets by permitting direct citizen investment in state and local governments.[1] The result in at least some cases may be a boon both to small-scale investors and to bond-issuing states and municipalities.

This Comment begins its analysis of minibond financing by explaining the major differences between minibonds and traditional bonds. In section two, it outlines the objectives which states, municipalities, citizens, and underwriters seek to accomplish through minibond offerings. In section three, it describes various aspects of minibond programs: form, rate of return, administrative cost, denomination, and bond liquidity. Section four traces recent developments in minibond offerings. This Comment concludes with a discussion of factors that issuers should consider before launching a minibond sale.

### I. THE MUNICIPAL BOND MARKET

State and local bond issues are strictly regulated by state statutory law.[2] Typically, bonds are sold in minimum denominations of $5,000.[3] The investor pays the face value of the bond

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1 Donlan, *Mini-Municipals*, BARRON'S WEEKLY, Aug. 6, 1979, at 11.

2 E. MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS §§ 43.02, .18, .42 (3d ed. 1970).

3 Lehan, *The Case for Directly Marketed Small-Denomination Bonds*, GOVERNMENTAL FINANCE, Sept. 1980, at 4.

and receives semi-annual interest payments over the duration of his investment.[4] Early-redemption subjects the investor to a substantial interest penalty.[5] Interest income from municipal bonds is exempt from federal and state income tax.[6]

To receive interest payments, an investor clips small coupons and mails them to a local bank.[7] This bank forwards the coupons to the certifying bank,[8] which pays the investor, reconciles the account by pasting the coupons in ledgers, and returns canceled coupons to the issuer.[9] The payment process involves an element of risk to the bondholder because of possible loss or theft of the negotiable coupon.[10]

Once the municipality decides to issue bonds, it publishes notice of the total value of securities offered and invites underwriters[11] to bid on the issue.[12] Bidders offer to buy the entire block of securities at various interest rates, which represent the price the municipality must pay for the funds. The issue is sold to the underwriter offering the lowest interest cost to the issuer.

Underwriters may then sell the securities to other investors. The bonds can be sold below, at, or above "par," the face value of the security, depending on market conditions at the time. The difference between resale price and par value represents the

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4 The actual bond can take a number of specific forms, such as coupon, registered, and deep discount. *See generally* E. MCQUILLEN, *supra* note 2, §§ 43.05-.09.

5 This penalty involves a reduction of the interest revenue paid to the investor and results in a disproportionately small rate of return for the duration over which the security was held.

6 Municipal bonds are exempt from federal income tax. I.R.C. § 103 (1981). Tax treatment at the state level depends on specific statutory exemptions. *See, e.g.*, MD. ANN. CODE art. 31, § 22 (1957); MASS. ANN. LAWS ch. 59, § 5 (Michie/Law. Co-op. Supp. 1982); OR. REV. STAT. § 286.070 (1979); R.I. GEN. LAWS § 44-3-3 (Supp. 1981).

7 Donlan, *supra* note 1, at 11.

8 The certifying bank, or paying bank, is hired by a municipality to perform the administrative tasks involved in a bond issue. The bank can coordinate publication of the prospectus, certification by bond counsel, interest payment over the duration of the issue, and reconciliation of the interest accounts. Of course, this service is provided at a cost. Communities generally survey local banks and choose the one offering to provide servicing at the lowest cost. A community can eliminate bank fees by performing the functions directly through the treasurer's office. Telephone interview with Julio Farulla, Treasurer, Town of Needham, Mass. (Apr. 7, 1982). *See generally* E. MCQUILLEN, *supra* note 2, at §§ 43.02, .18, .42.

9 Farulla, *supra* note 8.

10 Donlan, *supra* note 1, at 11, 22.

11 Individuals, institutional investors, investment bankers, and groups of bankers called syndicates can bid on the offering.

12 For a discussion of issuance procedures, see E. MCQUILLAN, *supra* note 2, at §§ 43.65-.66.

underwriter's profits and charges for handling,[13] leaving investors with a reduced real rate of return.

Unlike traditional offerings, minibonds typically are issued in $100, $500, and $1,000 denominations and are sold directly to individual investors. To reduce administrative costs, minibonds are offered in deep-discount and coupon form. Under the deep-discount arrangement, the investor pays a fraction of the face value of the note, but does not receive interest income until the bond is redeemed at face value. Coupon minibonds generally are offered in magnetic ink character recognition ("MICR") encoded form. Along with their bonds, investors receive a booklet of check-style[14] coupons which are magnetically encoded to allow processing by computerized scanning machines which banks use for processing checks.[15] The coupons can be cashed at any bank, supermarket, or retail store and are returned to the issuer like canceled checks.[16] Since the investor is paid upon initial presentation of the coupon, the risk of loss or theft characteristic of traditional bonds is reduced.[17] Certifying banks can provide the issuer with the same processing and reconciliation services available in traditional bond sales.[18]

Since minibonds are sold directly to the public, there is no need to solicit bids from underwriters. Interest rates are determined in one of two ways: either minibonds are part of a larger traditional offering and adopt the same rates as the major issue, or issuers and their certifying banks survey the local security markets and unilaterally determine the rate of return.[19] Municipalities also have attempted to provide early-redemption privileges for holders of minibonds, either by redeeming the bonds themselves or by maintaining a list of bondholders and interested purchasers and matching parties seeking to transfer securities.[20]

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13 On average, underwriters charge $20 per $1,000, or 2% of par value of the securities. *See, e.g.*, Donlan, *supra* note 1, at 12; Lehan, *supra* note 3, at 5, 6.

14 The coupons are postdated to allow interest payments at designated intervals.

15 Donlan, *supra* note 1, at 11.

16 *Id.*

17 *Id.*

18 *See supra* note 8.

19 *See infra* text accompanying notes 30-34.

20 *See infra* text accompanying notes 46-47.

## II. Objectives of Minibond Financing

### A. *States' and Municipalities' Objectives*

Since minibonds represent such a small fraction of total state debt offerings,[21] states which issue these securities usually are motivated by a desire to make available tax-free investments to citizens rather than by financial considerations. A number of states have adopted minibond programs in direct response to inquiries from their citizens.[22]

Revenue considerations are a major factor in municipal minibond issues because municipalities generally operate on smaller budgets than states.[23] Thus, they do not have access to as wide a range of borrowing markets as do states with larger financing needs. A minibond offering can provide total funding for many municipal projects. One advantage of the minibond approach is that it creates an additional investment market for issuing municipalities.

Moreover, municipalities as well as states offer minibonds as a service to citizens who are not able to meet the $5,000 minimum of traditional bond markets. Local leaders also hope that minibonds will increase citizens' awareness of the municipality's financial situation and result in greater acceptance of necessary budget and tax increases.[24]

The success of a minibond sale in a particular locale depends on factors such as the relative wealth of the citizenry, the propensity of citizens to invest in new securities, the size of the bond issue, and the prevalence of recent debt offerings by neighboring towns. Problems with any of these factors can dampen

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21 For information on the limits placed on state minibond issues, see *infra* text accompanying notes 48-66.

22 Massachusetts and Tennessee adopted minibond programs for this reason. Telephone interview with Patrick Sullivan, First Deputy State Treasurer, Commonwealth of Massachusetts (Oct. 12, 1981); telephone interview with David L. Manning, Executive Assistant to the State Treasurer, State of Tennessee (Nov. 5, 1981).

23 Telephone interview with L.M. Neely, Finance Director, Township of East Brunswick, N.J. (Oct. 30, 1981).

24 Telephone interview with Russell E. Galipo, Vice President, Hartford National Bank and Trust Co. (Nov. 2, 1981).

enthusiasm for the offering and may result in lagging sales and administrative difficulties.

### B. *Individual Investors' Objectives*

Investors benefit from the tax advantages of municipal bonds because the return on these securities is exempt from state and federal income tax. Of course, investors in jurisdictions which levy a state income tax derive greater benefits from these securities than investors in states which do not tax income. In either case, minibonds provide investors who are not able to meet the $5,000 minimum of traditional bonds an opportunity to invest smaller amounts in government securities.

Minibonds provide other benefits to investors. Individuals may wish to purchase municipal bonds because of civic pride or out of a desire to participate in a local building project. Minibonds provide a vehicle through which individuals can achieve these objectives.

### C. *Underwriters' Attitudes*

Underwriters form the largest group opposed to the minibond trend.[25] They perceive minibonds as a threat to their underwriting revenue. States and municipalities have responded to this fear by setting low limits on the total value of minibonds which jurisdictions can issue each year.[26] These restrictions as well as limits on consumers' investment capacity should give underwriters little reason to worry. Minibonds represent only a small fraction of debt outstanding and pose a negligible threat in the future. Indeed, the size of future minibond markets, once this financing approach is fully developed, has been estimated at only $5 billion of a total municipal debt of $60 billion.[27]

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25 Manning, *supra* note 22; *cf.* Donlan, *supra* note 1, at 11, 12.

26 For example, Massachusetts permits only $10 million, Tennessee $2 million, and Maine and Rhode Island $1 million each. *See infra* text accompanying notes 48-66.

27 Donlan, *supra* note 1, at 11, 12.

## III. Characteristics of Minibond Issues

### A. *Form*

Traditional $5000 bonds are issued in coupon form with interest payments processed manually by certifying banks or issuing municipalities. Since minibonds involve splintering large offerings into hundreds of smaller-denomination securities, the costs of offering minibonds in traditional form can be prohibitive.[28] Therefore, municipalities generally have chosen to offer minibonds in deep-discount or MICR encoded forms. Deep-discount bonds simplify the issuer's role by eliminating servicing requirements for bonds between purchase and redemption. Since interest is not paid to the investor until redemption, the municipality retains interest and saves administrative expenses.

Nevertheless, there are drawbacks to the deep-discount approach. First, since investors pay only a fraction of the bond's face value upon purchase, issuers seeking specific funding targets must authorize a larger nominal debt to realize their revenue objectives. Although the issuer profits by holding and investing the funds that are not paid as interest over the duration of the bond, legislators and citizens may be reluctant to approve a nominally larger debt. Of course, this problem can be rectified through education and public-relations measures.

A second objection to the deep-discount form is that it deprives investors of a steady stream of interest payments. Investors, however, purchase municipal securities to derive long-term tax-shelter or capital-gains advantages as well as to obtain interest income. Deep-discount bonds provide an initially lower-priced investment to individuals who are not as concerned with receiving interim interest payments.

Under the coupon approach, MICR encoded minibonds pay interest over the life of the security as in traditional issues, yet reduce administrative handling by relying on computerized processing. Since certifying banks provide the computerized services for a fee, however, the extent of actual cost reduction by an MICR encoding system is debatable.

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28 *See id.* at 11.

Furthermore, a municipality may choose to register its securities. Registration requires the municipality to maintain a list of the names and addresses of all bondholders.[29] While both deep-discount and coupon securities can be registered, the advantage of registering coupon bonds is that the certifying bank can mail interest checks directly to bondholders, who are not required to mail coupons to the bank or municipality. Risk of coupon loss or theft is reduced under this approach.

### B. *Rate of Return*

The traditional bond market functions well in determining rates of return on securities. Underwriters "bid" on the issue and the municipality accepts the offer which requires it to pay the lowest interest charges. The competitively determined return is considered "fair" in two respects: investors receive the market rate of interest and municipalities issue securities at the lowest cost.[30]

Municipalities set rates of return for minibonds in one of two ways. First, if the bond sale is an "independent issue," not sold in conjunction with a larger block of securities, the municipal treasurer or the certifying bank surveys the local bond market to determine prevailing rates for other municipal securities of similar size, risk, and duration. The municipality then sets whatever rate it deems consistent with market trends.[31] When the minibond issue is part of a larger debt offering, the rate of return is set at the level of the traditional securities in the same issue.[32]

Critics of minibonds argue that when the treasurer sets the rate of interest, it usually will be lower than that offered under competitive bidding. This is because municipalities can attract individual investors when offering interest rates that are lower than those required by institutional investors. Large institutional investors are faced with many investment alternatives and are unwilling to purchase securities with returns lower than those

29 Municipalities maintain records of bondholders in order to arrange direct interest payments, as well as to facilitate communication and to provide an added measure of security for investors.

30 *See* Donlan, *supra* note 1, at 12.

31 Lehan, *supra* note 3, at 7.

32 Massachusetts and Tennessee follow this approach. *See supra* note 22.

available on other issues. Individual investors, with limited investment options for short-term, low-denomination securities, are likely to accept lower returns. Indeed, a survey comparing the rates of return for traditional bonds and minibonds indicates that minibond returns are .25% to 1% lower than those for traditional issues.[33] Critics claim, therefore, that municipalities unfairly deny to small investors returns comparable to those available on traditional securities.[34]

This argument can be challenged in two respects. First, interest rates on traditional bonds reflect only the nominal or coupon rate. Since an investor usually purchases traditional securities from an underwriter above "par," the real rate of return on his investment is below the nominal rate of the bond. For example, an underwriter who purchases a $5,000 security paying interest at 7% usually will sell it to an investor above par for approximately $5,100. Since the investor receives 7% interest on the face value of $5,000, the real rate of return on his investment of $5,100 is less than 7%. Municipalities thus argue that minibond returns approximate real interest rates and offset underwriters' fees without harming investors' interests.

Second, to accept the argument that minibond returns should mirror rates available on traditional securities, one must assume that minibond purchasers also have the option of investing in higher return securities. Many investors, however, do not have such an option since they are not able to meet the $5,000 minimums of traditional bonds.

### C. *Administrative Costs*

Bond specialists disagree as to the administrative burden which minibonds place on a municipality. Since traditional bonds are sold through the competitive bidding system, the issuer deals with only one underwriter or investor who purchases the entire bond issue. The underwriter then sells the securities through its own marketing network.[35] This bidding

33 Lehan, *supra* note 3, at 6.
34 *See* Donlan, *supra* note 1, at 12.
35 *See supra* text accompanying notes 11-13.

system evolved to simplify bond issuance procedures for municipalities.

A municipality, however, markets minibonds directly to investors through mail subscriptions, its treasurer's office, or a community bank. Critics contend that the processing and handling expenses for minibonds are staggering. Municipalities must publicize the sale to attract local purchasers, print large numbers of securities because of the small denomination of each bond, and issue the securities to the public. Critics envision treasurers' offices being mobbed by citizens seeking these securities. They claim that the cost to the treasurer's staff is greater than the savings derived from eliminating underwriters' charges and from marketing the bonds at lower interest rates.[36]

Proponents of minibonds argue that municipalities can minimize handling costs by limiting the number of days on which securities will be sold, by requiring advance mail subscriptions to permit more timely processing of citizens' requests, and by adopting deep-discount or MICR encoded forms. Municipalities which register securities will incur slightly higher costs in the initial stages because of the additional bookkeeping entries required for large numbers of securities. Nevertheless, when compared to the municipality's lower interest costs,[37] savings can be significant.[38] Much depends upon the scope and size of the sale, the strength of investor demand, which affects the length of the sales period, and the efficiency of the treasurer's staff.

### D. *Denomination*

Unlike traditional bonds which require a minimum $5,000 investment, minibonds are sold in $100, $500, and $1,000 denominations, giving citizens with limited sums to invest an opportunity to acquire tax-exempt securities. Many, however, question the value of providing tax-exempt securities to investors who are in low marginal-tax brackets. The returns on min-

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36 *See supra* text accompanying notes 30-34.

37 *See supra* text accompanying notes 31-34.

38 *See* Lehan, *supra* note 3, at 6; *infra* text accompanying notes 48-76. Although the .25% to 1% saving on a $1 million issue may not seem substantial, at minibond interest rates of 6-7%, it can represent as much as one-sixth of the total interest costs of the issue.

ibonds currently average 5% to 8%,[39] as compared with corporate returns of about 14% to 15%.[40] Analysts contend that tax-free securities benefit only those whose marginal tax rate is at least 30%.[41] This is because the tax liability on regular securities is more than offset by their higher returns for those with low marginal tax rates. Only investors in high tax brackets can benefit from the lower but tax-free returns of government bonds. These individuals, many argue, are already adequately served by traditional bond markets.

It is important to keep in mind, however, that inflation and tax code revisions have placed a significant percentage[42] of the population in the 30% tax category. According to the 1981 tax tables, this group encompasses single persons earning at least $15,000 annually[43] and married couples earning $24,600 or more yearly.[44] These individuals can benefit from the tax advantages of municipal securities although they may not be in a position to invest $5,000 in a traditional bond.

Many claim that while $500 and $1,000 minibonds may be worthwhile for a municipality, splintering $5,000 traditional bonds into $100 securities involves substantial administrative handling. Yet municipalities may wish to issue $100 minibonds for strategic or educational purposes. By expanding initial markets to encompass the widest scope of investors, municipalities can familiarize consumers with tax-exempt securities. Once the public becomes accustomed to considering the tax implications of investments and to holding municipal issues, an issuer can eliminate the $100 offerings without significantly reducing the underlying investment constituency.[45] This, of course, assumes that investors will be able to purchase the $500 or $1,000 bonds.

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39 For a listing of returns on minibonds issued in 1978-1979, see Lehan, *supra* note 3, at 5. For a detailed discussion of minibond issues between 1978 and 1981, see *infra* text accompanying notes 48-76.

40 Aaa-rated corporate securities issued in 1982 have an average 13.99% to 14.84% interest return. 53 MOODY'S INDUSTRIAL NEWS REPORTS 2565 (1982).

41 *See* Donlan, *supra* note 1, at 12, Lehan, *supra* note 3, at 4, 5.

42 In 1980, 39% of all families had an annual income of $25,000 or more. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES P-60, NO. 127, MONEY INCOME AND PROVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1980 (Advance Report) 15 (1981).

43 U.S. Internal Revenue Service, *Form 1040*, Schedule X (1981).

44 U.S. Internal Revenue Service, *Form 1040*, Schedule Y (1981).

45 Galipo, *supra* note 24.

### E. *Bond Liquidity*

Although traditional bonds impose penalties for early redemption, issuers of minibonds have not followed suit, out of concern for maintaining the liquidity of small investors' securities. Community leaders wish to provide citizens with investment opportunities without significantly restricting the investors' access to funds. It can be argued, however, that minibond investors should hold bonds to maturity or suffer penalties for early redemption as do traditional bond purchasers. If investors cannot commit funds and assume the risk of such holdings, these individuals should not invest in municipal securities.[46]

Minibond issuers have developed two methods for enhancing minibond liquidity. Under the first approach, the municipality creates a secondary market. The issuer acts as an intermediary or clearing house for matching interested buyers and sellers. Municipalities maintain lists of individuals interested in minibond purchases and of existing bondholders. Parties are matched without requiring either to incur a penalty charge.[47] The secondary-market approach is particularly suited to jurisdictions that market registered securities because they already maintain lists of bondholders. Under this method, the municipality does not risk its supply of capital, although investors may not be able to find interested purchasers when market conditions are poor.

Direct repurchase of minibonds is another method of enhancing bond liquidity. Under this approach, investors may redeem minibonds before maturity. One method of redemption can be a pro-rata system. An investor with a 7% bond would receive interest payments at that rate for the shorter time period that he holds the security. This method overcompensates those who redeem early because a security's return reflects a payment for the uncertainty of holding a fixed-rate instrument for a particular time span; generally, the longer the duration, the higher the return. Thus, providing a limited number of interest payments at rates corresponding to those of longer-term issues gives investors who redeem securities early a higher rate than investors

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46 Neely, *supra* note 23.

47 *See supra* text accompanying note 29.

holding shorter-duration securities to maturity. An investor who has no intention of holding a long-term security to maturity can purchase such a bond and redeem early in order to receive the higher returns.

Alternatively, issuers can readjust the interest rates to reflect the shorter duration of the early-redemption securities. Investors would receive a rate comparable to that of a shorter-term security held to maturity. Thus, if the rate of return on three-year securities is 7% while the return on a one-year bond is 6.5%, an investor redeeming a three-year bond after one year would receive an adjusted 6.5% return. This method nevertheless encourages investors who intend to hold a longer-term bond to redeem securities whenever interest rates on newer issues increase since there is no penalty in such a transaction.

Under an early-redemption scheme, municipalities forego the certainty of holding funds for a fixed time period. This result is contrary to the objectives of bond financing measures. Municipalities issue securities to meet capital requirements and to shield themselves from market fluctuations. They compensate investors through interest payments for bearing the risk of market changes over the duration of the issue. If investors are permitted to redeem securities before maturity, municipalities will lose the guaranteed supply of capital which prompted the bond issue in the first place.

## IV. Recent Experience with Minibond Issues

### A. *States*

Massachusetts was the first state to offer minibonds. Its program, which began in January 1979, is regarded as a model for other states considering the issue of minibonds. The original enabling legislation, enacted in 1978, permitted the state treasurer to designate up to $1 million of total authorized bond issues to sell in minibond form each year.[48] The initial issue of $1 million in $100, $500, and $1,000 denominations was sold from the treasurer's office and was fully subscribed within

48 Mass. Ann. Laws ch. 29, § 49A (Michie/Law. Co-op. 1978).

hours.[49] The bonds were issued in deep-discount form with interest rates corresponding to those of the larger debt offering of which the minibonds were a part. The original legislation was amended in 1979 to allow a $10 million debt limit on minibond sales yearly.[50] In September of 1979, $10 million of minibonds were offered and only $6 million of securities were sold in the thirty day subscription period.[51] Since that time, two more issues of $5 million each have been sold — in October 1980 and May 1981 — both of which were fully subscribed.[52] One analyst considers the failure of the $10 million offering in 1979 an indication of the limits of the demand for municipal minibonds.[53]

Massachusetts permits investors to redeem minibonds early without incurring any interest penalty. This is the one drawback to that state's program. It has allowed holders of earlier series of minibonds to redeem them and purchase later issues with higher interest returns.[54] Since the returns on January 1979 securities average 5.7%[55] while October 1981 minibonds pay 8% interest,[56] investors have taken advantage of the early-redemption provision. Massachusetts has lost a portion of its capital supply as a result and has had to reacquire it at higher interest rates.

In 1980, Tennessee adopted legislation similar to the Massachusetts provision, but with a $2 million debt ceiling and a modified redemption plan.[57] Tennessee permits early exchange but modifies the rate of return to correspond to the shorter duration of the issue.[58] The state is now awaiting legislative authorization of debt in order to issue its first minibond offering.[59]

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49 *See* Sullivan, *supra* note 22.
50 MASS. ANN. LAWS ch. 28, § 49A (Michie/Law. Co-op. Supp. 1982) (amended 1979).
51 Lehan, *supra* note 3, at 4.
52 Sullivan, *supra* note 22.
53 Lehan, *supra* note 3, at 4.
54 Sullivan, *supra* note 22.
55 Lehan, *supra* note 3, at 5.
56 *See* redemption schedule on the back of Minibond, Series D, Commonwealth of Massachusetts.
57 TENN. CODE ANN. §§ 9-9-401 to -406 (Supp. 1981).
58 *See supra* text accompanying notes 46-47.
59 Manning, *supra* note 22.

Maine enacted its minibond legislation in 1979[60] and attempted to sell the full $1 million authorized in that year in registered deep-discount form. The securities were issued at 6.1% interest and carried an early-redemption feature. Despite thirty days of sale, only $930,000 of registered coupon bonds were sold.[61] State officials claim that minibonds were more costly than traditional bond offerings because of the administrative costs involved in registering and processing the securities and because of advertising and printing expenses.[62] As a result, the state treasurer's office does not plan any further minibond offerings absent specific legislation requiring such an action.[63]

Rhode Island also adopted legislation permitting minibond sales of $1 million annually with early redemption one month after issue, although the Treasurer is not planning a minibond sale at this time.[64] Maryland and Oregon have minibond provisions which authorize municipalities — but not states — to sell securities in low denominations.[65] Maryland permits municipalities, except the City of Baltimore, to market securities directly to the public. The Oregon statute enacted in 1981 permits cities to market small-denomination securities in accordance with rules to be established by the state treasurer's office.[66]

### B. *Municipalities*

Many municipalities have adopted minibond programs. In September 1978, the township of East Brunswick, New Jersey became the first to adopt minibond financing.[67] Within hours, $529,000 in $100, $200, and $500 MICR encoded coupon securities were sold.[68] No special enabling legislation was required

60 ME. REV. STAT. ANN. tit. 5, § 145-A (Supp. 1981).

61 Telephone interview with Maurice Stickney, Deputy Treasurer, State of Maine (Apr. 7, 1982).

62 *Id.*

63 *Id.*

64 R.I. GEN. LAWS § 35-8-20 (Supp. 1981); telephone interview with Anthony J. Solomon, Treasurer, State of Rhode Island and Providence Plantations (Mar. 18, 1982).

65 MD. ANN. CODE art. 31, § 29 (Supp. 1981); OR. REV. STAT. § 287.029 (Supp. 1981).

66 Telephone interview with James C. Joseph, Manager, Municipal Bond Division, State Treasury, State of Oregon (Apr. 9, 1982).

67 Donlan, *supra* note 1, at 11.

68 *Id.*

even though New Jersey law requires competitive bids for bond offerings.[69] The East Brunswick treasurer was able to avoid these restrictions by fixing a 4.6% to 5% interest rate on the minibonds prior to opening the issue for bidding. This interest rate was approximately 1% lower than returns on the township's other securities. Underwriters realized that they would be unable to sell such low-return securities to their investors and declined to bid on the issue. The treasurer then was able to sell the bonds directly to the public.[70]

Ocean County, New Jersey;[71] Rochester, New York;[72] and Arlington,[73] Needham,[74] and Framingham, Massachusetts[75] are also among the municipalities which have sold bonds directly to individual investors. Stonington, Connecticut has issued registered securities with interest payable by check directly by the bank to investors.[76]

## CONCLUSION

The minibond concept encompasses a variety of objectives, approaches and applications. A major goal of all issuers is to

69 N.J. STAT. ANN. § 40A:2-:27 (West 1980).

70 *See* Chell, *Small Denomination Bonds to be Sold by N.J. Township*, THE WEEKLY BOND BUYER, Sept. 25, 1978, at 9, col. 1.

71 The county issued $1 million in $100 and $500 coupon bonds paying 5.25% to 5.65% interest in April 1979. The issue was fully subscribed in three days, although it was slightly more costly than traditional bond measures. Telephone interview with Julie Towne, Comptroller's Office, Ocean County, N.J. (Nov. 5, 1981).

72 The city sold $500,000 of MICR encoded coupon bonds in $500 denominations in December 1979. The bonds paid 5.85% to 6.00% interest. The issue was considered successful and was done primarily as a public service. Telephone interview with Becky McNamara, Treasurer's Office, Rochester, N.Y. (Nov. 5, 1981).

73 Arlington sold $345,000 in $500 coupon minibonds in January 1981. These securities, paying 6.60% interest, were part of a larger debt issue and were sold out within three hours. Although financial considerations prompted the sale, the community derived significant public-relations benefits as a result of the issue. Telephone interview with Fred Fiantini, Assistant Treasurer, City of Arlington, Mass. (Apr. 7, 1982).

74 Needham issued $316,000 in $1,000 and $5,000 denominations in October 1981. Although the issue was successful and the city saved .5% to 1% in interest expenses, the city treasurer concedes that the market for these securities is limited and that community spirit plays a large role in the success of a sale. Farulla, *supra* note 8.

75 In March of 1979, Framingham offered $600,000 in $1,000-denomination minibonds paying 5.00% interest. The issue was sold out in one and a half days. The bonds were in registered coupon form, and the program saved the city the underwriters' expenses while providing significant public-relations benefits. The city will consider additional minibond issues. Telephone interview with Donald Croatti, Treasurer, City of Framingham, Mass. (Nov. 10, 1981).

76 Galipo, *supra* note 24.

provide tax-free investment options to consumers. Municipalities also wish to raise funds and to develop local support for revenue measures by transforming taxpayers into creditors and increasing citizens' awareness of local government problems.

Concern over maintaining the liquidity of citizens' investments has prompted issuers to provide early-redemption or secondary-market privileges. Although early redemption harms community interests by threatening the available supply of capital, the secondary-market approach involves no risk to municipalities while enhancing the bond purchasers' investment position.

Benefits to investors also vary according to individuals' reasons for purchasing the securities. Some individuals are motivated by community pride or a desire to participate in a particular development project. Others desire the tax advantages that municipal securities provide. In general, individuals in a 30% or higher marginal tax bracket benefit from the tax advantages of minibonds, although benefits to consumers are higher in municipalities with state and local income tax.

Since most states require syndicate bidding, notice, and publication for bond issues, special legislation is required for a direct sale of state-issued securities to the public. East Brunswick, New Jersey has avoided these requirements by setting low interest rates before opening the issue for bidding. Other communities have simply proceeded with the sale where the law neither permits nor forbids such issues.[77]

The success and desirability of minibond programs also depend on the relative wealth of the community and citizen enthusiasm over such a proposal. The prevalence of other area bond issues, the size of the minibond offering and the timing of the sale in relation to past municipal or state issues are additional factors affecting the success of the program.

The minibond concept is growing in popularity among states and municipalities as citizens become increasingly aware of the tax implications of their investment decisions. Minibonds seem to serve most municipalities well, although some have reported

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77 For an account of the New York State Comptroller's Office ruling on the validity of such sales absent specific legislative restrictions, see *Minibond Sale is Given Go-Ahead*, THE WEEKLY BOND BUYER, Jan. 14, 1980, at 8, col. 3.

only partial success with the sale. Minibonds probably will not develop into a major financing mechanism because of the limited investment resources of average citizens. Nonetheless, they do allow municipalities to provide tax-free investment options to citizens and to derive financial and public-relations benefits for the community. In light of the interest these programs have generated since their inception just four years ago, minibonds are a developing trend for municipal finance in the 1980's.

# BOOK REVIEWS

THE ECONOMICS OF JUSTICE. By *Richard A. Posner*. Cambridge, Mass.: Harvard University Press, 1981. Pp. vii, 415. $20.00 cloth.

*Review by Gary L. McDowell**

On the eve of President Reagan's appointment of Sandra Day O'Connor to the United States Supreme Court, Thomas Sowell, in a letter to the *Wall Street Journal*, urged that Richard A. Posner of the University of Chicago Law School be appointed instead. Sowell argued that, given the increasing economic complexity of modern life, it is important that someone on the Court have knowledge of that complexity. As this volume (most of which has been previously published in other forms) attests, Richard Posner is indeed an articulate spokesman for the field of the economics of law. But, all Posner's other qualifications aside, it is simply not clear that having an economic perspective of the law is a necessary (or even an appropriate) qualification for a Justice of the Supreme Court. For although the Court may be faced with increasingly complicated economic-legal questions, answering economic questions is not its primary purpose. In the end one must remember that the Court is, in the felicitous phrase of Ralph Lerner, a "Republican Schoolmaster" whose task is to articulate the fundamental *political* principles of the regime. The issue, then, is whether an economic jurisprudential approach is sound. In this instance, one can safely say that it is as sound as it can be.

As Professor (now Judge) Posner observes, this book is a collection of essays that cover "seemingly disparate subjects" but are "interrelated from the standpoint of economics" (p. vii). The book includes sections on (1) the efficiency theory of justice, (2) the social and legal institutions of primitive and archaic societies, (3) the law and economics of privacy and related matters, and (4) the constitutional regulation of racial discrimination and "affirmative action." Each section develops the idea that rational decision-making is a confrontation between the

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known and the unknown — a confrontation that involves calculating risks and deciding which risks to take. The underlying premise is that all decision-making implicitly shares that which is explicit in economic theory: in making decisions people weigh the costs and benefits of alternatives. The ultimate thesis is as follows:

> Although the traditional subject of economics is indeed the behavior of individuals and organizations in markets, a moment's reflection on the economist's basic analytical tool for studying markets will suggest the possiblity of using economics more broadly. That tool is the assumption that people are rational maximizers of their satisfactions. The principles of economics are deductions from this assumption — for example, the principle that a change in price will affect the quantity of a good by affecting the attractiveness of substitute goods, or that resources will gravitate to their most renumerative uses, or that the individual will allocate his budget among available goods and services so that the marginal (last) dollar spent on each good or service yields the same satisfaction to him; if it did not, he could increase his aggregate utility or welfare by a reallocation. (P. 1.)

The book's parts fit together well as a whole, moving from relatively abstract discussions of Blackstone, Bentham, and utilitarianism (in parts I and II) to more practical discussions of the application of Posner's theory to concrete political, legal, and constitutional issues (parts III and IV). For example, Posner explains the phenomenon of racial discrimination this way:

> Although there are pecuniary gains to trade between blacks and whites . . . such trade imposes non-pecuniary but real costs on those who dislike association with members of the other race. These costs are analogous to transportation costs in international trade, and like transportation costs they reduce the amount of trading and of the association incidental to it. (Pp. 351-52.)

The problem with this book is not that it is deficient in any technical sense, but that the argument it posits for legal and constitutional thinking is ultimately insufficient. Even if economic efficiency is, as the author argues, "an ethical as well as [a] scientific concept" (p. 13), its ethical basis is not broad enough to support a constitutional jurisprudence. Admittedly, the author does not suggest that economic theory provides a comprehensive view of law and legal matters, but his main

thrust is unambiguous: "the law uncannily follows economics" (p. 5). The problem with viewing law or other social institutions primarily through the lens of economic analysis is that the lens may serve to distort and obscure as much as it clarifies and uncovers.

The basis of the economic approach to law (like the economic approach to public policy) is the idea of consumer sovereignty: the idea that all persons of mental competence are capable of choosing what is best for them and should be allowed to do so without paternalistic interference. But, more accurately, consumer sovereignty is only the belief that men are capable of choosing what they think is best for them. That one's interests may on occasion be lost in the pursuit of one's inclinations is no great surprise. But while such a disjunction in private matters (buying a sports car instead of a station wagon for a family of five, for example) may be little more than annoying, in the public arena such a confusion can be catastrophic: the public interest is not always best served by unfettered public opinion. Welfare economics with its faith in consumer sovereignty is often incapable of providing any principled basis for distinguishing between the opinion of the public and their true interests.

The economic theory of law, by focusing on the normative assumptions of welfare economics, is informed by only one aspect of law broadly considered: consent. It is forced to ignore an equally powerful correlative aspect: wisdom. But in the American political tradition, the concern must be with both aspects of the law. As Alexander Hamilton pointed out in *The Federalist*, No. 71:[1]

> It is a just observation, that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do . . . .

By elevating the presumptions of consumer sovereignty to the status of constitutional jurisprudence we tend to lose sight of the problems of such decision-making. Given, as James Madison

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1. THE FEDERALIST No. 71, at 482 (A. Hamilton) (J. Cooke ed. 1961).

said in *The Federalist*, No. 10, that man's reasoning is inherently fallible and that he comes to be vehemently attached to his opinions that flow therefrom, the premises of consumer sovereignty — or consent — point to the primary problem of popular government: faction. In such a regime, Madison warned, "the public good is disregarded in the conflicts of rival parties, and . . . measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[2] The problem is that men, left to themselves, will pursue what they perceive to be their self-interest — they will behave as "maximizers of their satisfactions." While this may be economically efficient it is not necessarily just. And to suggest that economic efficiency is justice is to obscure the distinction between consent and wisdom necessary to any sound jurisprudence.

Jeffrey L. Sedgwick, in *Deterring Criminals: Policy Making and the American Political Tradition* (1980), provides a sound rejoinder to Professor Posner and his allies. "Put simply," Sedgwick notes,

> wisdom and consent exist together in our political tradition. Yet there is an irresolvable tension between the two; they cannot be reconciled in any simple way. The task of the policy maker defined by our political tradition is to bring them together. Total reliance on either wisdom or consent to the exclusion of the other would be improper. To the extent that welfare economics relies wholly on consumer sovereignty or public preference to identify desirable policies, that paradigm may be incompatible with American political tradition and the public interest. (P. 3.)

Ultimately, Posner's *The Economics of Justice* fails for the same reason that Friedrich A. Hayek's *Law, Legislation, and Liberty* (1979) fails: each fails to take seriously the science of politics. One would do well to recall Aristotle's judgment that politics is the architectonic science of human affairs because it employs and marshals the other sciences, including economics, for the good of man.[3] The economic theory of law aspires toward a notion of justice that is relatively unconcerned with wisdom or inquiries of how men ought to live; it is satisfied to describe

2. THE FEDERALIST No. 10, at 57 (J. Madison) (J. Cooke ed. 1961).
3. ARISTOTLE, NICHOMACHEAN ETHICS, BOOK I, CH. 2, 1094a26-b7.

how men live. Law should be more than that. Constitutional jurisprudence must be more than that; it must speak not only to the economics of justice, but more importantly, to the justice of economics.

THE DILEMMAS OF PRESIDENTIAL LEADERSHIP: OF CARETAKERS AND KINGS. By *Frank Kessler*. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1982. Pp. xii, 404, notes, appendices, index. $11.95 paper.

*Review by Valerie Earle**

In *The Dilemmas of Presidential Leadership: Of Caretakers and Kings*, Professor Frank Kessler of Missouri Western State College has made a useful contribution to the ever-burgeoning literature on the American presidency. The book is thoughtful, well-organized, well-written, and comprehensive. It would make a very good textbook for an undergraduate course in the American presidency.

As the footnotes in the book reveal, Kessler has familiarized himself with a large number of studies. In appendices he also presents statistical data such as the term(s), party, state of origin, and age of each President; the background information on the nominees for the office from 1932 to 1980; and the constitutional provisions relating to the presidential office.

In the first chapter, entitled "Will the Real President Stand Up?," Kessler makes the point that the presidency has a mystique which makes it difficult for those entering the office to appraise it realistically. The nature of the presidency varies because public views of the presidency differ, Presidents themselves differ in their conception of the office (for example, some are "literalists" and others are "activists"), and presidential personalities and characters differ. Furthermore, Presidents do not always understand that they must play politics or know how to play, even if they understand they must try. Thus, it is

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difficult to describe the presidential office as powerful or passive or imperial or truly political.

In succeeding chapters, Kessler discusses the sources of advice for the President: the personal staff ("Buddies, Brains, Bootlickers and Some Yahoos") and bureaucratic advisors. Kessler believes that a President should have access to diverse points of view; however, he cautions that personal staff may excessively shelter a President from those points of view. With respect to bureacratic advisors, Kessler states that a President does need the expertise of bureaucrats, but may find the "beasts" difficult to control.

Kessler then discusses those groups which are competitors for national leadership: the Congress (in both domestic and foreign policy), the courts, the bureaucrats, and the "imperial" press. He believes that Congress has abdicated much of its role, and he suggests that, especially in the field of foreign policy and national defense, Congress should assert itself far more vigorously than it has in the last seventy-five years. For example, Kessler suggests that Congress should persuade the President to share more information about national security matters. Similarly, Kessler believes that the judiciary constitutes no serious enduring threat to presidential leadership; the Supreme Court has only rarely struck down presidential acts. The bureaucracy and the press, however, are very different matters; each has power against which the President has no satisfactory reprisal. Thus, Presidents have difficulty in dealing with either one of them.

Kessler's concluding section, "Choosing and Disposing of Presidents," deals with the politics of presidential selection, the formal means of election, and the accountability which a President must face. The first of the two chapters in the section deals briefly with matters ordinarily studied more intensively: the politics of presidential campaigns and the formal method of election. There is a disappointing absence of any allusion to or use of the study on presidential electoral politics by James Lengle and Brian Shafer, *Presidential Politics*. Also disappointing is Kessler's failure to advance any argument on behalf of the continued use of the Electoral College, whatever Professor Kessler's own conclusion may be as to the College. There is, however, a footnote reference to a study by Wallace Sayre and

Judith Parris, *Voting for President: The Electoral College and the American Political System*, in which a case for the Electoral College is made in terms of the results obtained, but no reference to the thoughtful, indeed brilliant, essay by Martin Diamond, *The Electoral College and the American Idea of Democracy*.

Other serious omissions occur in the concluding chapter on presidential accountability. Although there is a reference to Raoul Berger's substantial work on impeachment, there is none to the infinitely more readable and understandable essay by Charles Black, *Impeachment: A Handbook*.

On a less important scale, the reference to Edward Levi as President Ford's *Jewish* Attorney General (p. 88), there being no comment on the distinction enjoyed by Professor Levi in the legal profession, is decidedly annoying.

For a constitutional and legal analysis of the presidency, a student would be better advised to refer to the study by E.S. Corwin, even though it was published in 1957. Nevertheless, Professor Kessler has produced a useful addition to the literature on the presidency.

# RECENT PUBLICATIONS

THE WASHINGTON REPORTERS. By *Stephen Hess*. Washington, D.C.: The Brookings Institution, 1981. Pp. xii, 174, appendix, index. $17.95 cloth, $6.95 paper.

Despite the scholarly interest accorded the news media's role in covering Washington politics, the psyche of the individual reporter has been ignored. Stephen Hess attempts to remedy this academic neglect in his work, *The Washington Reporters*.

Armed with an arsenal of facts and a novel aim, Hess explores the inner motivations of the individuals who report on the happenings of our nation's capital, their reactions to their jobs, and their goals. Through their eyes, Hess also explores the functions and objectives of reporting in Washington.

Hess's data consist of the results of an extensive content analysis of news stories and an impressive number of interviews with both Washington reporters and editors. This combination allows Hess to blend the objective and the subjective. Hess's success lies in his ability succinctly to use his facts (chapters one through five) as a framework upon which his theoretical conclusions (chapter six) comfortably rest. What emerges is an examination of the reporters' psychological motivations and, more significantly, an attempt to understand the effects of those motivations on reporting. The glimpse of journalistic-political dynamics offered by *The Washington Reporters* is a welcome and refreshing addition to the study of the news media's influence on politics.

Paradoxically, Hess depicts the Washington reporter both as an isolated automaton and as a necessary link between political figures and the public. More particularly, based on an analysis of objective data, Hess finds that the "Washington reporter" is a well-educated white male in his thirties from the Northeast; and his political ideology is somewhat left of center. Hess concludes that Washington reporters are objectively elite.

Hess presents another, and equally disturbing, conclusion: elitism and its attendant trappings have engulfed Washington reporters. Not only are Washington reporters objectively elite, they are subjectively elite in their political reporting because they want to cover only intellectually stimulating and glamorous news beats.

This subjective elitism has resulted in the establishment of a rigid journalistic hierarchy. Certain news beats — for example, the Pentagon or the State Department — are more desirable than others, and even within these areas certain jobs are more desirable than others. The psychological effects of this hierarchy are enormous, especially for those reporters relegated to the "outermost ring" of news gathering and those given the most tedious tasks. Hess finds that these reporters are often dissatisfied and unmotivated, and the result is poor reporting.

Apart from the importance of the internal dynamics of Washington news reporting, Hess stresses the importance of Washington news outside the Capital: the news media and the public consider Washington to be the nation's focal point of newsworthiness. Yet, despite the prodigious commitment of journalistic resources to Washington, reporters are often unable to gain access to primary news sources. However, since congressmen are perpetually in quest of news coverage, they serve as willing intermediaries between reporters and newsworthy events. The lower-echelon elitist reporters are "fed" the news the congressmen want the public to hear, thereby facilitating widespread bias and distortion in the coverage accorded the nation's capital.

In addition to elitist reporting and the reporters' reactive rather than active reporting, Hess cites the autonomy accorded to but not utilized by reporters, "pack" journalism, and hostility towards individual creativity as indicative of an institutional crisis. Yet, change is viewed as anathema, in an institution mired in obsolescence.

In any event, whether reflective or symptomatic of the general malaise affecting our political system, this crisis quite clearly cries out for attention, explanation, and remediation. Hess's *The Washington Reporters* uses a "psycho-factual" perspective to successfully address the first two components; the third, however, lies beyond the scope of this work.

*Brad S. Karp*

CONTROLLING THE NEW INFLATION. By *Thomas J. Dougherty*. Lexington, Mass.: Lexington Books, 1981. Pp. xvii, 171, appendix, index. $18.95 cloth.

There can be little doubt that the primary cause of Reagan's landslide victory in 1980 was the public's frustration with the performance of the American economy. Nearly half a century after the introduction of the welfare state, the growth of the American economy was grinding inexorably to a halt. Persistent double-digit inflation, declining productivity, and slow or negative growth in the G.N.P. had forced Americans to reassess the American economy and to reexamine old assumptions. As a result, there has been a great increase in the number of books and articles that deal with economic theory. Although most of the new analyses have tended towards the right, several liberal or "progressive" economists, perhaps the most notable being Lester Thurow of M.I.T., have aired their views. Thomas J. Dougherty in *Controlling The New Inflation* follows Thurow in bucking the conservative current.

Dougherty asserts that inflation is among "the most serious threats to this nation's economic order and democratic system since World War II" (p. 5). He rejects the classic Keynesian demand-management response to inflation — forcing the economy into a recession to cool demand and thereby lower prices — as costly and inefficient. Ultimately, he concludes, inflation must be attacked at its roots. Dougherty proposes the imposition of wage and price controls followed by forced stabilization of "necessity prices" — prices for such essentials as food, housing, energy, and health services.

In a sense, however, Dougherty sets up a straw man. Reagan's "supply-side" economic theories, in contrast to those of the more orthodox demand-management school, do not assume that recession is necessary to stop inflation. Rather, the central thesis of the supply-side theory is that increased capital expenditures, facilitated by tax cuts, will stimulate productivity growth and produce real economic growth without inflation. *Controlling The New Inflation* fails to deal with this solution to inflation and economic stagnation and, therefore, misses the point in that regard.

Part I of Dougherty's book argues for the reimposition of wage and price controls, an anti-inflation measure most recently tried by President Nixon in 1971. Controls, Dougherty concedes, are not a popular economic tool because they simply do not work. The shortcomings of wage and price controls, which Dougherty himself recognizes, include "high administrative cost, ineffectiveness, waste, procedural unfairness, complexity, delay, unresponsiveness of the bureaucratic machinery to democratic control, inherent unpredictability of the wage-price results in many cases, and uneven impact on income distribution" (p. 20). Indeed, trying to legislate against the operation of the free market is like trying to outlaw gravity. If one interferes with the operation of the market, distortions and complications will necessarily occur. Anticipation of wage and price controls causes rapid wage and price increases. Withdrawal of controls precipitates similar increases. Dougherty documents these problems well in his outline of the history of past attempts. Moreover, prolonged imposition of controls results in market shortages, black-market or "underground" economic activity, and chronic underinvestment.

Although Dougherty is convinced that past failures need not be repeated, it is unclear what evidence justifies his confidence. Even his arguments for the necessity of controls are unconvincing. Dougherty's position seems to be that "shock" inflation in several key economic sectors — for example, energy (the OPEC price hikes) and agriculture (the food price explosion following the Russian grain deal) — has caused the double-digit inflation of the last few years. This explanation, though no doubt partly true, is nevertheless too simple. Assuming that the money supply is constant, increases in the prices of some goods, such as bread and crude oil, would have to be accompanied by decreases in the prices of other goods, so there would be no net inflation. There must be other factors at work. Inflation is a complex problem with multiple causes, such as federal budget deficits, declining worker productivity, and "cost of living" escalators. Inflation does not respond to simple solutions.

In part II, Dougherty sets forth proposals for the second phase of his economic program, stabilization of prices for the "basic necessities" — food, energy, housing, and health services. This phase follows a gradual withdrawal of the mandatory wage and

price controls. Dougherty's "sectoral strategies" include the creation of a National Grain Stabilization Board with exclusive control of American grain export sales, gasoline rationing, government sponsored synthetic fuel plants, reserve requirements on mutual funds to provide mortgage assets for "necessity" housing projects, and a hospital cost containment and utilization program to limit health care costs.

All of these proposals involve increasing government management of the economy. Mr. Dougherty does not provide any convincing arguments why the failures attending previous government intervention will not recur under his plan. For example, since the 1930's, the government's Regulation Q has limited the amount of interest banks are allowed to pay their customers. This regulation has caused a market distortion — money flows out of the banks and into money-market funds. Now that the banks have become unhealthy as a result of government intervention and are no longer able to provide adequate mortgage funds, Mr. Dougherty proposes that money-market funds be required to "reserve" some of their assets for use as mortgage money. This proposal would simply lower the yield that money-market funds would be able to pay and force investors to seek out new, more lucrative investments.

Although Dougherty's proposals are impressive in their comprehensiveness and attention to detail, they would seem to be less advisable than those of either the old demand-management orthodoxy or the new supply-side theories.

*Eric S. Shube*

INTEREST GROUP POLITICS IN AMERICA. By *Ronald J. Hrebenar and Ruth K. Scott.* Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1982. Pp. xi, 275, index. $9.95 paper.

*Interest Group Politics in America* presents much that is already known about interest-group organization, strategy, and power, but goes no further. The book serves only as a comprehensive overview of the subject for the student of politics.

Although organized groups have always been active in our nation's political arena, today such groups have an increasing influence over political outcomes. In many situations an interest group controls decisions. The authors use thorough case studies of the scuttling of SALT II and the emasculation of President Carter's national energy policy to support this thesis.

Group exchange theory explains how these interest groups can generate an active membership in a climate of voter apathy; the established interests of business and labor are able to gain support primarily because their members derive direct material benefits from successfully influencing policy. On the other hand, a public-interest group — for example, Common Cause — gains support through the members' commitment to the organization's political goals; few direct material benefits accrue to individual members. Thus, public-interest groups have fewer resources available, in terms of both money and membership, to influence public policies.

The authors note that public-interest groups are, in general, more internally democratic than business or labor groups. While the AFL-CIO leadership often will pursue policies inconsistent with the views expressed by the rank and file, Common Cause will not lobby for something if "as few as 15 percent of the membership are opposed" (p. 44). This internal democracy hampers the ability of public-interest groups to compete against the more established and narrowly focused interest groups for political commodities. Policymaking in areas of limited concern is often influenced only by those groups with a specific stake in the outcome; too frequently the diverse nature of a public-interest group's membership precludes its participation. Since much legislative policymaking occurs in congressional subcommittees that have limited areas of policy concern, the authors fear a "tyranny of the minorities" (p. 259). Because "most reforms aimed at the lobbying process seek less to regulate these activities than to disclose them to public scrutiny" (p. 261), the authors believe that stricter lobbying laws will remedy this problem. Yet, public financing of congressional elections is the authors' only suggested means of lessening interest-group control of Congress.

The authors do not sufficiently discuss the ability of established interest groups to bypass the legislative arena by influ-

encing policy during a law's implementation.[1] Public-interest groups, again due to the competing interests of their memberships, tend to stop lobbying on a particular issue once the policy goal sought is realized in legislation. The regulated interests, however, remain and inevitably gain a near-monopolistic control over the long-term administration of the policy mandate. Thus, decentralized and largely unaccountable bureaucracies, responsible for regulation which is of little daily concern to the general public, are often "captured" by single-interest groups.

The authors' hope of avoiding tyrannical minorities cannot be realized without addressing the narrow interests' dominance of the implementation process. Toward this end, "sunset laws," which provide effective congressional oversight of administrative bureaucracies, would be a worthwhile topic for discussion. The failure of the authors adequately to address the influencing of policy during its implementation is a major shortcoming in an otherwise thorough account of the current role of interest groups in American politics.

*David J. Segre*

THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS. By *Herbert Kaufman*. Washington, D.C.: The Brookings Institution, 1981. Pp. xii, 220, appendices, bibliography, index. $22.95 cloth, $8.95 paper.

Federal bureau chiefs preside over powerful organs of government that establish and enforce regulations which have a pervasive impact on politics and society. Except for studies of atypical figures — for example, J. Edgar Hoover and Robert Moses — no attempt has previously been made to measure bureau chiefs' power or influence. In the *Administrative Behavior of Federal Bureau Chiefs*, Herbert Kaufman, a prominent authority on administrative theory and behavior, reports his observations of the actual work and activities of individual bu-

1. *See* Theodore Lowi, *The End of Liberalism* (1979).

reau chiefs and concludes they are "not as powerful or autonomous as they are sometimes alleged or inferred to be" (p. 139).

Kaufman personally observed the activities of bureau chiefs from a number of domestic cabinet departments and presents findings and conclusions based on his observations. Although the book is acceptable as an introductory text, Kaufman falls short of making a major contribution to the literature on administrative behavior primarily because of the methodology he employs. Although Kaufman concedes his data is impressionistic and his evidence anecdotal, he claims that observation is the best method for securing the desired information on the bureau chiefs' daily activities.

Kaufman's assertion that observation is best suited for seeking information on bureau chiefs' behavior is valid. An appreciation for the dynamics of bureau leadership can be accurately obtained only by examining primary rather than secondary sources. In other words, what bureau chiefs do rather than what happens as a result of what they do must be studied. Personal observation is a valid technique for reaching the primary source of the inquiry, the bureau chief, but the degree of precision Kaufman uses in recording and presenting his data is inadequate. Kaufman's findings would be far more clear and persuasive if he had utilized even rudimentary descriptive analysis to provide frequencies, percentages, or means. Such an analysis would give substance to his findings and allow the reader to determine their significance. For example, Kaufman could have provided objective data, to temper his subjective analysis, on the volume of contacts between bureau chiefs and Department heads, Congress, and interest groups. Moreover, the absence of objective data precludes replication and leaves questions as to those aspects of bureau chief leadership that do not depend on the personality and background of the particular individuals in Kaufman's sample.

Notwithstanding methodological flaws, Kaufman offers some intriguing insights. In his view, bureau chiefs face a commonality of constraints that reduce their behavior to "variations on a common theme" (p. 91). In essence, he portrays bureau chiefs as having a largely ceremonial role. He relates virtual impotence of bureau chiefs in dealing with substantive policy issues and only minimal, transient influence over agency procedural mat-

ters although he gives no concrete examples. In Kaufman's assessment, bureau chiefs only wield "time-specific influence" over "organizational tone, prestige, and the order and the timing of certain decisions and actions" (p. 177).

If Kaufman's conclusions are proved valid, they will have a staggering influence on administrative theory because he challenges some of its traditional precepts — command and control — and offers some novel approaches to organizational control and change. For example, Kaufman suggests that, for maximizing agency effectiveness, the proper focus is the internal organization and not the bureau chiefs. Unfortunately, the data analysis is too weak. Nevertheless, Kaufman has identified important areas in administrative theory which will require greater scrutiny and further research.

*Charles D. Holland*

THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES. By *Bruce Allen Murphy*, New York: Oxford University Press, 1982. Pp. x, 473, appendix, notes, bibliography, index. $18.95 cloth.

In this fascinating and unpredictable book, Bruce Allen Murphy reveals the previously unknown political activities of Louis D. Brandeis and Felix Frankfurter, two immortals of the Supreme Court. In the wake of Woodward and Armstrong's *The Brethren*, the book further tears away the shroud of secrecy surrounding the Court. The book opens with an account of the revered Justice Brandeis's annual retainer of Harvard Law School Professor Felix Frankfurter. For twenty-two years, Frankfurter used this financial backing to advance causes that Brandeis could not appropriately pursue from the bench. Murphy then deals with Frankfurter's own tenure on the Court, where, after taking his seat in 1939 (two weeks before Brandeis's resignation), Frankfurter continued the practice of covert intervention in national affairs.

The financial arrangement between the two men began in 1916, when Brandeis first arrived at the Supreme Court. Although Frankfurter was reluctant initially to accept the funds, Brandeis was insistent. Brandeis wrote Frankfurter that his expenses were being incurred in the public interest. By 1926, Brandeis's retainer had reached $3,500 a year (equivalent to a $30,000 salary today), which was a third of Frankfurter's Harvard salary. These funds enabled Frankfurter to pursue lobbying efforts on behalf of the progressive causes he and Brandeis believed in and to pay the psychiatric bills of his ailing wife.

The relationship worked to both men's advantage during the Wilson era and the conservative 1920's. Frankfurter was Brandeis's valuable lieutenant, "a conduit through which he could inquire freely into the political realm and influence the course of political decisions" (p. 58). In Brandeis, Frankfurter had a source of inside information about the Court, a financial patron, and a progressive ally.

During the Wilson Administration, Brandeis was able to pursue his political strategies without fear. He served as one of Wilson's most influential advisers, and all lines of communication to the Executive Branch were open to him. After the end of the Wilson presidency, Frankfurter played a pivotal role as the mouthpiece for Brandeis's views, which fell on deaf ears during the Harding, Coolidge, and Hoover Administrations. Articles on subjects suggested by Brandeis to Frankfurter often appeared in the Boston Herald, New York World, Nation, The Survey, and The New Republic. The shape of legal thought was influenced through numerous articles placed in the *Harvard Law Review* by Frankfurter's students at the behest of Brandeis.

The early New Deal marked the height of the collaborative effort of the two men. Frankfurter succeeded in placing legions of Harvard Law School graduates sympathetic to the Justice's views in the Roosevelt Administration. With the aid of these numerous contacts, Brandeis and Frankfurter were able to dilute the early collectivist predilections of the "Brain Trusters" (Rexford G. Tugwell, Raymond Moley, and Adolph Berle) who surrounded the President.

Much New Deal legislation was influenced by Brandeis, even if it did not bear his direct imprint. Frankfurter, however, was less doctrinaire than Brandeis in opposing the national-planning experiments of 1933. Lacking Brandeis's deep ideological com-

mitment to progressivism, Frankfurter often mixed pragmatism with his politics. As the New Deal progressed, Brandeis's relationship with Frankfurter was tempered by Frankfurter's increasing loyalty to FDR. Frankfurter was forced to take sides during the "court-packing" plan of 1937. The relationship between Brandeis and Frankfurter was never the same after Brandeis organized Senate opposition to the plan.

When Frankfurter ascended to the Court in 1939, he continued Brandeis's tradition of political intervention. Frankfurter enlisted former law clerks and students who were highly placed in the Executive Branch to aid in the kind of public-policy shaping he had done for Brandeis. In contrast to Brandeis, Frankfurter's participation in the political realm was much more open and direct. Unlike Brandeis, he employed no lieutenant to keep him above the fray, preferring to deal directly with his contacts.

Frankfurter greatly influenced America's conduct of World War II by conferring with Secretary of War Stimson, providing advisory opinions on such matters as the Lend-Lease Program, and tirelessly lobbying the Administration to prepare for war. Frankfurter came to be responsible for the United States' close friendship with Britain, and orchestrated the famous meeting of Harry Hopkins and Winston Churchill to ensure its success. In the postwar era, Frankfurter lobbied heavily for judicial candidates he liked, such as Charles Wyzanski and Henry J. Friendly, while seeking to prevent the ascension of those he disliked.

Murphy views Brandeis as a prophet who envisioned "a vast master plan for restructuring American society and its government" (p. 250). Frankfurter, on the other hand, had "no coherent philosophy" (p. 251). He was guided by political pragmatism. While Brandeis always sought to influence others, he maintained a separation between his judicial and political activities. In contrast, Frankfurter was not as successful in segregating the two, and would constantly throw himself into the political fray. Interestingly, neither of the Justices would discuss cases pending before the Court. Frankfurter, however, seemed more hypocritical: to maintain the appearance of judicial propriety he publicly espoused a sacerdotal devotion to judicial propriety, while in reality his own conduct was questionable.

Murphy's book is a rather troubling work. While it is well-documented and well-researched, its focus often wanders. Murphy vacillates between condemnation of the "conspiratorial"

political activities of the Justices and recognition of the tremendous accomplishments of these two men. Clearly, the revelation of Brandeis's payments to Frankfurter indicates a severe breach of judicial ethics. It casts an unfortunate taint on the accomplishments of both men.

Brandeis and Frankfurter's extensive extrajudicial activties are problematic. Undoubtedly, these dynamic individuals had a good deal of influence over policy formation during their tenures on the Court. However, a major failing of the book is that it does not place this activity in its proper perspective. Supreme Court Justices historically have meddled in the political process. In an illuminating appendix, Murphy relates the political activities of various Justices from 1789 to 1916. He points out that three Justices took an active part in the 1800 presidential election, and that Justice Joseph Story, the conservative jurist, bullied congressmen to get his bills passed and even wrote a treaty. The incidents of extrajudicial activity are legion — Chief Justice Roger B. Taney and Justice John Catron advised old cronies in the White House; Justice Charles Evans Hughes ran for the presidency in 1916 while he was still sitting on the Court, and so forth.

Elsewhere in the book Murphy describes the activities of Chief Justice William H. Taft and Chief Justice Harlan F. Stone in lobbying the Executive Branch, and the political activities of Justice James F. Byrnes, Justice William O. Douglas, Justice Frank Murphy, Justice Robert H. Jackson, and Chief Justice Fred M. Vinson, who freely gave advice to Presidents.

The activities of Brandeis and Frankfurter deserve to be analyzed in relation to the actions of other Justices. The history of political activities of Supreme Court Justices should serve as the framework for the book. By relegating this section to the appendix, Murphy changes the emphasis of his work. Although he notes in the book's opening that fully two-thirds of the Justices of the Supreme Court have been politically involved, he fails to acknowledge this throughout much of the work. Other Justices' political activities certainly do not excuse Brandeis's and Frankfurter's actions, but they serve to put them in proper perspective — a perspective that Murphy's book lacks.

Murphy's account of the two Justice's activities also exaggerates their influence upon the course of events. It does not

fully acknowledge the input of other viewpoints into the political process.

Murphy concludes that Brandeis and Frankfurter, despite their transgressions, must be classed among the Justices who were best able to separate their political views from their judicial decisions. He believes that they will survive as giants of twentieth-century America. He asks what standards of behavior we should expect from Supreme Court Justices, without providing any answers. The answer may lie in the realization that there are no absolute standards of conduct; the rules of the game are made to be broken.

Undeniably, this is an important book, one that should cause us to re-evaluate our view of the Supreme Court as an oracular body. It forces the reader to the realization that the judiciary is a part of the political process, and that judges cannot be monks. The challenge lies in constructing a clear and useful analysis of the Supreme Court's place in politics.

*Jess Howard Drabkin*

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