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ARTICLE

THE LEGISLATIVE VETO DECISION: A LAW BY ANY OTHER NAME?*

LAURENCE H. TRIBE**

In INS v. Chadha, *the Supreme Court decided that the one-House legislative veto was unconstitutional. The Court held that the veto undermined the separation of powers and violated the bicamerality and presentment requirements. In this Article, Professor Tribe examines the reasoning behind the Court's decision and the potential impact of the decision on Congress and the lower courts. Professor Tribe challenges the Court's premise that Congress's veto decision in* Chadha *was necessarily a legislative action and questions the general principle that Congress cannot delegate power to itself. Nevertheless, he argues that the* Chadha *result may be defensible on narrower bill of attainder or usurpation-of-judicial-function grounds. Finally, Professor Tribe agrees with the majority's holding that the legislative veto provision was severable from the rest of the delegation of power. He proposes a test for severability that avoids the traditional focus on hypothetical legislative intent and that will permit the survival of most of the existing statutes containing legislative veto provisions.*

I. THE JUDICIARY'S RENEWED ASSERTION OF STRUCTURAL CHECKS ON CONGRESSIONAL INNOVATION

In the past seven years, the Supreme Court has not been very receptive to Congress's more innovative assertions of authority. Three major decisions, the most recent of which is the legislative veto case, *INS v. Chadha*,[1] have undermined Congress's assertions of control on separation of powers and/or federalism grounds. The first two of those decisions—*Buckley v. Valeo*,[2] dealing with the Appointments Clause, and *National League of*

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** Tyler Professor of Constitutional Law, Harvard Law School.

[1] 103 S. Ct. 2764 (1983).

[2] 424 U.S. 1, 140 (1976) (per curiam) (holding the Federal Election Commission to be composed in a manner violative of U.S. CONST. art. II, § 2, cl. 2, and of the separation of powers, insofar as some of the Commission's voting members were appointed by the Speaker of the House and by the President *pro tempore* of the Senate rather than by "the President, . . . the Courts of Law, or . . . the Heads of Departments"). *See infra* note 68; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-8 (1978) [hereinafter cited as L. TRIBE, ACL]. Throughout this Article, references to *Buckley* deal only with this holding—not with that decision's substantive rulings with respect to campaign finances.

Cities v. Usery,[3] dealing with state sovereignty—appear thus far to have been signposts to nowhere in particular.

Buckley v. Valeo, to be sure, triggered renewed caution within the Justice Department and in Congress lest proposed statutes confer on state officials—or on others not appointed by the federal executive in accord with Article II, Section 2, Clause 2—"significant authority pursuant to the laws of the United States."[4] But *Buckley* has had no acknowledged judicial offspring. Indeed, the case seems to have been essentially ignored in *Chadha*, the one recent decision that may be partially understood as an application of *Buckley*'s teaching about who may exercise authority pursuant to federal statutes. *Buckley* appears in *Chadha* only as a vague symbol that separation-of-powers concerns are to be taken seriously.[5]

Unlike *Buckley*, *National League of Cities* has been noted in an impressive array of Supreme Court opinions. But all such subsequent decisions have thus far distinguished, rather than followed, *National League of Cities* itself.[6] Indeed, on at least one important occasion when *National League of Cities* seemed directly pertinent, the Court overlooked that precedent altogether.[7]

Of course, it is too early to say whether *Chadha*, the third in the trio of cases imposing new structural limits on Congress, will similarly prove to be less a fount of legal development than one more episodic judicial outburst against the pragmatic accommodations of our times.[8] But it seems plain even now that no clear unifying vision—and surely no vision the Framers of the Constitution would have recognized as theirs—emerges from

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[3] 426 U.S. 833, 845 (1976) (holding that Congress violated the rights of the "States as States" when it extended the federal minimum wage and maximum hour provisions to state and municipal employees). *See* L. TRIBE, ACL, *supra* note 2, § 5-22.

[4] *Buckley*, 424 U.S. at 126.

[5] *Chadha*, 103 S. Ct. at 2781, 2785 n.16.

[6] *See* EEOC v. Wyoming, 103 S. Ct. 1054, 1062–64 (1983); FERC v. Mississippi, 456 U.S. 742, 758–59 (1982); United Transp. Union v. Long Island R.R., 455 U.S. 678, 686–90 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293 (1981); Massachusetts v. United States, 435 U.S. 444, 456 n.13 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976), all discussed in the forthcoming volume, L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1978–84 (Foundation Press).

[7] *See* Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (holding that a municipality is not entitled to exemption from the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1982), under a home-rule delegation of state power); *cf.* Parker v. Brown, 317 U.S. 341 (1943) (states are exempted from the Sherman Antitrust Act).

[8] *See* L. TRIBE, ACL, *supra* note 2, § 4-2, at 163. Indeed, with new appointments to the Court, even *National League of Cities* could still be transformed into an enduring source of law.

the *Chadha* opinion. Although the opinion refers broadly to the Framers' wisdom in not "permitting arbitrary government acts to go unchecked,"[9] it seemingly countenances both an executive apparatus and a federal bureaucracy more autonomous and unaccountable in wielding their power than Congress itself could ever have become by using the legislative veto device.

What emerges from *Buckley*, *National League of Cities*, and *Chadha* taken as a group is less a coherent picture of checks and balances than a sense of judicial frustration and desire—a frustration with governmental structures that have long since outgrown the Framers' dreams, and a desire to reclaim—for the judiciary as the "least dangerous"[10] branch, or for the states as the most modest—some measure of the power that, under the exigencies of modernity, Congress has sought to centralize along the banks of the Potomac.

II. The Legislative Veto Decision: Its Unspoken Premises

The separation-of-powers ideal—variously decried as vaguely foolish[11] or praised as truly fundamental[12]—remains a central theme for the Supreme Court. When striking down the legislative veto in *INS v. Chadha*, the Court described "[t]he provisions of Art. I [as] integral parts of the constitutional design for the separation of powers."[13]

The intense controversy surrounding the legislative veto is as old as the device itself. Since 1932, Congress has passed a wide range of legislative veto procedures allowing it, or one of its Houses or committees, to review and revoke the actions of

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[9] 103 S. Ct. at 2788.

[10] The Federalist No. 78, at 490 (A. Hamilton) (B. Wright ed. 1961).

[11] *See, e.g.*, F. Frankfurter, The Public and Its Government 77–78 (1930) (The separation of powers principle is "what Madison called a 'political maxim,' and not a technical rule of law."); K. Loewenstein, Political Power and the Governmental Process 34–37 (1957) (doctrine is "obsolete and devoid of reality"); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 Ind. L.J. 367, 390 (1977) ("It is doubtful that the concept of separation of powers could really have any objective meaning."); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L. Rev. 449, 464–65 (1958) (separation of powers doctrine is at best vague and uncertain).

[12] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam); 1 Annals of Congress 604 (J. Gales ed. 1789) (statement of James Madison) ("[I]f there is a principle in our constitution, indeed in any free constitution, more sacred than another, it is that which separates the legislative, executive, and judicial powers.").

[13] 103 S. Ct. at 2781.

various federal agencies and departments.[14] Some 200 statutes containing half again as many legislative veto provisions have been enacted—more than half of them since 1970 alone.[15] The President's power to reorganize the executive branch, to impound appropriated funds temporarily, to introduce American armed forces into foreign conflicts, to provide nuclear fuel and technology to other nations, and to sell sophisticated weaponry abroad are all statutorily constrained by the purported authority of one or both Houses of Congress to exercise what may loosely be called a legislative veto.[16]

The legislative veto has become steadily more important since its conception in the waning days of Herbert Hoover's administration.[17] The veto offered lawmakers a way to delegate vast power to the executive branch or to independent agencies while retaining the authority to cancel particular exercises of such power—and to do so without having to pass new legislation or to repeal existing laws. Whatever the practical virtues or vices of the veto,[18] its popularity as a means of controlling agency action and executive discretion has been enhanced by two other apparent advantages. First, the veto afforded Congress a visible means of stemming the tide of executive regulation of American life and industry. Such regulation is at the lowest ebb of its popularity since the beginning of the modern regulatory period.[19] Second, the veto appealed to many who resist deregulation but espouse increased democratic control over those regulations which remain.[20] Yet, while the legislative veto appeared to stand at the confluence of the desires to curtail regulation, restrain the executive, and assert the prerogatives of popular control, it also stood at the intersection of a number of doctrines that cast grave doubt on its constitutional validity.

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[14] The first legislative veto provision was included in the Legislative Appropriations Act for fiscal 1933. Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (repealed 1966); *see* Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachments on Legislative Prerogative*, 52 IND. L.J. 323, 324 n.5 (1977), *cited in Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).

[15] *See* 103 S. Ct. at 2792 (White, J., dissenting); Abourezk, *supra* note 14, at 324.

[16] *See* 103 S. Ct. at 2811–16 app. (White, J., dissenting); 128 CONG. REC. S2575 (daily ed. Mar. 23, 1982) (listing 33 laws containing legislative veto provisions enacted by the 96th Congress).

[17] *See supra* note 14.

[18] For a useful compilation of conflicting views, see 103 S. Ct. at 2797 n.12 (White, J., dissenting).

[19] *See, e.g.*, J. BOLTON, THE LEGISLATIVE VETO: UNSEPARATING THE POWERS 8–10 (1977).

[20] *See, e.g.*, Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 459–65 (1977).

The constitutionality of the legislative veto was tested not on the battlefield of so crucial an executive prerogative as the power to wage war, but in a skirmish over the authority to suspend the deportation of a small class of aliens. Congress, weary of handling such matters through cumbersome special immigration bills, delegated to the Department of Justice's Immigration and Naturalization Service (INS) limited discretion to suspend deportations, subject to a legislative veto within a specified period by either the Senate or the House of Representatives.[21] Jagdish Rai Chadha, born in Kenya of Indian parents, had come to the United States under a student visa with a British passport. In order to suspend deportation when his visa expired, Chadha applied for permanent resident status under section 244(a)(1) of the Immigration and Nationality Act.[22] That provision permits an alien who has been a continuous resident of the United States for seven years, who is of good moral character, and whose deportation would cause him to suffer extreme hardship, to become a permanent resident.[23] Kenya refused to take Chadha back on the ground that he was a British, not a Kenyan, citizen, and the United Kingdom told Chadha that he would not be allowed to immigrate for at least a year.[24] Since Chadha was literally a man without a country, the immigration judge, acting on behalf of the Attorney General, granted Chadha's request and suspended his deportation.[25]

A year and a half later, Representative Eilberg (D-Pa.), Chairman of the Subcommittee on Immigration, Citizenship, and International Law of the House Judiciary Committee, introduced a resolution striking Chadha and five others from a list of 340 resident aliens to whom the INS had decided to accord permanent resident status.[26] The House of Representatives approved

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[21] *See* Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1248, *amending* Immigration and Nationality Act, ch. 477, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c)(2) (1982)).

[22] 103 S. Ct. at 2770.

[23] 8 U.S.C. § 1254(a)(1) (1982).

[24] Transcript of Hearing of Deportation Proceedings held Jan. 11, 1974, Joint Appendix to the Briefs at 12–15, 33–46, *Chadha* (available on LEXIS, Genfed library, Briefs file).

[25] 103 S. Ct. at 2770.

[26] H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

> So far as the record . . . shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution [Chadha and five others] did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended."

Chadha, 103 S. Ct. at 2772 (quoting 121 CONG. REC. 40,800 (1975)).

the resolution, thus vetoing the suspension of those six deportations. That House action allowed the suspensions of the deportations of the other 334 aliens to become final, thereby permitting those aliens to remain in the United States. The resolution was adopted without debate or recorded vote.[27] The INS judge agreed with Chadha that the legislative veto provision in section 244(c)(2) was unconstitutional but decided that he had no authority to rule on that question. He therefore ordered Chadha deported.[28] Following the affirmance of his deportation order by the INS, Chadha filed a petition for review in the United States Court of Appeals for the Ninth Circuit. That court upheld Chadha's constitutional challenge to the legislative veto.[29] After plenary consideration of the case, the Supreme Court held it over to the following Term for reargument. In 1983, the Court affirmed the appellate judgment.[30]

The demise of the legislative veto was not without its harbingers. Eleven Presidents have gone on record at one time or another to challenge the constitutionality of at least some forms of congressional veto.[31] At least five Presidents have vetoed

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[27] 121 CONG. REC. 40,800 (1975).

[28] 103 S. Ct. at 2772. The Court properly rejected the contention that no Article III controversy existed simply because "Chadha and the INS [took] the same position on the constitutionality of the one-House veto." *Id.* at 2778.

[29] Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983). The Supreme Court recognized the House and Senate as parties in the case. INS v. Chadha, 103 S. Ct. at 2773 n.5 (1983).

[30] INS v. Chadha, 103 S. Ct. 2764 (1983).

[31] *See, e.g.*, President's Memorandum of Disapproval of the Amendments to the Education Consolidation Improvements Act, 19 WEEKLY COMP. PRES. DOC. 38 (Jan. 12, 1983); President's Memorandum of Disapproval of the Amendments to the Tribally Controlled Community College Assistance Act, 19 WEEKLY COMP. PRES. DOC. 7 (Jan. 3, 1983) (Reagan); President's Message on Regulatory Reform, 15 WEEKLY COMP. PRES. DOC. 491 (Mar. 26, 1979); President's Message on Legislative Vetoes, 14 WEEKLY COMP. PRES. DOC. 1146 (June 21, 1978); International Security Assistance Act of 1977: Statement on Signing H.R. 6884 Into Law, [1977] 2 PUB. PAPERS 1431 (Aug. 5, 1977) (Carter); Veto of the Atomic Energy Act Amendments, 1974 PUB. PAPERS 294 (Oct. 12, 1974) (Ford); President's Statement Upon Signing the Public Buildings Amendment of 1972, 8 WEEKLY COMP. PRES. DOC. 1076 (June 17, 1972); President's Statement Upon Signing the Second Supplemental Appropriations Act, 8 WEEKLY COMP. PRES. DOC. 938 (May 28, 1972) (Nixon); Statement by the President Upon Signing the Omnibus Rivers and Harbors Bill, [1965] 2 PUB. PAPERS 1082 (Oct. 23, 1965) (Johnson); Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds, 1963 PUB. PAPERS 6 (Jan. 9, 1963) (Kennedy); Special Message to the Congress Upon Signing the Department of Defense Appropriations Act, 1955 PUB. PAPERS 688 (July 13, 1955) (Eisenhower); Disapproval of House Bill After Sine Die Adjournment, 98 CONG. REC. 9756 (July 19, 1952); Veto of Bill Relating to Land Acquisition and Disposal Actions by the Army, Navy, Air Force, and Federal Civil Defense Administration, 1951 PUB. PAPERS 280 (May 15, 1951) (Truman); F.D. Roosevelt, Memorandum for the Attorney General (Apr. 7, 1941), *reprinted in* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357 (1953) (Roosevelt); Veto

legislation containing congressional veto provisions on the express ground that they considered such provisions unconstitutional.[32] Others have declined to do so but have raised specific objections to the veto provisions.[33] It is therefore understandable that the Justice Department has occasionally conceded the unconstitutionality of a legislative veto provision in open court, even while representing the federal government.[34]

Much, although far from all, of the controversy over the legislative veto was resolved when the Supreme Court held in *INS v. Chadha* that the one-House legislative veto provision in section 244(c)(2) was unconstitutional.[35] In an opinion by Chief Justice Burger,[36] the Court held that *all* action by Congress that is "legislative" in "character"[37] must be taken in accord with the "single, finely wrought and exhaustively considered,

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Message from the President of the United States—The First Deficiency Bill (H. Doc. No. 529), 76 CONG. REC. 2445 (Jan. 24, 1933) (Hoover); Veto Message—The Budget Bill, 59 CONG. REC. 8609 (June 4, 1920); Legislative, Executive, and Judicial Appropriations Bill—Veto Message, 59 CONG. REC. 7026 (May 13, 1920) (Wilson).

[32] Presidents Eisenhower, Johnson, Nixon, Ford, and Carter. *See, e.g.*, Veto of Department of Energy Authorization Bill, [1977] 2 PUB. PAPERS 1972 (Nov. 5, 1977) (Carter); Veto of the Federal Fire Prevention and Control Bill, [1976–1977] 2 PUB. PAPERS 1984 (July 7, 1976); Veto of Atomic Energy Act Amendments, 1974 PUB. PAPERS 294 (Oct. 12, 1974) (Ford); President's Message Vetoing the War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 24, 1973) (Nixon); Veto of the Military Authorization Bill, [1965] 2 PUB. PAPERS 907 (Aug. 21, 1965) (Johnson); Veto of Bill Providing for the Conveyance of Lands Within Camp Blanding Military Reservation, Florida, 1954 PUB. PAPERS 507 (May 25, 1954) (Eisenhower); *see also* Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 428 & n.21, 429 & n.24, 432 & n.29 (1978). Members of the Ford and Carter administrations testified against legislative vetoes in various legislative hearings. *See, e.g., Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Comm. on Governmental Operations*, 94th Cong., 2d Sess. 124 (1976) (statement of Asst. Atty. Gen. Antonin Scalia); Letter from Asst. Atty. Gen. Patricia Wald to Rep. Peter Rodino, Jr. (D-N.J.) (May 5, 1977) (letter prepared in response to congressional request for Justice Dept. opinion), *cited in* McGowan, *Congress, Court and the Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1141–42 (1977).

[33] The most famous example is that of President Franklin Roosevelt, who signed the Lend-Lease Act of 1941 despite its legislative veto provision but filed a memorandum with his Attorney General asserting the President's constitutional objections to the concurrent resolution veto section of the bill. F.D. Roosevelt, Memorandum for the Attorney General (Apr. 7, 1941), *reprinted in* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357 (1953). Presidents have often restrained their opposition to specific legislative veto provisions where they greatly desired the statutory authority vested in the bills containing such provisions. *See* J. BOLTON, *supra* note 19, at 10–13.

[34] Then Assistant Attorney General Rex Lee, for example, made such an admission to the Court of Claims in Atkins v. United States, 556 F.2d 1028, 1079 (Ct. Cl. 1977) (Skelton, J., concurring in part and dissenting in part), *cert. denied*, 434 U.S. 1009 (1978).

[35] 103 S. Ct. 2764 (1983).

[36] The Chief Justice's opinion was joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor.

[37] 103 S. Ct. at 2785.

procedure"[38] set out in the "explicit and unambiguous provisions" of Article I.[39] Those provisions expressly mandate both *bicamerality* (passage by a majority of both Houses)[40] and *presentment* to the President for possible veto (with a requirement of two-thirds of each House to override),[41] not simply when Congress *purports* to be legislating but whenever it takes action that must be *regarded* as "legislative."[42] Otherwise, the separation of powers—which the Court saw as more than "an abstract generalization"[43]—could be betrayed by congressional lawmaking masquerading as something else. Given the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power,"[44] the Court must police all such attempts by Congress to circumvent the bicamerality and presentment checks on its authority. A law by any other name is still a law.

According to a majority of the Court, the House veto of Chadha's status as a permanent resident alien *had* to be viewed as "an exercise of legislative power."[45] Thus, since it was neither approved by both Houses nor presented to the President for signature or veto—two independently fatal flaws—the House's action was doubly unconstitutional.[46]

That "a law is a law is a law" is hard to refute. But that statement sheds little light on *why* the veto at issue in *Chadha was* so "law-like" an action that it "had" to be deemed legislative. Certainly the Court's careful enumeration of the "four provisions in the Constitution, explicit and unambiguous, by which one house *may* act alone with the unreviewable force of law, not subject to the President's veto"[47] is of no help in deciding which of the actions that a House might seek to take *pursuant to a statutory delegation of power* are inherently "legislative" in nature.[48]

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[38] *Id.* at 2784; *see also id.* at 2786.
[39] *Id.* at 2781.
[40] U.S. CONST. art. I, §§ 1, 7; *see* 103 S. Ct. at 2783–84.
[41] U.S. CONST. art. I, § 7, cl. 2; *see* 103 S. Ct. at 2782–83.
[42] 103 S. Ct. at 2781.
[43] 103 S. Ct. at 2781, *quoting* Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam).
[44] 103 S. Ct. at 2784.
[45] *Id.* at 2787.
[46] *Id.* at 2787–88.
[47] 103 S. Ct. at 2786 (emphasis added). The four provisions are U.S. CONST. art. I, § 2, cl. 6 (House impeachment); U.S. CONST. art. I, § 3, cl. 5 (Senate trial and conviction in impeachment cases); U.S. CONST. art. II, § 2, cl. 2 (Senate approval of presidential appointments); U.S. CONST. art. II, § 2, cl. 2 (Senate treaty ratification).
[48] *See* 103 S. Ct. at 2804 n.21 (White, J., dissenting).

The Court's only direct attempt at defining this set of inherently legislative actions is also not particularly illuminating. The Chief Justice explained that the veto of Chadha's suspension of deportation was "essentially legislative" because it "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."[49] Absent the veto, after all, Chadha would remain in the United States. Therefore, "Congress has *acted* and its action has altered Chadha's status."[50] Moreover, "[w]ithout the challenged [veto] provision in § 244(c)(2), this [change of status] could have been achieved, if at all, only by legislation requiring deportation."[51] In a sense, all of this may be so.[52] But the same observations could apply with equal validity to nearly *all* exercises of delegated authority. Nearly all such actions alter legal rights, duties, and relations, thereby changing the legal status of persons outside the legislative branch in ways that, *without* the challenged delegation, could have been achieved, if at all, only by legislation.

Both through rulemaking and through case-by-case dispositions, exercises of delegated authority change legal rights and privileges no less than do full-fledged laws. Unlike such laws, however, these actions need meet neither the bicamerality requirement nor the presentment requirement. Indeed, as Justice

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[49] 103 S. Ct. at 2784.

[50] *Id.* at 2784–85 (emphasis added).

[51] *Id.* at 2785 (footnote omitted).

[52] In another sense, *none* of this is so. For example, as Justice White argues in his dissent, the structure and history of § 244(c) make plain that, unless and until Congress ratifies a deportable alien's permanent residence by the silence of both the House and the Senate in the congressional session in which the Attorney General reports his suspension order and in the next session, the suspension order merely *defers deportation*. This order alters no legal rights; it merely proposes such an alteration. 103 S. Ct. at 2804–08 (White, J., dissenting). The retort of the *Chadha* majority—that this understanding of the legal sequence would impermissibly allow Congress to legislate by inaction, *see* 103 S. Ct. at 2787 n.22—is less than convincing. As I have suggested elsewhere, constitutional objections to lawmaking by inaction are inapposite when Congress itself enacts a statute ascribing operational meaning to its own future silence:

> Sunset provisions [ascribe meaning to silence] by creating situations in which *inaction* by a future Congress will lead a law to *lapse* when it would otherwise have survived. And the one-House veto technique . . . does so by making the fact of *joint inaction* by both Houses for a specified period the *condition precedent* for an agency's action under its delegated authority to become final. Once authority has been delegated in this special way, such inaction by Congress functions *not* as a "sign" of unenacted "intent," but rather as an operative fact giving final effect to an otherwise incomplete exercise of delegated power.

Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 528–29 (1982) (emphasis original); *see also* 103 S. Ct. at 2796 n.11 (White, J., dissenting).

White stressed in his thoughtful dissent,[53] we live in a sprawling administrative state in which "legislative" power, in the exact sense employed by the *Chadha* majority, is *routinely* exercised by the federal executive branch, by the headless "fourth branch of the government,"[54] and even by private individuals and groups.[55] These exercises of power all occur without any of the structural checks the *Chadha* Court held indispensable when similar power is wielded by legislators pursuant to otherwise indistinguishable statutory delegations of authority to Congress or to one of its parts. Yet the absence of those checks is evidently deemed immaterial in these many cases.

In other words, it is only when power is delegated to Congress (or to part of that body) that the Court insists on squeezing such power into one of the three classic pigeonholes envisioned by the Framers, labeling that power "executive," "judicial," or "legislative." The Court therefore appears to suppose that, although members of the executive or judicial branches (or of hybrid entities difficult to classify as either) need not be seen as acting purely in their executive or judicial capacities when they act pursuant to a statutory delegation from Congress, members of the *legislative* branch must be seen as acting purely in their *lawmaking* role even when they are simply discharging duties delegated to them by statute. It is as though the mere fact of statutory delegation obviates the need for formal classification of the power delegated when the recipient of such power is *outside* the legislative branch, while the fact of delegation somehow becomes irrelevant in assessing an exercise of delegated power by part of the legislative branch itself.

The only imaginable justification for what Justice White called "this odd result"[56] lies in a principle never expressly articulated by the majority: "that the legislature can delegate authority to others *but not to itself*."[57] Although the *Chadha* majority never

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[53] 103 S. Ct. at 2801–04 (White, J., dissenting).

[54] Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556, 3558 (1983) (White, J., dissenting).

[55] 103 S. Ct. at 2803 (White, J., dissenting) (citing United States v. Rock Royal Coop., 307 U.S. 533, 577 (1939)) (statutory delegation to affected producers of specified commodities); Currin v. Wallace, 306 U.S. 1 (1939) (statutory delegation to farmers affected by restrictions upon production or marketing of agricultural commodities).

[56] 103 S. Ct. at 2803 (White, J., dissenting).

[57] *Id.* at 2802 (emphasis added). Rather than reflecting generic problems with the very *logic* of self-reference, inhibitions of a "constitutional" character against self-delegation would presumably reflect more particularistic concerns as to the *psychology* of roles and of their behavioral elaboration. *Cf.* D. HOFSTADTER, GÖDEL, ESCHER, BACH: AN

says this in so many words, it seems to recognize that the decision's pivotal rationale is indeed to be found in this unspoken premise. In a relatively cryptic footnote, the majority admits that agencies and executive officers commonly wield "quasi-legislative" power[58] without the safeguards of bicamerality and presentment. The Court proceeds to distinguish such exercises of power solely on the ground that those who wield it are executive officers—that is, officers whose appointment is by the Chief Executive or his subordinates and whose conduct is always subject to judicial review for compliance with duly enacted statutory standards.[59]

Such judicial review is, admittedly, unavailable to ensure that legislative vetoes are wielded only in the circumstances, and for the reasons, contemplated by the underlying statute. For, even if all veto-delegating statutes were to specify the conditions under which legislative vetoes could be invoked—something most such statutes certainly do not attempt[60]—the Speech or Debate Clause[61] would presumably prevent any court from holding a member of the House or Senate accountable for that member's vote on a veto resolution.[62]

ETERNAL GOLDEN BRAID (1979). An analogy between legislators and testators is useful in discussing this point. Rules permitting testators—so long as various formalities are observed—to delegate to independent others the discretionary authority to act with less formality than is demanded of the testamentary disposition itself need not entail the existence of rules permitting the same testators, acting with identical formality, to attach decisive consequences to their own future informal actions (e.g., "I hereby bequeath to my nephew whichever bonds I happen to leave in my desk the day I die"). Similarly, it might be supposed that rules permitting legislators—as long as they comply with the formalities of bicameral agreement and presentment—to delegate to agencies the discretionary authority to act informally (i.e., without the safeguards of bicamerality and presentment) need not entail the existence of rules permitting the same legislators, acting identically, to attach decisive consequences to their own future non-lawmaking acts. However, the *reasons* for taking this view as to testators—reasons grounded in a fear that ritualized solemnity in the assumption of a role will assure adequately considered choice, while informal, independent action might not do so—are difficult to extend to the congressional-administrative context.

[58] 103 S. Ct. at 2785 n.16.

[59] *Id.*

[60] For a relatively rare exception, see 20 U.S.C. § 1232(d)(1) (1976 & Supp. IV 1980) (specifying that a regulation by the Secretary of Education may be vetoed by concurrent resolution only if deemed by Congress to be "inconsistent with the Act from which [the regulation] derives its authority").

[61] U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.").

[62] It is, perhaps, a theoretical possibility that deciding whether or not to cast such votes might be deemed a task so inherently non-legislative in character as to fall outside the protection of the Speech or Debate Clause. But the breadth of the protection the clause has been deemed to confer seemingly precludes such a result, *see* L. TRIBE, ACL, *supra* note 2, § 5-18, and certainly precludes it for a Court that deems a one-House veto an inherently *legislative* act.

The same insulation from judicial review may also exist, however, even with respect to exercises of delegated authority by officers *outside* Congress. Even the *Chadha* majority conceded that Article III limits on the federal judiciary would ordinarily prevent federal courts from reviewing exercises of executive or administrative discretion *favorable* to the private parties whom Congress seeks to regulate: witness the Attorney General's suspension of deportation of Chadha himself.[63] Thus, even where the available criteria for judicial review might create more than an illusory predicate for holding the agents of delegated power within statutory bounds in the context of a properly justiciable case or controversy,[64] the case-or-controversy requirement itself refutes the notion that the exercise of congressionally delegated authority by agents outside Congress "is *always* subject to check by the terms of the legislation that authorized it."[65]

Thus the *only* objection peculiarly applicable to the exercise of statutorily delegated power by all or part of Congress itself—as opposed to such exercise of delegated power by an agent or agency *external* to Congress—must be the proposition that entrusting members of Congress with such power ipso facto confers upon federal lawmakers the mantle of "officers" of the United States government, in violation of the Appointments Clause[66] and of the Incompatibility Clause.[67] It is noteworthy that the *Chadha* majority not only failed to mention but also seems not to have envisioned[68] any such rationale for its holding.

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[63] 103 S. Ct. at 2787 n.21 (invoking this observation as a reply to Justice Powell's rationale, 103 S. Ct. at 2788–92 (Powell, J., concurring), that the one-House veto in *Chadha* usurped a judicial function); *see* 103 S. Ct. at 2803, 2810 (White, J., dissenting).

[64] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856 (1983) (holding that the National Highway Traffic Safety Administration acted in disregard of its statutory duties in revoking passive-restraint requirements without adequate substantive basis).

[65] 103 S. Ct. at 2785 n.16 (emphasis added).

[66]

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2, *applied in* Buckley v. Valeo, 424 U.S. 1, 40–41 (1976) (per curiam).

[67] U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

[68] The Court cited Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), only in passing and only for a less directly relevant proposition. *See* 103 S. Ct. at 2774, 2781, 2785 n.16.

Instead the Court insisted that invocation of the legislative veto at issue in the case before it *had* to be regarded as an exercise of *legislative* authority[69]—a "characterization [under which] the practice does not, even on the surface, constitute an infringement of executive . . . prerogative."[70]

One must, nonetheless, ask whether this rationale that "Congressmen cannot be officers" could be put forward to declare the veto unconstitutional. Its key premise would, of course, have to be that the delegation of legislative veto authority to Congress (or to part of that body) automatically makes the members of Congress who are entrusted with such veto power into "officers of the United States." The objection would then have to be made that these officers were not appointed by the executive branch in the manner required by Article II, Section 2, Clause 2.[71] To add the final blow, it would be stressed that the very membership of these officers in Congress violates the Incompatibility Clause of Article I, Section 6, Clause 2.[72]

The argument is a tidy one—but it confronts at least one major problem. Neither is there, nor could there be, any general principle that anyone to whom a federal statute delegates a significant decisionmaking role on which the rights or duties of persons outside Congress may depend becomes, by virtue of such delegation, an "Officer of the United States" within the meaning of the Appointments Clause and the Incompatibility Clause. If such a principle existed, then Congress could not "confer upon the *States*"—which are surely not United States "Officers"—"an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."[73] And the private individuals and groups to whom decisionmaking roles were delegated in *Currin v. Wallace*[74] and *United States v. Rock Royal Co-Operative*,[75]

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[69] *See* 103 S. Ct. at 2784–87.

[70] 103 S. Ct. at 2810 (White, J., dissenting).

[71] *See* L. TRIBE, ACL, *supra* note 2, § 4-8.

[72] Presumably someone like Chadha—i.e., someone adversely affected by an action taken by a member of Congress in an allegedly "incompatible" role—would have standing to invoke the clause in a lawsuit urging that the action be disregarded. *Cf.* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (holding that individuals suing only in their capacity as citizens lack standing to invoke the Incompatibility Clause against members of Congress holding commissions in the Armed Forces Reserve). *See also* L. TRIBE, ACL, *supra* note 2, § 3-20, at 89–91.

[73] Lewis v. BT Inv. Managers, 447 U.S. 27, 44 (1980) (emphasis added). *See generally* L. TRIBE, ACL, *supra* note 2, § 6-31.

[74] 306 U.S. 1 (1939) (marketing restrictions effective only upon approval by majority of affected farmers).

[75] 307 U.S. 533 (1939) (marketing orders issued by Secretary of Agriculture subject to veto by certain affected producers).

for example, would have been United States officers whose failure to be appointed in accord with Article II would have constituted fatal constitutional flaws in the statutory schemes upheld in those two landmark decisions.

What made the members of the Federal Election Commission (FEC) United States "officers" in *Buckley v. Valeo* was the significant executive responsibility those FEC members exercised under the Federal Election Campaign Act of 1971.[76] The responsibility exercised by the House and Senate under the reservation of legislative veto authority struck down in *Chadha* seems profoundly different. Whether viewed as the *unicameral rejection* of an action taken by the Attorney General in those instances where a veto is cast by one House, or viewed as the *bicameral acceptance* of a legislative proposal made by the Attorney General in those instances where neither House vetoes the Attorney General's suspension of deportation,[77] what Congress does in cases like *Chadha* hardly seems to involve congressional interference with the "execution" of any enacted law. Indeed, it bears repeating here that the *Chadha* majority itself was at pains to insist that the power at issue in the veto is "legislative" in nature.[78]

Whatever classification scheme one may adopt for other purposes, the core concern of the Appointments and Incompatibility Clauses hardly seems to be activated by legislative vetoes of the sort involved in *Chadha.* That concern, which is tied closely to the Constitution's rejection of parliamentary government, is to ensure that federal executive power is located under the ultimate direction of a single President chosen by and responsive to a national electorate. Such power is not to be dispersed among a series of ministries selected from the National

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[76] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, *amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 2 U.S.C. §§ 431–455 (1982)); *see* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). The 1974 amendments to that 1971 act vested in the eight-member FEC primary responsibility for administering and enforcing the act by bringing civil actions against violators, making rules for carrying out the act's provisions, temporarily disqualifying federal candidates for failing to file required reports, and authorizing convention expenditures in excess of the act's specified limits. Because such powers of enforcement, rulemaking, and adjudication could not "be regarded as merely in aid of the legislative function of Congress," *id.* at 138, they could be "exercised only by persons who are 'Officers of the United States,'" *id.* at 141.

[77] *See supra* note 52.

[78] *See supra* note 69 and accompanying text.

Legislature, each headed by a congressman answerable only to a local constituency.[79]

Giving Congress a legislative veto over certain intrinsically executive functions, such as the initiation of criminal prosecutions,[80] or entrusting a legislative veto to a congressional committee or committee head, might significantly implicate this anti-parliamentary concern. But treating *all* legislative vetoes[81]—or even all vetoes in situations analogous to that in *Chadha*—as a threat to the Constitution's choice of a presidential over a parliamentary system seems altogether implausible, particularly in an era when presidential politics may be no less sectional than congressional politics often is.

Apart from this anti-parliamentary rationale, *Chadha* might be deemed defensible on an entirely different ground in those special contexts where Congress or one of its Houses uses a legislative veto either to decide the legal fate of an identifiable individual or to pass upon the conformity of generic rules or regulations to the underlying statute. In such cases, the task Congress has delegated to itself is arguably too "adjudicative" in character to be performed by anything but a court. Perhaps sensing the difficulty of reconciling this argument with the long-standing judicial approval of agency action "construing" Congress's laws in both generic and individual settings,[82] Justice Powell, whose concurring opinion was the only one to voice this particular view, endorsed it only as applied to action by a

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[79] *See* THE FEDERALIST No. 76 (A. Hamilton). *See also* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1523 (Boston 1833); *cf.* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 150–51 (1963) (refusing to accord national pre-emptive effect to federal marketing rules not drafted "by impartial experts in Washington or even in Florida, but rather by the South Florida Avocado Administration Committee," under a delegation of federal regulatory authority).

[80] *See* 103 S. Ct. at 2810 (White, J., dissenting).

[81] In fact, without so much as setting the issue for separate briefing or argument, the Court summarily extended *Chadha* to legislative vetoes of entirely generic rulemaking by administrators or executives less than two weeks later in a set of eight related cases. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), *aff'g mem.* Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (Nos. 81-2008, 81-2020, 81-2152, and 81-2171), *denying cert. to* 673 F.2d 425 (Nos. 82-177 and 82-209), *and rev'g mem.* Consumers Union of United States v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (Nos. 82-935 and 82-1044). *Process Gas* invalidated the one-House legislative veto provision of the Natural Gas Policy Act of 1978, as applied to a FERC regulation shifting part of burden of higher natural gas prices from residential to industrial users, and invalidated the two-House legislative veto provision of the Federal Trade Commission Improvements Act of 1980, as applied to an FTC regulation requiring used car dealers to disclose major defects to buyers.

[82] *See, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981).

legislative body adversely affecting the legal status of a specific person. Such action, he opined, offends "not only . . . [the Constitution's] general allocation of power, but also . . . the Bill of Attainder Clause," which concretely embodies "the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."[83]

The most striking thing about any such rationale for the *Chadha* result—either in the broader form represented by a ban on delegating adjudicative tasks to bodies other than courts, or in the narrower form espoused by Justice Powell—is that this rationale would *divorce the Chadha decision entirely from objections to the legislative veto as such.* For if exercise of the legislative veto is objectionable because it usurps the functions of an Article III court by "construing" pre-existing law in a manner binding on the federal judiciary, that objection seemingly remains even if such usurpation is engaged in by both Houses acting with the signature of the President.[84] And, even more clearly, if exercise of the legislative veto is objectionable because it amounts to trial by legislature, that objection persists even if bicameral action and presentment to the President are assured. Chadha's claim under the Bill of Attainder Clause would not have been weakened in the least had his exile from this country been legislatively decreed by the House and Senate acting through an ordinary bill designating Chadha and his five co-victims for deportation notwithstanding the Attorney General's favorable ruling—a bill solemnly passed with the political safeguards of bicamerality and duly signed by the President in full conformity with the Presentment Clause.[85]

Thus, to whatever extent it is the usurpation-of-judicial-function theme of *Chadha*, or its bill-of-attainder flavor, that may commend its factual outcome to some observers, the Court's legal holding seems even harder to defend than the invalidation

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[83] 103 S. Ct. at 2789–90 (Powell, J., concurring); *see* U.S. CONST. art. I, § 9, cl. 3. *See generally* L. TRIBE, ACL, *supra* note 2, §§ 10-4 to 10-5.

[84] That Congress's action would thereby comply with Article I's formal requirements for legislation certainly would not preclude its invalidation on these Article III grounds. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1872), *discussed in* L. TRIBE, ACL, *supra* note 2, § 3-5, at 39–40.

[85] *Cf.* L. TRIBE, ACL, *supra* note 2, § 10-6. Justice Powell seems to recognize as much when he compares "the effect on Chadha's personal rights" with the impact "had he been acquitted of a federal crime and thereafter found by one House of Congress to have been guilty." 103 S. Ct. at 2791 n.8 (Powell, J., concurring). Needless to say, such a legislative "conviction" would fare no better if decreed by both Houses with the President's express approval. *See id.* at 2792 n.9 (Powell, J., concurring). *But see id.* at 2776 n.8, 2785 & n.17 (purporting to leave this question open).

of "an entire class of statutes based on . . . a somewhat atypical and more-readily indictable exemplar of the class."[86] For in truth, the *Chadha* decision—if viewed through a usurpation-of-adjudication lens or a bill-of-attainder lens—is *not* an exemplar of "the class" of legislative vetoes *at all.*

Chadha thus seems remarkable particularly because it is so *transparently* perplexing. The gaps in the Court's argument are almost too obvious, leaving one with the strange feeling that comes from confronting an edifice in which the flaws seem too conspicuous to be accidental, rather like approaching a building with windows but no door. Surely the architect knew that the omission would strike others as a defect in design. But if the architect knew, then are we perhaps overlooking something?

Two speculations suggest themselves. The first is that *Chadha* represents a return to a form of constitutional exegesis that simply proclaims intelligible essences more than it purports to explain or to justify philosophical or practical premises. "The legislative veto simply *is* a perversion of the Constitution's design," the *Chadha* Court seems to announce; "those who cannot 'see' it that way are just out of touch." The second, and more plausible, possibility is that *Chadha* represents only a transition to a more thoroughgoing repudiation of the constitutional upheaval that led to the approval, beginning in the mid-1930's, of the modern administrative state. Even if *Chadha* makes little sense against a backdrop of nearly limitless judicial tolerance for delegations of lawmaking authority to federal agencies and commissions, the decision would at least be of a piece with a significant judicial tightening of the limits within which Congress may entrust *anyone* with lawmaking power.[87]

In the end, for those who find neither of these speculations a satisfying enough answer, *Chadha* must remain something of a mystery. Neither the near-unanimity with which the Court decided *Chadha*, nor the breathtaking sweep of the Court's holding, are easily explained by anything in the Constitution's text,

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[86] 103 S. Ct. at 2796 (White, J., dissenting).

[87] Justice White may have just this in mind. He finds in the majority's holding "a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state." *Id.* at 2810 (White, J., dissenting); *see also supra* note 64; *cf.* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543–48 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.) (arguing that OSHA was an unconstitutional delegation of legislative power to the executive branch); Industrial Union Dep't., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring) (same).

history, or structure; by the force of the Court's own logic; or by the thrust of any analysis thus far advanced, at least to my knowledge, in the decision's defense. That *Chadha* realigns power in America in an extraordinary exercise of what some like to call "judicial activism" is clear enough. *Why* the Court has chosen to take this step remains unclear.

III. Allowable Methods of Ex Post Congressional Restraint on Executive and Agency Action After *Chadha*

Just how *much* and in what precise *ways* the *Chadha* decision realigns governmental power also remains to be seen. That the ruling, purely as a matter of arithmetic, "[struck] down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history,"[88] seems indisputable. But how "monumental [a] change [will result] in the way government does business"[89] will surely depend (a) on how many devices *analogous* to legislative vetoes are actually felled by *Chadha*'s ax; and (b) on how many of the provisions rendered inoperative by *Chadha* must be deemed *inseverable* from, and thus fatal to, the entire delegations of authority to which those provisions are attached.

So far as *Chadha*'s reach into analogous areas is concerned, even the most cursory analysis uncovers many legislative methods for containing, after the fact, the power delegated to agencies, commissions, or the executive branch that simply do not implicate the holding of *Chadha* at all. Thus, even the broadest reading of *Chadha* contains nothing that would prevent Congress from enacting "report and wait" provisions. The Federal Rules of Evidence and of Civil Procedure are already governed by such provisions—mandating that rule changes shall not take effect as law until after the legislative session in which they have been reported to Congress by the Attorney General.[90] Such

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[88] 103 S. Ct. at 2810–11 (White, J., dissenting).

[89] Press, *The Court Vetoes the Veto*, Newsweek, July 4, 1983, at 16, 17 (quoting Stanley Brand, Counsel to the House of Representatives).

[90] *See* 28 U.S.C. § 2072 (1976) (Rules of Civil Procedure take effect 90 days after reported to Congress); 28 U.S.C. § 2076 (1976) (Rules of Evidence take effect 180 days after reported to Congress); *see also* Sibbach v. Wilson, 312 U.S. 1 (1941), *cited with approval in Chadha*, 103 S. Ct. at 2776 n.9. On July 20, 1983, four Senators introduced a bill under which *no* proposed agency rule could go into effect until thirty days had elapsed. During that time, if a congressional committee approved a joint resolution of

laws give Congress a greater opportunity to pass otherwise valid legislation denying legal effect to those executive, agency, or court actions with which it disagrees. Similarly, a law declaring that no administrative agency rule would take effect until affirmatively approved by a joint resolution of Congress and presented to the President,[91] while perhaps unwise, would nevertheless be constitutional. Nothing in *Chadha*, and nothing in the Constitution, prevents Congress from reducing the regulatory agencies to the status of advisory study commissions.[92] Refinements of this type of continuous legislative scrutiny are also possible. For example, a rule that all proposed regulations, or all regulations of a certain description, are automatically to be introduced as congressional resolutions and brought to a floor vote in both Houses within a fixed time, subject to delay beyond that time only pursuant to a majority vote in both chambers, would be less cumbersome than requiring the regulatory state to grind to a halt while proposed regulations wandered endlessly from one committee to another. The constitutional validity of such a scheme follows quite plainly from the Constitution's reservation to each House of the prerogative to determine its own rules of operation.[93]

May Congress specify by statute the circumstances in which approval by *both* Houses—in the form of a further statute, a step such as an explicit declaration of war, or a concurrent resolution expressly approving a presidential request—must be obtained by the Chief Executive in order for a particular exercise of presidential power (such as an arms sale, an impoundment of funds beyond a stated time or amount, or various troop deployments abroad) to occur or to continue? Provided the contested presidential action is not altogether beyond Con-

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disapproval, the rule would be delayed for a further sixty days, in which time the House and Senate could pass the resolution and send it to the President for his signature or veto. S. 1650, 98th Cong., 1st Sess. (1983); *see* N.Y. Times, July 21, 1983, at A19, col. 5.

[91] Such a provision, sponsored by Representative Elliot Levitas (D-Ga.), was tentatively added to an appropriations bill for the Consumer Product Safety Commission, H.R. 2668, incorporated into S. 861, 98th Cong., 1st Sess. (1983). *See* 129 CONG. REC. H4773 (daily ed. June 29, 1983) (statement of Rep. Levitas).

[92] Arguments such as those of House Counsel Stanley Brand that, once Congress has delegated power, it cannot "involve [itself] in the rule-making process on a return trip," N.Y. Times, June 29, 1983, at A19, col. 1, col. 4, greatly overstate *Chadha* by misconstruing its disapproval of one *method* of ex-post restraint on the executive as a blanket prohibition of *any* form of after-the-fact legislative oversight.

[93] U.S. CONST. art. I, § 5, cl. 2.

gress's constitutional power to constrain,[94] the answer to this question does not depend on *Chadha*—for such congressional specification and delegation of power circumvents neither presentment nor bicamerality.[95] The answer depends, rather, upon the extent to which Congress may, within limits, *define the boundary* between (a) the zone in which the executive *may* act absent statutory *prohibition*,[96] and (b) the zone in which the executive may *not* act absent statutory *authorization*.[97] That Congress may indeed specify such a boundary, within a fairly wide band whose outer limits are defined by the federal judiciary, seems an inescapable corollary of Congress's broad Article I powers and of its undoubted authority, by creating rights based on federal statute (e.g., rights of property), to add to the circumstances in which executive action (e.g., action seizing property) would be unlawful absent further statutory authorization.

Having declined to forbid a contested presidential action by statute, and having declined to condition that action on specific congressional approval, may Congress nonetheless specify by statute that such presidential actions may not occur, or must cease, if either House so demands within a stated time—or if Congress so directs by a concurrent resolution not subject to

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[94] For an example of an action that *is* beyond Congress's constitutional power to restrict, see Myers v. United States, 272 U.S. 52 (1926) (holding that Congress may not protect certain executive officials appointed by the President with the approval of the Senate from removal by the President without the Senate's consent).

[95] Thus it seems plain that nothing in *Chadha* casts doubt on the validity of those provisions of the War Powers Resolution that impose *reporting requirements* on the President, War Powers Resolution § 4(a), 50 U.S.C. § 1543(a) (1976), and set *durational limits* of 60 to 90 days on the presence of United States Armed Forces in "hostilities" abroad "unless the Congress . . . has declared war or has enacted a specific [statutory] authorization for such use of United States Armed Forces," War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (1976 & Supp. V 1981). As the Court expressly stated in *Chadha*, "other means of control [by Congress], such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power." 103 S. Ct. at 2786 n.19. It follows from *Chadha*, however—as well as from the purpose of § 5(b) of the War Powers Resolution—that such reporting requirements and durational limits must be triggered by the objective presence of events such as "hostilities"—events whose presence or absence a court can itself ascertain—and *not* by a one-House or even two-House "resolution" that such events have indeed occurred. The contrary reading of § 5(b) in Crockett v. Reagan, 558 F. Supp. 893, 899–901 (D.D.C. 1982) (holding that the time limit in § 5(b) does not begin to run until Congress "take[s] action to express its view that the [War Powers Resolution] is applicable to the situation"), is thus manifestly untenable after *Chadha*.

[96] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding President Carter's Iranian hostage settlement), *discussed in* Tribe, *supra* note 52, at 526–27.

[97] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (invalidating President Truman's Steel Seizure), *discussed in* Tribe, *supra* note 52, at 519–20, 524–25.

presidential veto? *Chadha* strongly suggests not. Even if the presidential action subjected to legislative veto represents an exercise of authority inherent in the executive office (albeit limitable by Congress) rather than a discharge of authority traceable entirely to a delegation by Congress, it is the delegation *to* Congress, or to one of its Houses, of a continuing role in the implementation of extant laws that *Chadha* forbids.[98]

The upshot of this analysis is that, after *Chadha* as before, "[t]he Constitution provides Congress with abundant means to oversee and control [both] its administrative creatures"[99] and the semi-autonomous executive branch. Justice White may be correct in concluding that "the alternatives [to the legislative veto] to which Congress must now turn are not entirely satisfactory,"[100] and that the Court had insufficient warrant for constraining Congress as it did in *Chadha*. But that constraint, while considerable, is far from total.

IV. Legislative Veto Provisions: An Occasion to Rethink the Problem of Severability

What follows for a law as a whole, and for actions taken under its authority, when a legislative veto mechanism included in the law is held unconstitutional? An analysis of that question may shed useful light on the general problem of severability and on the nature of judicial review itself.

Legislative veto provisions that simply purport to constrain exercises of inherent executive authority—such as section 5(c) of the War Powers Resolution[101]—if struck down under *Chadha*, leave in place whatever residuum of authority the Constitution itself entrusts to the executive over the matter at hand absent a valid statutory limitation by Congress. No real problem of severability is posed in this circumstance.[102]

In contrast, striking down a legislative veto provision that is attached to an exercise of authority wholly dependent on an

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[98] It follows that § 5(c) of the War Powers Resolution, 50 U.S.C. § 1544(c) (1976 & Supp. V 1981), is invalid under *Chadha* insofar as that section purports to require a removal of United States Armed Forces in specified circumstances "if the Congress so directs by concurrent resolution."

[99] 103 S. Ct. at 2786 n.19.

[100] 103 S. Ct. at 2795 (White, J., dissenting) (footnote omitted).

[101] *See supra* note 98.

[102] Certainly § 5(b), *see supra* note 95, is in no way jeopardized by the invalidity of § 5(c).

underlying delegation by Congress typically does pose a genuine severability problem. Congress might have chosen to withhold the delegated authority altogether, rather than see it survive shorn of the veto that Congress had insisted on retaining for itself or for one of its Houses or committees. Once the veto provision is held void and thus unenforceable, it may always be argued that a court cannot permit the delegated authority to be exercised even in cases where *no* veto occurs (and, a fortiori, in cases where there has been a veto). Therefore, the court must strike down the entire law.[103] Indeed, the question of who bears the burden of persuasion in determining Congress's intent may even be irrelevant. It may not matter whether, as the *Chadha* majority held, the presence of a boilerplate severability clause (of the sort most laws contain) raises a presumption that Congress would have enacted the law even without its veto provision;[104] or, as Justice Rehnquist argued in dissent, Congress should be strongly (although not conclusively) presumed to have made an all-or-nothing choice.[105] For clearly, whatever Congress *would have done* if the veto device had been unavailable to it at the time of the underlying law's enactment, the fact is that Congress *has not enacted* the law in a veto-free form.

When a severability clause is regarded as an instruction to judges that they ought to act *as if* Congress has enacted a veto-free law (or, indeed, any other law severed from a portion subsequently held to be unconstitutional), the clause seems nothing more than an invitation for courts to disregard the absence of any actual enactment of the severed law in accord with Article I's strictures. The constitutional safeguards of bicamerality and presentment are thereby abandoned, and a new law is created by judicial fiat.[106] Given the President's inability to ex-

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[103] A federal district court recently reached just this conclusion in striking down the Carter Administration's transfer of Equal Pay Act enforcement authority from the Labor Department to the Equal Employment Opportunity Commission. This transfer occurred under a plan adopted pursuant to the Executive Reorganization Act of 1977, 5 U.S.C. § 906 (1982), which gave the President authority to restructure the executive branch subject to a one-House veto. Finding such a scheme unconstitutional under *Chadha*, the district court deemed the veto provision inseverable from the act as a whole because Congress would not, in the court's view, have delegated such broad power to the President without reserving a veto. The court thus held the transfer of authority to EEOC void although no legislative veto was exercised. EEOC v. Allstate Ins. Co., 98 Lab. Cas. (CCH) ¶ 34,431 (S.D. Miss. Sept. 9, 1983). The approach urged in this Article would require that decision to be reversed.

[104] *See* 103 S. Ct. at 2774–76.

[105] 103 S. Ct. at 2816–17 (Rehnquist, J., dissenting).

[106] *See* L. TRIBE, ACL, *supra* note 2, § 12-27, at 717–18.

ercise an "item veto," it is particularly striking that the law at issue was enacted, and presented to the President for veto or signature, *as a single entity* and *not* as two distinct pieces of legislation. It seems especially odd for these concerns to be overlooked in *Chadha*—the very decision that held the legislative veto device void precisely because of its failure to meet the bicamerality and presentment requirements.

On the other hand, the option of *refusing* to sever the invalid provision so as to leave the underlying law in effect once its unconstitutional veto provision has been held void and rendered inoperative poses separation-of-powers problems of its own. After all, striking down a provision "fully operative as a law"[107] simply because Congress passed that provision only on a mistaken guess about how courts would treat *another* provision seems akin to invalidating one otherwise perfectly sound statute solely because those who voted for it wrongly supposed that another, closely related statute would be upheld. Moreover, if a severability clause is read as a legislative mandate that the two provisions should be regarded as two distinct laws, the President's failure to veto the entire measure, or its passage over his veto, may be treated as satisfying the presentment requirement as to each provision separately regarded.

If the debate is conducted in these terms, the anti-severability position seems the winner by a wide margin. This position avoids the apparent trap of judicial legislation. Moreover, the anti-severability viewpoint requires a court to invalidate the entire law *not* because of Congress's mistaken assumption as to the invalid part but because of Congress's failure to *enact* the remainder, and to present it to the President, as a separate piece of legislation.

There is another ground, however, on which the survival of nearly all laws infected by invalid legislative veto devices may be supported—a ground available even for laws containing no severability clause at all. At least where no legislative veto has been exercised in the case before the reviewing court,[108] it may be argued with considerable force that a litigant who is subjected only to an exercise of the underlying authority delegated by Congress has *no standing to invoke the rights of the third parties*

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[107] *Chadha*, 103 S. Ct. at 2775, (quoting Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

[108] *See supra* note 103.

who would be injured were the legislative veto to be used to their disadvantage.[109] Unless a law is void because of some defect in the process by which it was enacted, only very special considerations—such as the avoidance of an intolerable chill of First Amendment rights—would warrant facial attack by *all* litigants who are subject to a law where the constitutional defect in that law is salient in only a few of the law's applications.[110]

Even in the absence of a severability clause, the consequence of holding a law's legislative veto device unconstitutional is not, after all, to *excise* that device,[111] leaving behind a truncated and judge-made law that Congress never passed. Rather, the consequence is only to hold that the law Congress *did* pass is unconstitutional *as applied to cases in which the law's veto provision is invoked.* When the veto has *not* been used, the law may well be constitutionally inoffensive. Any suggestion that enforcing the law when no veto occurs entails treating the mere inaction of the House and Senate as legislation[112] betrays a basic misunderstanding of the objections to congressional legislation through silence.[113]

These observations leave open the question of remedy in a case in which the legislative veto *has* been cast—as it had been in *Chadha* itself. Once the invalidity of the immigration law as applied against Chadha is conceded, permitting *him* to invoke the deportation-suspension action taken by the Attorney General on his behalf pursuant to Congress's underlying delegation of authority in that immigration law may seem to give him the benefit of a law that Congress simply did not pass in the veto-free form that he seeks to have applied to him.[114]

Despite the analytic appeal of the resulting argument against Chadha—and indeed against giving *any* litigant the benefit of an

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[109] *See* L. TRIBE, ACL, *supra* note 2, §§ 3-23, 3-25 to 3-29.

[110] *See* L. TRIBE, ACL, *supra* note 2, §§ 12-24, 12-29.

[111] As David Shapiro has remarked, "No matter what language is used in a judicial opinion, a federal court *cannot* repeal a duly enacted statute of any legislative authority." Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759, 767 (1979) (emphasis added).

[112] The *Chadha* majority may be understood to have suggested as much, *see* 103 S. Ct. at 2787 n.22, but only in response to Justice White's dissenting argument that the *exercise* of a one-House veto should be viewed not as unicameral lawmaking but as a failure to obtain bicameral approval. *See* 103 S. Ct. at 2808 (White, J., dissenting).

[113] *See supra* note 52.

[114] Compare Justice Rehnquist's argument in Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (plurality opinion), that one who relies on an Act of Congress for his underlying substantive entitlement "must take the bitter with the sweet." *See* L. TRIBE, ACL, *supra* note 2, § 10-12.

agency adjudication or rule which has been subjected to a legislative veto that a court later decides to invalidate—it seems most unpalatable to conclude that the very invalidity of the veto device has the de facto effect of vetoing, albeit judicially, any agency action that has actually been subjected to it! Since a court could not *enjoin* future uses of the veto,[115] the upshot would be to render the *Chadha* holding binding only to the degree Congress might choose to obey it—a result that is hard to swallow, even for those who think *Chadha* was wrongly decided.

To escape this nasty conclusion, one need only accept a somewhat more modest view of precisely what a federal court does when it strikes down a veto provision in a case like *Chadha*, or indeed invalidates any provision of any law. Rather than conceiving of the court as enforcing the law "minus" its invalidated provision—a "law" the legislature never enacted—perhaps one should simply understand the court as resolving the controversy before it in terms of the *entire* body of law applicable to that controversy, the entire Act of Congress (*not* the Act "minus" any offending portion) *plus the Constitution*.[116]

So conceived, the Court's holding in *Chadha* is that, because of the bicamerality and presentment requirements of Article I, the only way to give constitutional effect to Congress's enactment in the case at bar—i.e., the only way to give effect to the Constitution while enforcing, to the degree possible and to the extent consistent with its meaning, the statute Congress enacted—is to treat Congress's specific action in exercising a "legislative veto" against Chadha as incapable of abridging whatever rights Chadha otherwise enjoys under the law that Congress passed. That Congress might not have conferred such rights upon Chadha had it anticipated this outcome is interesting but immaterial to this perspective. Invalidation of the entire law would result only if one could show that the meaning of the entire law Congress enacted was so thoroughly and radically compromised by the invalidation of the law's veto device that, as a matter of ordinary statutory construction, the stump that remains after the veto branch has been cut off ought to be given no legal effect at all.

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[115] The Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, would presumably immunize Congress at least to that degree.

[116] That is, after all, the theory of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

This approach to severability regards courts not as choosing how much or how little of a law to "strike down" but as resolving controversies in a manner that rejects only such claims based upon a given law as are themselves deemed incompatible with the Constitution. Such a perspective avoids the several paradoxes to which the more heavily intent-based approaches to severability—the approaches ordinarily employed by the Supreme Court[117]—give rise. In particular, the approach urged here avoids both the puzzle of how a court can ever choose to enforce a law "severed" into a form that was never duly enacted, and the converse puzzle of how a court that views itself as powerless to enforce a law "minus" a severed veto can ever effectuate its holding that the veto's exercise should be disregarded.

Under the view urged here, a law's total invalidity would follow from a holding that the law's application in a given case, or in a given class of cases, is unconstitutional only when the entire law's very invocation is held to be inconsistent with the Constitution. Such an inconsistency could be found when the law is not duly enacted, is vague in all applications, is facially overbroad under the First Amendment, or deals with a matter beyond the enacting jurisdiction's authority. Under the approach here proposed, inseverability would *never* follow from the mere prospect that the legislature might not have enacted the law at all if it had known that the offending aspects or applications of that law would not survive.

Of course, if Congress were actually to *enact*, as part of a law, an explicit *non*-severability clause—directing that no part of the law should survive if a certain portion, or a certain set of applications of the law, were invalidated—then an adjudication of unconstitutionality would necessarily doom the law in its entirety, simply as a matter of statutory interpretation. Similarly, if a fair reading of a law is that it cannot have been meant to apply *at all* once certain parts or applications had been excised, then ordinary canons of interpretation would leave the law a nullity once such partial invalidity had been decreed.[118] But

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[117] *See Chadha*, 103 S. Ct. at 2816 (Rehnquist, J., dissenting); Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936).

[118] To be sure, legislative history and intent may shed light on this issue of meaning just as on other issues of statutory construction. But there is a major, even if subtle, difference, both in principle and as a practical matter, between (a) treating evidence of what Congress would have done, or would have wanted courts to do, in the event of partial invalidation as shaping our understanding of what Congress's law *means*; and (b) treating Congress's unenacted wishes or inclinations as the very *objects* of the court's

these quite rare instances of total nullification would be far more exceptional under the view proposed here than they are apt to be under the much looser approach to inseverability that has characterized adjudication in the past.

V. CONCLUSION

The immodesty of the Supreme Court's wide-ranging holding in *Chadha* presents more than a puzzle in divining the Court's aims; it presents, as well, a challenge in confining the dislocation caused by the Court's ruling. The Court's own lack of restraint in destroying "an important if not indispensable political invention"[119] need not, and should not, inspire a similar abandon on the part of those who must be guided by the Court's work.

search. *See, e.g.*, Tribe, *supra* note 52, at 523, 533–34 & n.105. In practice, the former perspective—which I regard as the only defensible one—is much less likely than the latter to generate rulings of inseverability. For such rulings follow with considerably greater ease when the question put is whether Congress *might have preferred* no law to a severed law had the choice been unavoidable than they do when the question put is whether Congress *in fact meant*, and all but expressly *agreed*, to enact a law that would indeed self-destruct rather than survive a certain form of partial invalidation. Whenever the law's language and logic leave the matter in doubt, only the clearest evidence that a majority of both Houses of Congress actually *meant to choose self-destruction over severability* should suffice to yield an interpretation of inseverability. And, whenever the law's language and logic compel the contrary interpretation (i.e., one of severability), that should end the matter whatever the evidence of intent.

[119] *Chadha*, 103 S. Ct. at 2795 (White, J., dissenting).

ARTICLE

THE LEGISLATIVE VETO: A CONSTITUTIONAL AMENDMENT

DENNIS DECONCINI*
ROBERT FAUCHER**

In response to the Supreme Court's decision in INS v. Chadha, *Senator DeConcini introduced a joint resolution that would amend the Constitution to provide expressly for a legislative veto mechanism. The Subcommittee on the Constitution of the Senate Judiciary Committee has scheduled hearings on Senator DeConcini's bill for February, 1984.*

In this Article, Senator DeConcini and Mr. Faucher sketch the history of the legislative veto, from the "laying procedure" of colonial times to the Chadha *decision. The authors then discuss the proposed amendment and demonstrate how the amendment reinforces the separation of powers and preserves Congress's constitutional role in the lawmaking process. Senator DeConcini and Mr. Faucher argue that the legislative veto mechanism promotes efficiency in government and increases Congress's ability to check abuses of power by the executive branch. They contend that the* Chadha *decision, with its literal reading of the Article I requirements, has not altered or diluted the separation of powers rationale that has persuaded Congresses, for over fifty years, to adopt and utilize the legislative veto. Finally, the authors review alternatives to the legislative veto and conclude that the amendment is necessary to restore a balance of power among the branches of government.*

In *INS v. Chadha*,[1] the Supreme Court held unconstitutional the one-House veto provision contained in section 244(c)(2) of the Immigration and Nationality Act.[2] The Supreme Court's sweeping language in *Chadha* appears to invalidate every use of the legislative veto,[3] and this decision "will be remembered as the beginning of a fundamental restructuring of the powers between the executive and legislative branches in Washington."[4]

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* Member, United States Senate (D-Ariz.). B.A., University of Arizona, 1959; LL.B., University of Arizona Law School, 1963. Senator DeConcini is the ranking minority member of the Subcommittee on the Constitution of the Senate Judiciary Committee and was the former Chairman of the Subcommittee on Courts.

** B.A., Arizona State University, 1980; J.D., College of Law, Arizona State University, 1983.

[1] 103 S. Ct. 2764 (1983).

[2] Act of Oct. 24, 1962, Pub.L.No. 87-885, § 4, 76 Stat. 1247, 1248, *amending* Immigration and Nationality Act, ch. 477, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c)(2) (1982)).

[3] *Chadha*, 103 S. Ct. at 2788 (Powell, J., concurring); *id.* at 2792 (White, J., dissenting). "Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history." *Id.* at 2810–11 (White, J., dissenting).

[4] 129 CONG. REC. S9554 (daily ed. June 29, 1983) (statement of Sen. Nunn (D-Ga.)).

A constitutional amendment proposed in response to *Chadha*, S.J. Res. 135,[5] would prevent this "fundamental restructuring of powers" by expressly providing for a legislative veto mechanism in the Constitution. Moreover, both by promoting efficient government and by increasing Congress's ability to check abuses of power by administrative agencies, such an amendment would reinforce the separation of powers doctrine incorporated in the Constitution.

The legislative veto has been surrounded by controversy[6] since its first modern use in 1932.[7] This controversy involves the respective powers, limitations, and responsibilities of the executive, legislative, and judicial branches of government under the Constitution. Before *Chadha*, "[t]he legislative veto offered the means by which Congress could confer additional authority while preserving its own constitutional role."[8] The proposed amendment would reinstate the means by which Congress can delegate broad authority to the executive branch, yet retain its constitutional mandate to check the exercise of that power.

This Article first will sketch a brief history of the congressional veto, from the "laying procedure" of colonial times to the termination of its use with the decision in *Chadha*. The main body of this article will deal with S.J. Res. 135, which would restore Congress's right to approval of executive actions through the legislative veto device. After explaining the amendment, the Article will demonstrate how the amendment complements the constitutional framework and accords with the political theory underlying the Constitution. Finally, the Article reviews other approaches with which Congress can respond to the Supreme Court's holding in *Chadha* and concludes that this constitutional amendment is necessary to restore a balance of power among the branches of government.

I. Historical Development of the Congressional Veto

The modern congressional veto device evolved from an early British parliamentary antecedent, the laying system. As early

[5] S.J. Res. 135, 98th Cong., 1st Sess., 129 Cong. Rec. S11,015–17 (daily ed. July 27, 1983).

[6] For a survey of materials on the controversy see *Chadha*, 103 S. Ct. at 2797 nn.12–14 (White, J., dissenting).

[7] Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (authorizing reorganization of executive departments subject to legislative review).

[8] *Chadha*, 103 S. Ct. at 2793 (White, J., dissenting).

as 1386, Parliament delegated authority to make rules and regulations to various executive agents.[9] Such delegation of statutory authority increased over the centuries[10] and included the delegation by Parliament of legislative and judicial authority in the American colonies.[11] By the eighteenth century, it was not uncommon for delegation statutes to contain provisions that required delegatees to lay before Parliament various matters under their charge, including rules and regulations.[12]

The delegation of legislative authority, along with other principles of British parliamentary government, formed the background for the writing of the Constitution and provided guidance for early congressional statutes requiring delegatees to "lay before" Congress several matters which were under their delegated control.[13] A notable example of the laying of delegated legislation involved the administration of the Louisiana Purchase. In 1804, Congress passed an act that divided the recently purchased land of Louisiana into two territories and delegated Congress's rulemaking authority under the Constitution[14] to the governors of the two territories, subject to disapproval of such rules by Congress:

> The legislative powers shall be vested in the governor, and in thirteen of the most fit and discreet persons of the territory . . . . The governor shall publish throughout the said terri-

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[9] 10 Rich. 2, ch. 1 (1386).

[10] *See, e.g.*, Statute of Wales, 34 & 35 Hen. 8, ch. 26, §§ 119–120 (1542–1543) (authorizing Henry VIII to issue rules for governing Wales, including the power to levy taxes); 9 Geo. 3, ch. 8 (1769) (empowering certain harbor commissioners "to make such Bye-laws, Rules, Orders, and Regulations, as shall be found necessary for the Purposes in this Act . . . .").

[11] *See, e.g.*, 14 Geo. 3, ch. 19 (1774) (giving the King authority to reopen all or part of port of Boston); 14 Geo. 3, ch. 83 (1774) (authorizing the King to appoint council for governing Quebec with power to make ordinances, to avoid "delay and inconvenience").

[12] *See, e.g.*, 18 Geo. 3, ch. 13 (1778) (granting commissioners the power to make "Regulation, Provision, Matters" to quiet disorder, but providing that the regulations should not become effective until confirmed by Parliament); *see also* 9 Anne, ch. 21, § 17 (1710); 1 Geo., stat. 2, ch. 21, § 8 (1714); 27 Geo. 3, ch. 13, § 122 (1787); 33 Geo. 3, ch. 29, § 9 (1793) (all requiring the delegatees to lay before Parliament matters relating to finances); 31 Geo. 3, ch. 30 (1791) (requiring the King to lay before Parliament orders he was authorized to make with respect to the price of grain).

[13] *See, e.g.*, Act of May 4, 1798, ch. 38, § 2, 1 Stat. 555, 555–56; Act of May 6, 1796, ch. 21, § 4, 1 Stat. 461, 461; Act of Mar. 3, 1795, ch. 43, § 13, 1 Stat. 426, 429; Act of July 1, 1790, ch. 22, 1 Stat. 128. *See generally Chadha*, 103 S. Ct. at 2800 n.18 (White, J., dissenting); Sibbach v. Wilson, 312 U.S. 1, 15 n.17 (1941); A Motion for Leave to file Amici Curiae Brief, and the Brief Amici Curiae of The Honorable Charles Pashayan, Jr., Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983) (brief for consolidated case, United States House of Representatives v. FTC).

[14] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property, belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2.

> tory, all the laws which shall be made, and shall from time to time, report the same to the President of the United States, *to be laid before Congress; which, if disapproved of by Congress, shall thenceforth be of no force.*[15]

Although the statutory requirements vary, typically under the laying procedure Congress delegates authority to an agent to perform some legislative act, subject to the condition that the act will not assume the force of law until after a certain period of time during which the agent presents his proposed action to Congress. During the post-presentment period, Congress may disapprove of the proposal by passing a law (to be presented to the President), which would nullify or amend the proposed action. Without congressional action, the proposal becomes law.[16]

The modern legislative veto evolved from this laying procedure. The congressional veto, however, differs from the laying procedure in that Congress expresses its disapproval of a delegatee's proposal without the formal passage of a second piece of legislation. Historically, congressional veto provisions have lacked uniformity. Statutes may require that executive proposals be approved by Congress before they can be implemented, or they may provide that any such proposals would become effective unless specifically disapproved by Congress within a designated period.[17] Some statutes authorize either the Senate or the House of Representatives, acting alone, to reject proposals.[18] Other statutes require that both Houses grant approval or

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[15] Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284 (emphasis added).

[16] *See, e.g.*, Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1976)) (Federal Rules of Civil Procedure prescribed by the Supreme Court shall not take effect until the expiration of ninety days after they have been reported to Congress). In Sibbach v. Wilson, 312 U.S. 1, 15–16 (1941) (footnote omitted), the Court noted that:

> in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.
>
> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.

[17] *See, e.g.*, Trade Expansion Act of 1962, Pub. L. No. 87-794, § 351, 76 Stat. 872, 899 (codified at 19 U.S.C. § 1981(a) (1982)) (tariff or duty recommended by the International Trade Commission may be imposed by concurrent resolution of approval); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 211(a), 90 Stat. 729, 743 (codified as amended at 22 U.S.C. 2776(b)(1) (Supp. V 1981)) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, § 12, 88 Stat. 1878, 1892–93 (codified at 42 U.S.C. § 5911 (1976)) (rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by a resolution of either House).

[18] *See, e.g.*, Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § 201(1), 90 Stat. 303, 309 (codified at 10 U.S.C. § 7422(c)(2)(C) (1982)) (President's

pass a disapproval measure.[19] A number of statutes, however, allow affirmation or rejection merely by committee action.[20]

The types of measures that may be used by Congress to express its approval or disapproval also differ. Quite often, a simple resolution of either House is sufficient.[21] Many laws provide that a concurrent resolution of approval or disapproval must be employed.[22] A few congressional veto acts in recent years have required that both Houses pass a joint resolution.[23]

Typically, a legislative veto provision is included in a statute as part of a compromise between the executive and legislative branches whereby the executive is delegated authority, the exercise of which is subject to a form of congressional approval.[24]

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extension of production period for naval petroleum reserves may be disapproved by resolution of either House); Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f)(3), 92 Stat. 1705, 1752 (codified at 49 U.S.C. § 1552(f)(3) (Supp. V 1981)) (rules or regulations governing employee protection program may be disapproved by a resolution of either House).

[19] *See, e.g.*, International Navigational Rules Act of 1977, Pub. L. No. 95-75, § 3(d), 91 Stat. 308, 308–09 (codified at 33 U.S.C. § 1602(d) (Supp. V 1981)) (presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution); Federal Civil Defense Act of 1950, Pub. L. No. 81-920, § 201(g), 64 Stat. 1245, 1248 (codified at 50 U.S.C. app. § 2281(g) (Supp. V 1981)) (interstate civil defense compacts may be disapproved by concurrent resolution).

[20] *See, e.g.*, Futures Trading Act of 1978, Pub. L. No. 95-405, § 26, 92 Stat. 865, 877 (codified at 7 U.S.C. § 16(a) (1982)) (two-committee approval of any plan of fees developed by the Commodity Futures Trading Commission to cover the estimated cost of regulating transactions); Act of Sept. 5, 1962, Pub. L. No. 87-639, § 1, 76 Stat. 438 (codified at 16 U.S.C. § 1009 (1982)) (one committee of either House may direct the making of investigations, surveys, and reports for flood prevention).

[21] *See, e.g.*, Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, § 3(a), 84 Stat. 1946, 1949 (codified at 5 U.S.C. § 5305(m) (1982)) (President's alternative plan for federal pay adjustment may be disapproved by resolution of either House).

[22] *See, e.g.*, International Security Assistance Act of 1977, Pub. L. No. 95-92, § 16, 91 Stat. 614, 622 (codified at 22 U.S.C. § 2753(d)(2) (Supp. V 1981)) (except in a presidentially certified emergency, Congress by concurrent resolution may disapprove of certain transfers of defense equipment or services); Energy Security Act, Pub. L. No. 96-294, § 129(a)(1), 94 Stat. 611, 652 (1980) (codified at 42 U.S.C. § 8725(a)(1) (Supp. V 1981)) (amendments substantially altering the use of funds under the comprehensive strategy of the Synthetic Fuels Corporation must be approved by concurrent resolution).

[23] *See, e.g.*, Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 1326(a), 94 Stat. 2371, 2488 (1980) (codified at 16 U.S.C. § 3213(a) (1982)) (approval by joint resolution of withdrawals of public lands covering more than 5000 acres in the aggregate); Crude Oil Windfall Profits Tax Act of 1980, Pub. L. No. 96-223, § 402, 94 Stat. 229, 301 (codified at 19 U.S.C. § 1862(e) (1982)) (disapproval by joint resolution of a presidential action to adjust imports of petroleum or petroleum products); Education Amendments of 1980, Pub. L. No. 96-374, § 248, 94 Stat. 1367, 1389 (codified at 20 U.S.C. § 1047(g) (Supp. V 1981)) (approval by joint resolution of any design for a national periodical system).

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> Typically the way the device has come into being is that Congress and the President reach an agreement that the executive will be granted a specific power, which would not exist except for the enactment of the law, and Congress ties a limitation to that delegation—that the executive decision will be subject to a form of congressional nullification.

129 CONG. REC. H4824 (daily ed. June 29, 1983) (statement of Rep. Moakley (D-Mass.)).

A recent commentator has described the mechanics of a veto provision:

> [The legislative veto] enables Congress, by action short of enactment of new legislation, to preclude implementation of proposed executive or administrative actions which have been advanced pursuant to statutory authority . . . . The congressional veto customarily takes effect in the following manner. Congress enacts a statute, either signed by the President or passed over his veto, requiring implementation by the executive or an administrative agency. Pursuant to a delegation of authority in the enabling statute, an affected agency must submit to Congress whatever executive orders, rules, regulations or directives it proposes to implement the stated congressional policy. If at the expiration of a specified time period, usually thirty to sixty days, no disapproval action is taken by Congress, the proposed action becomes effective.[25]

The resolutions of approval or disapproval cannot be amended in committee or on the floor.[26] This characteristic, along with the mandated time period within which Congress must consider the issue, permits a large and diversified legislature to make judgments efficiently.

The congressional veto was first employed in the government reorganization acts in the first half of this century.[27] More than 200 laws containing over 350 separate congressional veto provisions have been enacted in the last half-century.[28] Although legislative veto provisions were adopted sparingly in earlier years, the number of acts containing such provisions increased markedly during the 1970's.[29] For example, in the Ninety-sixth Congress alone, legislative veto provisions were included in thirty-three statutes.[30]

Congress has been modest in its exercise of the veto. Since 1932, Congress has passed approximately 125 resolutions over-

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[25] Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 323–24 (1977).

[26] *See, e.g.*, Energy Security Act, Pub. L. No. 96-294, § 129, 94 Stat. 611, 652 (1980) (codified at 42 U.S.C. § 8725 (Supp. V 1981)). See also the discussion in HOUSE COMM. ON RULES, EXPORT ADMINISTRATION AMENDMENTS OF 1983, H.R. REP. No. 257, 98th Cong., 1st Sess. 3–4 (1983) (questioning such limitations).

[27] *See supra* note 7 and accompanying text. For a discussion of the development of the modern legislative veto see *Chadha*, 103 S. Ct. at 2793–96 (White, J., dissenting).

[28] C. Norton, Data on and Examples of Congressional Disapproval of Rules and Regulations, Congressional Research Service Report (July 8, 1983).

[29] *Id.*

[30] 127 CONG. REC. S2575 (daily ed. Mar. 23, 1982) (list of congressional veto laws enacted by the 96th Congress).

turning presidential or administrative agency actions.[31] Of these, sixty-six have been rejections of presidential requests under the 1974 Congressional Budget and Impoundment Control Act[32] for deferrals of spending authority, and twenty-four have been disapprovals of executive reorganization plans.[33]

The creation and use of the veto mechanism was a direct response to increasingly broad congressional delegations of authority to administrative agencies. The delegation of congressional power to the heads of territories by the Congress of 1804[34] can be seen as a decision by that Congress that the day-to-day administration of the nation's territories and the concomitant requirement of rulemaking would have been an inefficient use of its limited time. Similarly, the burdens inherent in governing a complex industrialized society have led Congress to increase its delegation of rulemaking authority to the heads of administrative agencies.[35] As Congress has increasingly resorted to statutes delegating authority, so has it attempted to preserve the legislative branch's role as the supreme lawmaking and policy-directing body of government through the legislative veto.

By declaring all uses of the legislative veto constitutionally invalid, *Chadha* dismantled this highly evolved political system.[36] The specific question in *Chadha* was the constitutional validity of section 244(c)(2) of the Immigration and Nationality Act, which authorizes either House of Congress, by resolution, to invalidate the decision of the executive branch (pursuant to authority delegated by Congress to the Attorney General) to allow a particular deportable alien to remain in the United States.

The Court held the congressional veto provision in section 244(c)(2) to be unconstitutional.[37] The Court's rationale was based upon the constitutional design for the separation of powers.[38] The Court reasoned that "the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in

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[31] Norton, *supra* note 28.

[32] Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334–35 (codified at 2 U.S.C. § 684 (1982)).

[33] Norton, *supra* note 28.

[34] *See supra* note 15 and accompanying text.

[35] *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); *see also infra* text accompanying notes 97–103.

[36] *See supra* note 3 and accompanying text.

[37] *Chadha*, 103 S. Ct. at 2788.

[38] *Id.* at 2781–84.

The Supreme Court may consider the legislative procedure to be "clumsy" and "inefficient," but that perceived awkwardness results only when strict constitutional formalism is forced upon the structure of the government. The legislative process has always included procedures that serve efficiency and preserve the basic principles upon which the Constitution is founded: the principles of accountability and representative legislation. The legislative veto, as evolved from the laying procedure, reinforces those principles within the framework of the Constitution.

II. THE PROPOSED AMENDMENT

On July 25, 1983, S.J. Res. 135 was introduced in the Senate.[43] This joint resolution would amend the Constitution specifically

[39] *Id.* at 2784.
[40] *Id.* at 2785–86.
[41] *Id.* at 2787.
[42] *Id.* at 2788 (citations omitted).
[43] S.J. Res. 135, 98th Cong., 1st Sess., 129 CONG. REC. S11,015, S11,017 (daily ed. July 27, 1983). The amendment was referred to the Senate Committee on the Judiciary.

to permit the use of the congressional veto. The proposed amendment would restore the balance of power that existed among the branches of government prior to *Chadha*. The text of the amendment is concise.

The joint resolution states:

***Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission by the Congress:**

"ARTICLE—

"Section 1. Executive action under legislatively delegated authority may be subject to the approval of one or both Houses of Congress, without presentment to the President, if the legislation that authorizes the executive action so provides."

This amendment reinforces the full powers granted to Congress under the Necessary and Proper Clause.[44] Of this provision, Madison wrote in *The Federalist*:

> The sixth and last class [of provisions] consists of the several powers and provisions by which efficacy is given to all the rest.
>
> 1. "Of these the first is the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States."
>
> Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, no part can appear more compleatly invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter.[45]

The proposed amendment explicitly permits Congress, in accordance with the broad grant of power in the Necessary and Proper Clause, to utilize a legislative procedure necessary "to respond to contemporary needs without losing sight of fundamental democratic principles."[46]

The first phrase of the amendment, "Executive action under legislatively delegated authority," encompasses only those ac-

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[44] U.S. CONST. art. I, § 8, cl. 18.

[45] THE FEDERALIST No. 44, at 302–03 (J. Madison) (J. Cooke ed. 1961) (emphasis original).

[46] *Chadha*, 103 S. Ct. at 2798 (White, J., dissenting).

tions taken to execute a law pursuant to a legislative delegation of authority. "Executive action" under this amendment includes both action and failure to act, whether by executive or independent agencies or by the President. Thus, if Congress appropriates funds and the President impounds those funds, the impoundment may be subject to the approval of Congress.

Under the separation of powers doctrine, Congress may not subject the constitutionally authorized powers of the executive branch to its legislative approval.[47] Constitutionally authorized executive action includes the power to pardon criminals[48] and the general administrative control of those executing the laws, including the power of removal of executive officers.[49] Furthermore, after Congress enacts a statute, the executive branch is constitutionally empowered to apply the law of that statute. In *Myers v United States*, the Supreme Court stated that "Article II grants to the President the executive power of the Government, . . . a conclusion confirmed by his obligation to take care that the laws be faithfully executed."[50]

Yet, unless Congress legislates, the executive generally will have no power to act. The authority to apply executive power and the manner in which the executive power may be applied are dictated by the statute itself. As Justice Holmes stated, "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."[51] It is the exercise of this power under the statute that may be subjected to Congress's approval. In his dissent in *Chadha*, Justice White pointed out, "*The Steel Seizure Case* resolved that the Article II mandate for the President to execute the law is a directive to enforce the law which Congress has written."[52] Under this amendment, as long as Congress does not interfere with or encroach upon the constitutional powers of the executive, Con-

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[47] "The separation of powers doctrine has heretofore led to the invalidation of government action only when the challenged action violated some express provision in the Constitution." *Id.* at 2809 (White, J., dissenting); *see also id.* at 2790 (Powell, J., concurring).

[48] U.S. CONST. art. II, § 2, cl. 1; *see also* Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867); United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833).

[49] *See* Myers v. United States, 272 U.S. 52 (1926).

[50] *Id.* at 163–64.

[51] *Id.* at 177 (Holmes, J., dissenting).

[52] 103 S. Ct. at 2809 (White, J., dissenting); *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

gress may condition its delegations of power through the legislative veto device.

The amendment's phrase "may be subject to approval" envisions that Congress may choose, as it has in the past, what action it wishes to subject to approval. "Approval" may be demonstrated by conditioning the action of the executive branch upon affirmative congressional acceptance, such as the passage of a simple resolution. "Approval" could also be expressed by permitting executive action to become effective unless Congress passes a disapproval measure. Under this amendment, Congress may select whatever means it wishes to employ to express approval, as long as the procedure for approval is clearly delineated in the enabling act. The committee veto thus remains a viable option as a means of expressing approval.

The phrase "of one or both Houses of Congress" clearly permits a one-House veto. Furthermore, the one-House veto procedure is consistent with the bicameral requirement of the Constitution. A properly constructed legislative disapproval provision is not a veto by Congress of action that the executive branch is authorized to take, but rather is a rejection by Congress of a recommendation that the executive branch is authorized or directed to make. The executive action essentially is a proposal for legislation. As with other proposals for legislation, the disapproval of but a single House is all that is required to prevent its passage. Since approval is indicated by the failure of both Houses to veto the proposal, the one-House veto functionally is in harmony with the requirement of bicameral approval contained in the Constitution.[53]

The phrase "without presentment to the President" clearly allows all the veto mechanisms the Supreme Court struck down in *Chadha*. Under this amendment, the presentment requirement will have been fulfilled when the enabling legislation containing the veto provision passed Congress and was signed by the President or passed over his veto. This phrase would render moot the Supreme Court's more stringent interpretation of presentment.

There is a noteworthy parallel between legislation containing a legislative veto provision and legislation authorizing the appointment of officers of the federal government. If Congress by law vests the appointment of inferior officers in the President

[53] *See Chadha*, 103 S. Ct. at 2807–08 (White, J., dissenting).

alone, it may not, without further legislation, assert a power in the Senate to advise and consent to such appointments. But Congress can initially reserve such a power to the Senate.[54] Congress in this way has the constitutional power to choose to participate or not to participate in the appointment process.

Similarly, under the amendment, Congress—in a statute presented to the President and if necessary, passed over his veto—may authorize agencies to propose or recommend rules but retain for itself the power to disapprove any such rules and regulations. Such a provision would not subvert the President's veto power. Congress has simply determined the extent of its own participation under the broad scope of choice provided by this amendment and in keeping with the spirit of the Necessary and Proper Clause of the Constitution.[55]

The concluding phrase "if the legislation that authorizes the executive action so provides" requires that the approval mechanism be in the legislation enabling the executive branch to act. As before, Congress can decide whether to include a legislative veto procedure in a statute delegating authority. A post-hoc veto, however, cannot be applied to previously unlimited delegations of authority.[56]

This amendment permits Congress to utilize fully the congressional veto device. In effect, Congress will be permitted to proceed as it has in the past. The amendment simply gives the legislative veto the constitutional approval which the Supreme Court declared does not presently exist.

III. The Separation of Powers

The American system of government, under the Constitution, is premised upon the doctrine of separation of powers. While the Constitution distributes authority, it does not mandate absolute separation of power. Within this constitutional framework, the theory of separation of powers serves a dual purpose. First, the Constitution divides governmental power among the three branches in order to prevent abuses of power. Second, power is distributed among the three branches of governement

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[54] U.S. Const. art. II, § 2, cl. 2.

[55] U.S. Const. art. I, § 8, cl. 18.

[56] On the other hand, Congress may amend the authorizing statute to provide for a legislative veto mechanism.

in order to provide for a more efficient government.[57] In short, the Framers established a blueprint for governing that would maximize both protection from governmental abuses and economy in governmental action. Because the legislative veto is an extension of the accountability and efficiency aspects of this doctrine, this amendment fully accords with the pre-existing constitutional framework. The *Chadha* decision, with its literal reading of the Article I requirements, has not altered or diluted the separation of powers rationale that has persuaded Congresses, for over fifty years, to adopt and utilize the legislative veto. By expressly providing for a legislative veto in the Constitution, this amendment reinforces that doctrine.

Montesquieu, in his famous exposition of the separation of powers doctrine in *The Spirit of Laws*, states that "[i]n every government there are three sorts of power: the legislative; the executive; . . . [and the judiciary]."[58] The Framers incorporated the principle of separation of powers into the Constitution by distributing authority among the three branches of government: Article I vests the legislative power in the Congress; Article II vests the executive power in the President; and Article III vests the judicial power in the Supreme Court and such inferior courts as the Congress may establish.

At the same time, the Framers did not intend for the distribution of authority among the three branches of the government to be an absolute separation of the three powers. In *The Federalist* No. 47, Madison maintained that the preservation of liberty does not require the total separation of the legislative, executive, and judiciary departments from each other. Madison began his discussion of separation of powers by stating a political maxim: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[59] Madison then pointed out that Montesquieu viewed the British system and its characteristic principle of separation of powers as the model of political liberty. Yet, under that system of government, Madison wrote, "the legislative, executive and judiciary departments are by no means totally separate and distinct from each

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[57] For a discussion of the efficiency aspects of the separation of powers principle, see Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971).

[58] C. MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (T. Nugent trans. 1949).

[59] THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

other."[60] Madison continued, "[Montesquieu's meaning] can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[61] In *The Federalist* No. 48, Madison further argued "that unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained."[62]

Under the Constitution, there are no "watertight compartments"[63] of power.[64] Instead, there is an overlap of the three powers among the different branches of government. For example, the chief of the executive branch, the President, exercises legislative power when he vetoes acts of Congress[65] or recommends legislative proposals for action. He may also act on his judicial prerogative and pardon citizens found guilty of crimes.[66] Congress acts in an executive manner when the Senate participates in the process of appointment of executive officers of the government[67] and when it ratifies treaties negotiated by the executive branch.[68] Furthermore, the House of Representatives may initiate[69] and the Senate conduct the judicial process of impeachment.[70] The Constitution also makes Congress the judge of the election and qualification of its members.[71]

The authors of the Constitution believed that by separating the powers and distributing them among three branches of government, each branch would contain any tendency to usurp power by either of the other branches. They thus created a separation of powers to serve as a complete system of checks and balances that would restrain abuses by any branch of the

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[60] *Id.* at 325.

[61] *Id.* at 325–26 (emphasis original).

[62] THE FEDERALIST No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

[63] Springer v. Phillipine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting).

[64] *See* Buckley v. Valeo, 424 U.S. 1 (1976), which stated that the Framers "saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.* at 121.

[65] U.S. CONST. art. I, § 7, cls. 2–3.

[66] U.S. CONST. art. II, § 2, cl. 1.

[67] U.S. CONST. art. II, § 2, cl. 2.

[68] *Id.*

[69] U.S. CONST. art. I, § 2, cl. 5.

[70] U.S. CONST. art. I, § 3, cl. 6.

[71] U.S. CONST. art. I, § 5, cl. 1; *see also* Kilbourne v. Thompson, 103 U.S. 168, 190 (1880).

government. As one modern commentator has observed, "[t]yranny or arbitrariness does not stem from blended power; it is more likely to stem from unchecked power."[72]

Madison wrote that if Congress should exercise powers not warranted under the Constitution, the "success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . ."[73] The above quotation reveals that the Framers, in their day, identified the legislative branch as especially likely to encroach upon the powers of the coordinate branches. Yet, as one commentator has noted:

> The Framers' day . . . is not our day. The branch that now threatens to expand beyond its proper place, assert the proponents of the legislative veto, is the executive branch. Among other causes, the rapid growth of administrative agencies over the last half century has contributed to executive exercise of a wide array of powers that more traditionally lodged within the other two branches.[74]

This growth of power in the executive branch did not come in one day, but rather developed slowly in conjunction with the growth of the modern administrative state. The legislative veto enables Congress to reduce the concentration of power in the executive branch, in keeping with the intent of the Framers. As stated in *The Federalist*, "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[75] The legislative veto empowers the legislative branch to counteract the ambition of the executive branch. The veto is a "means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation's lawmaker."[76]

"When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II."[77] The Article II executive functions respecting legislation, including the Section 3 duties of the President to "take Care that the Laws

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[72] 1 K. DAVIS, ADMISTRATIVE LAW TREATISE § 2:6, at 81 (2d ed. 1978).
[73] THE FEDERALIST No. 44, at 305 (J. Madison) (J. Cooke ed. 1961).
[74] Mailin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 263 (1982).
[75] THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).
[76] *Chadha*, 103 S. Ct. at 2796 (White, J., dissenting).
[77] *Id.* at 2785.

be faithfully executed,"[78] are merely duties to execute "the laws consistent with the provisions therefor made by Congress."[79] The Supreme Court, in the past, has made it clear that the executive provisions of Article II primarily empower the President simply to carry out the laws enacted by Congress.[80] "The President's power, if any, to issue an order must stem either from an act of Congress or from the Constitution itself."[81] Moreover, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[82] This "power to execute the laws starts and ends with the laws Congress has enacted."[83]

In short, the President has nothing to execute unless legislation on that subject is passed by Congress or unless he is acting under his constitutional power as Commander in Chief, his power to grant pardons and reprieves, his power to receive ambassadors, or his power to make treaties. Under this amendment, "[u]nless Congress invades a power specifically granted to the President in the Constitution . . . , or fails to provide guidelines, no separation-of-powers problem arises from [a delegation of power with a legislative veto provision attached]."[84]

The legislative veto mechanism originates from the constitutional concept that Congress will be responsible for legislation. Legislative power is the authority to make laws.[85] One article described the characteristics of lawmaking:

> Several attributes of legislative authority may be deduced by reference to what is perhaps the core of Congress' powers—the authority to enact laws. The essence of law-making is the issuance of rules that have the substantive authority to regulate conduct or direct the operation of government. These rules take effect prospectively through standards of general application. They impose legal sanctions or constitute legal authorization to take certain actions. If not unconstitutional, laws bind courts as well as other branches of government . . . . If characterized by any single feature, legislative power involves the formulation of policy, as opposed to the actual implementation of law.[86]

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[78] U.S. CONST. art. II, § 3.

[79] Myers v. United States, 272 U.S. 52, 247 (1926) (Brandeis, J., dissenting).

[80] *See*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[81] *Id.* at 585.

[82] *Id.* at 587.

[83] *Id.* at 633 (Douglas, J., concurring).

[84] Atkins v. United States, 556 F.2d 1028, 1068 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

[85] *See* Springer v. Philippine Islands, 277 U.S. 189, 209 (1928).

[86] Note, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593, 603–04 (1976) (footnotes omitted).

Agency rules and regulations—presently immunized by *Chadha* from direct congressional oversight—have similar attributes. In his dissent in *Chadha*, Justice White described the force of administrative rulemaking as equivalent to that of lawmaking.[87] Without the legislative veto device, the ability to control this administrative "lawmaking," especially by independent agencies, is greatly diminished.[88] The doctrine of separation of powers urgently requires the use of the legislative veto as a check upon the actions of these regulatory agencies.

The encroachment upon congressional lawmaking by such extra-legislative rulemaking should not be dismissed lightly. Senator Charles E. Grassley (R-Iowa) recently testified before Congress: "For every statute created by Congress in recent years the unelected bureaucracy has cranked out 18 regulations . . . . As noted by Murray Weidenbaum, former Chairman of the President's Council of Economic Advisors, federal regulations cost the U.S. economy about $126 billion annually."[89]

The legislative veto provides Congress with a direct means of oversight over the rules and regulations that are promulgated by executive bodies. This preserves the doctrine, under the theory of separation of powers, that no power go unchecked. It also preserves Congress's role as the lawmaking body under the Constitution.

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[87] There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U.S.C. § 551(4) provides that a "rule" is an agency statement "designed to implement, interpret, or prescribe law or policy." When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded "legislative effect." . . . These regulations bind courts and officers of the federal government, may pre-empt state law, . . . and grant rights to and impose obligations on the public. In sum, they have the force of law.

Chadha, 103 S. Ct. at 2802 (White, J., dissenting) (citations omitted).

[88] Congress, with the President's consent, characteristically empowers the agencies to issue regulations. These regulations have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law that they make. The President's authority to control independent agency lawmaking, which on a day-to-day basis is non-existent, could not be affected by the existence or exercise of the legislative veto. To invalidate the device, which allows Congress to maintain some control over the law-making process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch.

Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556, 3558 (1983) (White, J., dissenting).

[89] *Legislative Veto: Hearings on the Supreme Court's Decision in* INS v. Chadha *Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (in press) (statement of Sen. Grassley (R-Iowa)) [hereinafter cited as *Hearings*].

The legislative veto also establishes a check upon the abuse of power by administrative agencies. With the veto, Congress can force accountability while retaining the flexibility of action which the broad delegation of legislative authority permits. At the same time, Congress can continue to oversee the overall legislative policy of the government. The requirements of checks and balances dictate that Congress have the power to restrict abuses by the executive branch. With ineffective checks on that power, the executive branch certainly will attempt to achieve as great an authority as possible. Montesquieu wrote that "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go . . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."[90] As Madison put it, "You must first enable the government to controul the governed; and, in the next place, oblige it to controul itself."[91]

The veto mechanism is a controlling device in the government. The use of a legislative veto makes the legislative branch rightfully accountable for the laws of the nation. This is important as citizens look to Congress for relief from the oppressive measures promulgated by the administrative arm of the government.

The legislative veto was rarely used before it was found constitutionally impermissible. This does not mean that the legislative veto was an ineffective instrument, serving only to salve Congress's conscience for its generous delegations of power. For, although it was rarely exercised, it does not follow that it would never be exercised. The very threat of this flex of legislative muscle often seemed to temper otherwise extreme action by the executive branch. For instance, a threatened use of the veto figured prominently in the recent debate on the sale of military equipment to Saudi Arabia.[92]

In addition to creating a system of checks and balances, power is distributed among the branches in order to provide for a more efficient government. In fact, the failure of the Articles of Confederation to provide an efficient, workable system of government led to the demands for a new constitution. Under the Articles of Confederation, power was vested only in the legis-

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[90] C. MONTESQUIEU, *supra* note 58, at 150.
[91] THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).
[92] *See* 127 CONG. REC. S12,171–204 (daily ed. Oct. 27, 1981).

lature.[93] The net effect was an inefficient government suffering from paralysis.[94] In constructing the new government, the Framers sought economy of government by division of authority and specialization of duties.

In *The Federalist*, Hamilton described the problems of governing under the Articles of Confederation[95] and then advocated an effective centralized government.[96] The Framers applied the separation of powers doctrine to create an efficient government.[97] They realized that complete separation of authority would only increase the problem of inefficiency.

The demands of governing in modern society have forced Congress to delegate authority and effectively intermix the functions of the three branches of government. As a result, the government does not have sharply defined boundaries around each of the coordinate branches. Instead, the boundaries between each branch are fixed "according to common sense and the inherent necessities of governmental co-ordination."[98] As Justice Jackson stated, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.

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[93] ARTICLES OF CONFEDERATION art. IX.

[94] *See* Fisher, *supra* note 57.

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> In our case, the concurrence of thirteen distinct sovereign wills is requisite under the confederation to the complete execution of every important measure, that proceeds from the Union. It has happened as was to have been forseen. The measures of the Union have not been executed; and the delinquencies of the States have step by step matured themselves to an extreme; which has at length arrested all the wheels of the national government, and brought them to an awful stand.

THE FEDERALIST No. 15, at 98 (A. Hamilton) (J. Cooke ed. 1961).

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> The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a Foederal Government capable of regulating the common concerns and preserving the general tranquility, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed constitution. It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislation; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. . . . It must in short, possess all the means and have a right to resort to all the methods of executing the powers, with which it is entrusted, that are possessed and exercised by the governments of the particular States.

THE FEDERALIST No. 16, at 102–03 (A. Hamilton) (J. Cooke ed. 1961).

[97] *See* Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973). Miller states that "[e]fficiency was stressed as the principal reason for establishing an executive independent from the legislature by, among others, John Adams, Thomas Jefferson, John Jay and James Wilson." *Id.* at 588.

[98] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[99]

The benefit of coordination of effort by the three branches of government has led directly through the process of delegation of legislative powers to the creation of modern administrative government. "Delegation by Congress," said the Supreme Court in 1940, "has long been recognized as necessary in order that the exertion of legislative power does not become a futility . . . . [T]he burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues."[100]

Many advantages result from delegating the power to solve a complex problem to an administrative agency. An agency created to solve a problem possesses or obtains accurate and comprehensive knowledge of the problem. Its solutions exhibit a steady and systematic adherence to the same views concerning the problem. Decisionmaking with dispatch is facilitated. In short, specialization promotes efficiency that could not exist in the congressional bodies.

In the past fifty years, delegation to administrative agencies has increased dramatically. As Justice Jackson stated:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decision apart. They also have begun to have important consequences on personal rights . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.[101]

The delegation of rulemaking authority to agencies should be thought of as "unfinished law which the administrative body must complete before it is ready for application."[102] Congress

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[99] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[100] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) (citations omitted) (upholding the constitutionality of independent agency rulemaking under congressional delegation).

[101] FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

[102] *Id.* at 485 (Jackson, J., dissenting) (footnote omitted). Jackson continued:

> In a very real sense the legislation does not bring to a close the making of the law. The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediences or conflicting guides, and so leaves the rounding out of its command to another, smaller and specialized agency.

can only provide broad outlines because it does not know what the agency will encounter. But Congress cannot, for that reason alone, lose all voice in the rulemaking that the agency performs. Therefore, Congress attaches a legislative veto provision to those delegations which it deems too broad to go unchecked.

The delegation of rulemaking authority results from cooperation between Congress and the President. The President usually will initiate the cooperative process by recommending the establishment of an agency or the expansion of the authority of an existing agency in order to handle a specific problem. Members of the President's staff will then meet with their congressional counterparts to reach a compromise on the details of the legislation.

Without a veto provision in the enabling legislation, this cooperation between the President and Congress often ends with the passage of the enabling statute. On the other hand, the cooperation between the executive and legislative branches of government does not end with the passage of a statute containing a veto provision. Rather, the cooperation continues when the executive branch presents to Congress its recommendations under the statute. The requirement of congressional concurrence will lead to continued cooperation and will "have a powerful, though in general a silent operation."[103] Moreover, the inclusion of a legislative veto provision serves as an excellent check on partisanship in the delegatees.

Just as the executive is made more cooperative by the congressional checks in the appointment process, so the executive will be made more cooperative by a congressional veto provision in the rulemaking process. As Hamilton pointed out in *The Federalist* No. 76:

> It will readily be comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and indepen-

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> . . . Because Congress cannot predetermine the weight and effect of the presence or absence of all the competing considerations or conditions which should influence decisions regulating modern business, it attempts no more than to indicate generally the outside limits of the ultimate result and to set out matters about which the administrator must think when he is determining what within those confines the compulsion in a particular case is to be.

Id. at 485–86 (Jackson, J., dissenting).

[103] THE FEDERALIST No. 76, at 513 (A. Hamilton) (J. Cooke ed. 1961) (discussing advice and consent of Senate in the appointment process).

> dent body; and that body an entire branch of the Legislature. The possibility of rejection would be a strong motive to care in proposing.[104]

In this way, the veto works to produce the best proposals for regulation from the administrative bodies.

With a legislative veto, Congress can delegate without losing its voice in the delegated matter and can at the same time approach a problem without becoming overburdened by the weight of information generated while researching the problem. For example, Congress may not have much information about the technicalities of providing for clean water or a safe workplace at the time it passes authorizing legislation. The delegatee agency, however, develops that information through adjudication on a case-by-case basis or through hearings specifically convened to develop the expertise required to write the regulations to implement the statutes Congress enacts. The veto process permits Congress to draw on the developed expertise of the delegatee agency when the proposed regulations are presented to Congress. With a legislative veto provision, Congress gets the benefits of delegation as well as the continued oversight of the delegatee's exercise of delegated legislative authority.

In addition to controlling the use of delegated legislative power by another arm of the government, the legislative veto enhances the efficiency of the congressional branch of the government. The legislative veto procedure often promotes better-informed deliberation than the regular legislative process. "Under the legislative veto procedure, members of Congress act in the presence of specific and contemporary facts about a pending administrative proposal. Debates are often sharply focused and carefully considered."[105] Recent examples of more extensive deliberation by Congress include the debates on the sale of nuclear fuel to India in 1980,[106] on the sale of military equipment to Saudi Arabia in 1981,[107] and on the used-car rule promulgated by the Federal Trade Commission in 1982.[108]

Efficiency in government militates against permitting agency regulations to go into effect only to be revoked or replaced by later congressional actions. The inconsistency and uncertainty

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[104] *Id.*

[105] *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service).

[106] *See* 126 CONG. REC. S13,249–88 (daily ed. Sept. 24, 1980).

[107] *See* 127 CONG. REC. S12,171–204 (daily ed. Oct. 27, 1981).

[108] *See* 128 CONG. REC. S5380–402 (daily ed. May 18, 1982).

this would create for those governed by the regulations would be devastating. Such unsound governing most assuredly would burden the commerce of the nation.

The congressional veto ensures that the delegated power is exercised as Congress intended. Yet it does add another level to the legislative process, a layer that causes delay. This would seem to militate against any efficiencies Congress was seeking when it delegated authority in the first place. The delay, however, in practice only slightly expands the legislative process. The standard period for approval, thirty or sixty days, does not cause excessive delays. Indeed, the additional time for approval is relatively short compared to the time required for passage of a bill that would alter or eviscerate a regulation promulgated by an agency.[109]

Subjecting the expert decisionmaking of an agency to congressional review is also necessary in order to maintain public support for the agency's policies. The congressional process allows for an interaction between what the regulator proposes and what the American people, speaking through Congress, are willing to support. Without a blend of those two, no strong policy may ever be carried out.

For the private individual, the legislative veto procedure is "among the simplest and most direct methods of introducing accountability to the federal regulatory structures and enhancing Congressional responsiveness to the public's demands for sensible government."[110] For example, small businesses do not have the time or the resources to work directly with regulatory agencies or even to go to court to challenge unfair or inequitable regulations. With a legislative veto procedure, "the small business owner could take his case directly to his senators or representative."[111] Congress would then be able to correct any regulatory excesses evidenced by the complaint of the small business owner. This reinforces Congress's role as the supreme legislative body of government.

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[109] For example, in 1973 the Department of Transportation promulgated its unpopular regulation requiring seatbelt interlock systems in all new automobiles. 38 Fed. Reg. 16,072 (1973) (amending 49 C.F.R. § 571.208 (1973)). Despite overwhelming opposition to the regulation, it took Congress more than a year after the regulation took effect to reverse it by legislation. *See* Motor Vehicles and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1470, 1482 (codified at 15 U.S.C. § 1410b (1976)).

[110] *Hearings*, *supra* note 89 (statement of James McKevitt, Director of Fed. Legislation, Nat'l Fed'n of Indep. Business).

[111] *Id.*

It may be argued that a legislative veto would inappropriately interfere with executive functions and would serve only to give Congress an improper influence over the executive branch. But Congress has some power of interference and influence without the legislative veto.[112] The legislative veto, however, provides a much more effective and direct technique to control the exercise of delegated authority by the executive branch than do the other available alternatives, such as the threat of a bill to abolish an agency or restrict its jurisdiction. Furthermore, if what these critics mean by "influencing or interfering" with the executive is "restraining him," this is precisely what is intended.

Two commentators addressed the "problem" of congressional interference with the executive branch in this way:

> To argue that the veto is unconstitutional because it interferes with execution is to assume that oversight which interferes with execution can be distinguished from oversight which does not; in short, that there is a "proper" kind of congressional oversight which does not interfere and an "improper" kind which does. As the brief survey of Congress' oversight weapons demonstrates, such a distinction cannot be maintained. Basically, all oversight interferes with execution; indeed, it cannot avoid doing so. When Congress passes a piece of amendatory legislation, reduces an appropriation, conducts an investigation, formally or informally requires prior reporting, criticizes administrators on the floor or contacts them on behalf of constituents, it involves itself in the administrative process and interferes with what has been going on or what would go on if it had not stepped into the process.[113]

There is nothing "improper" about the legislative veto. Under this amendment, the executive branch becomes a party to the act when the President signs the enabling legislation and a member of the executive branch administers the law. These two conditions combine to preserve the integrity of the executive branch and spare needless interferences by the legislative branch. Congress will only intervene when necessary.

The legislative veto is a complex tool that has proven its benefits over the years. The proposed amendment is fully consonant with the spirit of the Constitution and the principles underlying that document. Congress will be able to continue to

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[112] *See* Atkins v. United States, 556 F.2d 1028, 1068 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

[113] Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 492–93 (1962).

delegate power in order to achieve efficient solutions to the problems at hand. Congress, however, may retain a control over that delegated power. As the Supreme Court stated, without the legislative veto, governmental processes will be "clumsy, inefficient, even unworkable" with "obvious flaws of delay, untidiness, and potential for abuse."[114] This does not necessarily have to be so. The legislative veto that this amendment explicitly permits would change the Supreme Court's formulation of the legislative process to allow a more efficient, workable process.

IV. Other Approaches

Without passage of this constitutional amendment, Congress must resort to statutory mechanisms in order to overturn or preempt federal agency rules, to limit their impact, or to prevent or hinder their promulgation.[115] These statutory mechanisms include: (1) direct override or preemption of rules; (2) modification of agency jurisdiction; (3) limitations in agency authorizations and appropriations; (4) extra-agency prior consultation requirements; and (5) advance notification requirements. While each of these statutory alternatives gives Congress some check over the exercise of delegated authority, none of these devices has proven as effective as the legislative veto.

The most direct alternative to a legislative veto is a statutory override of the offending rule or action. This method ensures that the executive branch acts in accordance with Congress's intent. However, requiring Congress to enact a second piece of legislation in order to implement its intent is highly inefficient. Further legislation presents heavy demands on congressional resources, requires review and approval by the entire Congress, and must be signed by the President or his veto overridden. If the President chooses to veto this second bill, Congress could enforce the intent of its original act only by a two-thirds majority of both Houses. In addition, until the proposed legislation is adopted, a controversial agency rule remains in effect, in direct conflict with congressional intent.

Congressional experience during the Vietnam War demonstrated the difficulties involved in passing a second bill.

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[114] *Chadha*, 103 S. Ct. at 2788.

[115] *See generally* Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 Ad. L. Rev. 667 (1980).

> The Vietnam war underscored the concern by Members of Congress that they might have to form extraordinary majorities in both Houses to control the President. Twice in 1973 Congress passed legislation to bring the war to a halt. Twice President Nixon vetoed these measures. On both occasions attempts in Congress to override the President were unsuccessful. The need to "enact a law" meant that the President could continue a war opposed by a majority in each House so long as he retained the support of a minority in a single chamber. Federal district judge Orrin Judd held that "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized." It was precisely for that reason that Congress insisted on a concurrent resolution of disapproval in the War Powers Resolution of 1973.[116]

Even if Congress is able to enact corrective legislation, this probably will not occur until after the executive branch officials have acted or the agency rule has gone into effect. This creates further serious problems:

> Post hoc substantive revision of legislation, the only available corrective mechanism in the absence of post-enactment review, could have serious prejudicial consequences; if Congress retroactively tampered with a price control system after prices had been set, the economy could be damaged and private rights seriously impaired; if Congress rescinded the sale of arms to a foreign country, our relations with that country would be severely strained; and if Congress reshuffled the bureaucracy after a President's reorganization proposal had taken effect, the results could be chaotic.[117]

As a second alternative, Congress could pass a statute altering the jurisdiction of a regulatory agency or expanding the exemptions from its authority, thereby affecting both existing and anticipated rules. This mechanism, however, requires Congress to restructure an agency or its powers whenever congressional intent is ignored. As a result, Congress would rarely utilize this option and would more likely overlook the agency's transgression.

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[116] *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service) (quoting Holtzman v. Schlesinger, 361 F. Supp. 553, 565 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)).

[117] Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 464 (1977) (footnotes omitted).

Congress may also attempt to influence executive action through the budget process by prohibiting expenditures for enforcement of particular rules or by revoking funding discretion for rulemaking activity. These limitations prevent an agency from promulgating or implementing a rule during the authorization or appropriation period. The effectiveness of such authorization or appropriation restraints is limited, however, because certain types of budget expenditures are largely immune from control: borrowing and contract authority (or "backdoor spending"); permanent authorizations or appropriations; expenditures for off-budget agencies; and carry-overs of unexpended funds.

Moreover, congressional reduction of a specific appropriation account may not generate sufficient pressure to compel the executive branch to implement a policy that it wishes to ignore. The impoundment controversy of the 1970's demonstrated the ineffectiveness of appropriations as a substitute for the legislative veto.[118]

A similar, but nonstatutory, control involves the prior approval by designated congressional committees of agency "reprogramming" of funds above a dollar threshold from one program to another.[119] The agency, however, can ignore the committee recommendation and spend the funds as appropriated in the lump-sum accounts. Generally, the agency will defer to the committee because it fears retribution in the form of budget cutbacks, line-itemization, or other sanctions.[120] As a result, this mechanism effectively acts as a committee veto. The informality of this procedure makes reprogramming a very dubious form of congressional control.

A fourth statutory mechanism would require agency consul-

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[118] *See id.*

[119] *See* Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 374 (1977).

[120] *Hearings*, *supra* note 89 (statement of Louis Fisher, Congressional Research Service). Fisher goes on to state a recent example of reprogramming:

> This type of legislative (or committee) veto operated this year when President Reagan wanted to reprogram $60 million to El Salvador. The administration honored the reprogramming procedure, touching base with the authorizing and appropriations committees to secure their support. In a reprogramming request a month ago submitted by the Commerce Department, agency officials sought approval from the Appropriations Committees to shift one million dollars to another program. Technically and legally they could have spent this money without consulting the committees and obtaining their approval, but a bureau official admitted that "whatever the particulars of the legalities might be, one ignores appropriations subcommittees at one's own peril."

Id. (footnotes omitted).

tation with or review by congressional committees or other agencies.[121] Such a procedure gives Congress only an indirect influence over proposals but has the salutary effect of broadening the agency's perspective during the decisionmaking process.

A fifth mechanism, which is similar to the consultation and review provisions, would require an agency to notify Congress or the appropriate congressional committee regarding proposed or final rules, usually within a specified period (e.g., thirty days) before the rules become effective.[122] While such a provision enables committees to be more readily aware of forthcoming regulations and might spur negotiations between Congress and the agency prior to the effective date of the regulation, this mechanism also gives Congress only an indirect role in the rulemaking process. After the *Chadha* decision, both the advance notice and the consultation and review requirements could be used to disapprove a regulation only in conjunction with a joint resolution of Congress. Thus, Congress would have to produce a super-majority vote of both Houses, if faced with a President's veto, in order to invalidate an offending agency proposal or regulation. This is an extraordinary requirement for Congress to meet in order to get an agency to act as it intended.

Many nonstatutory controls are also available to Congress. A congressional committee could explore the matter in a public hearing. Congress could mandate specialized committee staff

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[121] *See, e.g.*, Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, § 208(b), 90 Stat. 425, 454–55 (codified at 23 U.S.C. § 402 note (1976)) (prohibiting the Secretary of Transportation from enforcing any uniform safety standards which he promulgates until he conducts an evaluation of their adequacy and appropriateness and reports his findings to Congress); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(b), 90 Stat. 31, 35 (codified at 49 U.S.C. § 1(5) (1976)) (requiring the Interstate Commerce Commission to solicit and consider the recommendations of the Attorney General and the Federal Trade Commission in establishing rules to determine "market dominance").

[122] *See, e.g.*, Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 5(b), 89 Stat. 773, 794 (codified at 20 U.S.C. § 1411 note (1976)) (the Commissioner of Education must submit for review and comment any proposed regulations concerning the classification of children with special learning disabilities to Congress at least fifteen days before their publication in the Federal Register); Foreign Relations Authorization Act, Fiscal Year 1976, Pub. L. No. 94-141, § 406, 89 Stat. 756, 770–71 (1975) (codified at 22 U.S.C. § 2666 (1976)) (regulations by the Secretary of State authorizing security officers to carry firearms must be transmitted to Congress twenty days before the date on which such regulations take effect); Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 315(a), 88 Stat. 409, 415 (codified at 49 U.S.C. § 1356(a) (1976)) (the Administrator of the Federal Aviation Administration, unless he determines that an emergency exists, must notify Congress of any changes in passenger screening regulations at least thirty days before such changes become effective).

and General Accounting Office examinations. Congress also could establish select committees and specialized subcommittees to oversee agency rulemaking and enforcement. Committee reports, especially those reports accompanying authorizations and appropriations, may be used to advocate agency reconsideration of particular rules and their implementation. Congressmen could issue floor statements critical of specific rules or agency enforcement procedures. All of these devices, however, increase congressional workload without directly controlling executive action. As a result, the control that these mechanisms provide is inefficient and often ineffective.

Another course that has been recommended as an alternative to the legislative veto is a Legislated Regulatory Calendar.[123] The proposed calendar would consist of the following elements:

> 1. Each year Congress would receive a list of planned major regulatory proposals . . . , together with preliminary analyses of projected costs and benefits, from the Executive Branch and independent agencies . . . .
> 2. New Regulatory Authorization committees in the House and Senate . . . would consider the list, modify it as necessary, and then send it to the floor . . . .
> 3. The full Congress would be required to approve the Calendar before the agencies could proceed with their rulemakings . . . .[124]

The legislated calendar approach would require the establishment of regulatory authorization committees in the House and Senate. Each committee would consider the list of proposed regulations, modify it as necessary, and send the list with its recommendations to the floor for approval. This process would consume a tremendous amount of Congress's time and resources. Moreover, the Legislated Regulatory Calendar is an inflexible, indirect approach to legislative control of agencies.

Chadha also might revive interest in the Bumpers Amendment.[125] That bill would expand judicial review of agency action by removing any presumption in favor of agency action in determinations on questions of law and by imposing a more rigorous standard of judicial review for agency rulemakings.[126]

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[123] *Hearings*, *supra* note 89 (statement of Robert Litan, former Energy and Regulation Economist, President's Council of Economic Advisors).

[124] *Id.*

[125] The latest version of the Bumpers Amendment is S. 1766, 98th Cong., 1st Sess., 129 CONG. REC. S11,587 (daily ed. Aug. 4, 1983).

[126] *Id.*; *cf. Chadha*, 103 S. Ct. at 2796 n.11 (White, J., dissenting) (suggesting a limited role for a redefined legislative veto as a guide to interpretation of congressional intent);

While this proposal would result in closer judicial scrutiny of agency rulemaking to ensure conformity with congressional intent, it also may substantially delay the administrative process. In addition, the role contemplated for the judiciary under this proposal is not entirely appropriate.[127]

For Congress, "the greatest difficulty that will be caused by the Supreme Court decision is a mushrooming of workload during a time when Congress is having difficulty coping as it is with its necessary legislative activities."[128] None of the alternatives suggested to date will enable Congress to review effectively executive proposals before they take effect. None permit a direct expression of congressional intent to control the exercise of delegated authority by the executive branch. Thus, the only effective response to the *Chadha* dilemma is the adoption of this amendment.

V. Conclusion

The Constitution of the United States has been in operation for nearly two hundred years. Although the Framers realized that the document was not perfect and provided means for its amendment, it has undergone surprisingly few changes. The Constitution has proven to be an enduring instrument. In the course of the growth of this nation, more than 6,900 constitutional amendments have been proposed, but only twenty-six have been adopted.[129]

Hearings, *supra* note 89 (statement of Sen. Grassley (R-Iowa)) ("[Another option is] a proposal to attach a presumption of invalidity to an agency action that is challenged before the courts where that action has been the subject of congressional resolution of disapproval.").

[127] *See* R. Natter & M. Rosenberg, Scope of Judicial Review of Agency Rulemaking: A Review and Assessment of Pending Congressional Proposals for Change, Congressional Research Service Report (Aug. 24, 1982).

> [S]ome question may be raised whether the role envisioned for the courts is appropriate. Under the proposed statutory scheme some argue, it is possible the courts will become enmeshed, willingly or otherwise, in substantive rationality review of informal rulemaking determinations. Such involvement carries the potential that the courts will engage in tasks that in administrative law have been considered both beyond their competence or legitimate sphere of concern.

Id. at 73.

[128] *Hearings*, *supra* note 89 (statement of Norman Ornstein, Professor of Politics, Catholic University).

[129] According to *Proposed Amendments to the Constitution of the United States Introduced in Congress from the 88th Congress, 1st Session Through the 90th Congress, 2nd Session*, S. Doc. No. 38, 91st Cong., 1st Sess. (1969), 6940 proposals to amend the

An amendment to the Constitution is never to be treated lightly. Nevertheless, the *Chadha* decision seriously weakens the government's ability to function as an accountable, harmonious whole. Therefore, even though amending the Constitution will take time, it is a necessary endeavor. As Hamilton stated, "'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE."[130]

The *Chadha* case presents a situation that requires an amendment to the Constitution. The legislative veto "is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[131]

The words of Justice White in his dissent in *Chadha* best describe the role of the legislative veto:

> The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[132]

As Thomas Jefferson predicted, the people "will see and amend the error in our Constitution, which makes any branch independent of the nation."[133] The *Chadha* decision establishes the administrative agencies of the government as an independent, unaccountable fourth branch. This amendment will correct that error.

Constitution had been offered as of the end of 1968. Since then, there has been no reduction in the number of proposals.

[130] THE FEDERALIST No. 82, at 553 (A. Hamilton) (J. Cooke ed. 1961) (emphasis original).

[131] *Chadha*, 103 S. Ct. at 2795 (White, J., dissenting).

[132] *Id.* at 2792–93 (White, J., dissenting).

[133] D. MALONE, JEFFERSON, THE PRESIDENT: SECOND TERM, 1805–1809, 304–05 (1974) (questioning the degree to which the Constitution insulates the judiciary).

STATUTE

A MODEL STATE ACT: REMEDIES FOR DOMESTIC ABUSE

LISA G. LERMAN*

The problem of domestic violence has been the subject of increasing national concern. In response to that concern, states have enacted legislation providing protection to victims of domestic violence, encouraging improved police enforcement of protection laws, and constructing appropriate legal sanctions against abusers. Drafting comprehensive legislation to address this problem is difficult because both civil and criminal remedies are needed, because the needs of battered women are diverse and complex, and because effective protection requires a coordinated response by courts, law enforcement agencies, mental health personnel, and the bar. While some new legislation on wife abuse has been enacted in a majority of states, few states have addressed the full range of available remedies, or made relief available to all victims of domestic violence.

In this Article, Ms. Lerman presents a Model Act that consolidates and addresses remedies needed for domestic violence in one comprehensive statute. Ms. Lerman asserts that the primary goal of any law on domestic violence should be to protect the victim. Accordingly, the Model Act facilitates the victim's ability to gain access to the courts and to request protection. The Model Act also acknowledges the need for improved police response to domestic violence and specifies particular police duties. In addition, the Model Act recognizes that domestic violence may be handled as a civil matter, as a criminal matter, or both. Finally, the Model Act considers the appropriate legal treatment of abusers and includes both punitive and rehabilitative dispositional options.

During the last decade, forty-nine states and the District of Columbia have enacted new legislation to provide legal remedies

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* Advocacy Fellow, Center for Applied Legal Studies, Georgetown University Law Center. B.A., Barnard College, Columbia University, 1976; J.D., New York University, 1979. From 1979 to 1981 Ms. Lerman was Staff Attorney of the Family Violence Project at the Center for Women Policy Studies in Washington, D.C., and in 1982 she was a Clinical Fellow at the Women's Rights Clinic of Antioch School of Law. This article was initiated as part of the curriculum of the Women's Rights Clinic.

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to victims of domestic violence.[1] Most of the legislation confers broad injunctive powers on the courts to provide emergency

[1] For a comprehensive analysis of all state statutory provisions providing remedies to victims of domestic abuse, consult Lerman & Livingston, *State Legislation on Domestic Violence*, RESPONSE, Sept.–Oct. 1983, at 1. This article is available from the Center for Women Policy Studies, 2000 P St., N.W., Suite 508, Washington, D.C. 20036.

The following provisions are representative of recent enactments. ALA. CODE §§ 30-5-1 to -11 (Supp. 1982) (protection order); ALASKA STAT. §§ 25.35.10–.060 (1983) (protection order, police intervention); ARIZ. REV. STAT. ANN. §§ 13-3601 to -3602 (Supp. 1982–1983) (protection order, police intervention, criminal law); ARK. STAT. ANN. §§ 41-1653 to -1659 (Supp. 1981) (criminal law); CAL. CIV. CODE § 4359 (West 1983) (protection order); CAL. CIV. PROC. CODE §§ 545–553 (West Supp. 1983); COLO REV. STAT. §§ 14-4-101 to -105 (1973 & Supp. 1982) (protection order), *amended by* Act of Apr. 29, 1983, ch. 175, 1983 Colo. Sess. Laws 640.; CONN. GEN. STAT. ANN. § 46b-38 (West Supp. 1982) (protection order); DEL. CODE ANN. tit. 10, §§ 901(9), 902, 921(6), 925(15), 950(5) (1974 & Supp. 1982) (protection order); D.C. CODE ANN. §§ 16-1001 to -1006 (1981 & Supp. 1983); (protection order, criminal law); FLA. STAT. ANN. § 741.30 (West Supp. 1983) (protection order); GA. CODE §§ 19-13-1 to -5 (1982 & Supp. 1983) (protection order); HAWAII REV. STAT. § 586 (Supp. 1982), *amended by* H.B. 1102, 12th Leg. (1983) (protection order); IDAHO CODE § 19-603 (1947 & Supp. 1982) (police intervention); Illinois Domestic Violence Act §§ 101–103, 201–213, ILL. ANN. STAT. ch. 40, ¶¶ 2301-1 to -3, 2302-1 to -13 (Smith-Hurd Supp. 1982) (protection order), *amended by* Act of Aug. 18, 1983, Pub. Act No. 83-101, 1983 Ill. Legis. Serv. 1102 (West); IND. CODE ANN. §§ 34-4-5.1 to -6 (West Supp. 1982–1983) (protection order); IOWA CODE ANN. §§ 236-1 to -8 (West Supp. 1982–1983) (protection order); KAN. CIV. PROC. CODE ANN. §§ 60-3101 to -3111 (Vernon Supp. 1982) (protection order), *amended by* Act of May 6, 1983, ch. 201, § 1, 1983 Kan. Sess. Laws 1127; KY. REV. STAT. ANN. §§ 209.010–.140, 403.710 (Bobbs-Merrill Supp. 1982) (protection order); LA. REV. STAT. ANN. §§ 46:2131–2139 (West 1982) (protection order), *amended by* Act of July 24, 1983, Act No. 195, § 1, 1983 La. Sess. Law Serv. 875 (West), *and* Acts of July 2, 1983, Acts No. 406, 407, 1983 La. Sess. Law Serv. 1400, 1401 (West).; ME. REV. STAT. ANN. tit. 19, §§ 761–770 (1981 & Supp. 1982) (protection order); MD. CTS. & JUD. PROC. CODE ANN. §§ 4-404, 4-501 to -506 (Supp. 1982) (protection order); MASS. GEN. LAWS ANN. ch. 208, § 34C, ch. 209A, §§ 1–6 (West Supp. 1982–1983) (protection order); MICH. COMP. LAWS ANN. §§ 764.15(a)–(b), 769.4a, 772.13, 772.14a (West 1982) (police intervention, criminal law); MINN. STAT. § 518B.01 (1982) (protection order, police intervention), *amended by* Act of Apr. 22, 1983, ch. 52, § 1, 1983 Minn Sess. Law Serv. 205 (West); MISS. CODE ANN. §§ 93-21-1 to -29 (Supp. 1982) (protection order); MO. REV. STAT. §§ 455.010–.085 (Supp. 1983) (protection order); MONT. CODE ANN. § 40-4-106(3) (1981) (protection order); NEB. REV. STAT. §§ 42-901 to -903, -924 to -926 (1978) (protection order); NEV. REV. STAT. § 33.020 (1979) (protection order); N.H. REV. STAT. ANN. §§ 173-B:1 to -B:11 (Supp. 1979) (protection order), *amended by* Act of June 29, 1983, ch. 522, 1983 N.H. Laws 777; N.J. STAT. ANN. §§ 2C:25-1 to -16 (West 1982) (protection order); N.M. STAT. ANN. § 31-1-7 (Supp. 1981) (police intervention); N.Y. FAM. CT. ACT §§ 153-C, 155, 168, 216-a(ii), 812, 813, 817, 818, 821–828, 832–836, 838, 841–847 (McKinney 1975 & Supp. 1976–1982) (protection order), *amended by* Act of June 21, 1983, ch. 347, 1983 N.Y. Laws 601; N.C. GEN. STAT. §§ 50B-1 to -7 (Supp. 1981) (protection order); N.D. CENT. CODE §§ 14-07.1-01 to -08 (1981 & Supp. 1983) (protection order); OHIO REV. CODE ANN. §§ 1901.18–19, 1909.02 (Page Supp. 1982) (protection order); OKLA. STAT. ANN. tit. 22, §§ 60–60.6 (West Supp. 1982–1983) (protection order), *amended by* Act of June 23, 1983, ch. 290, 1983 Okla. Sess. Laws 888; OR. REV. STAT. §§ 107.700–.720, 133.310, 133.381 (1977 & 1981) (police intervention), *amended by* S.B. 476, 62nd Leg., 1983 Regular Sess.; 35 PA. CONS. STAT. ANN. §§ 10,182–10,190 (Purdon 1977 & Supp. 1982–1983) (protection order); R.I. GEN. LAWS §§ 15-15-1 to -7 (Supp. 1983) (protection order); S.D. CODIFIED LAWS ANN. §§ 25-10-1 to -14 (Supp. 1982) (protection order); TENN. CODE ANN. §§ 36-1201 to -1215 (Supp. 1982) (protection order); TEX. FAM. CODE ANN. §§ 71.01–.19 (Vernon Supp. 1982) (protection order); Act of June 19, 1983, ch. 631, 1983 Tex Sess. Law Serv. 4046 (Vernon) (amending TEX.

protection,[2] and imposes specific duties on law enforcement officials for protection of battered women and other victims of domestic violence.[3] Although little research has been conducted exploring the effectiveness of domestic abuse laws, the collective experience of advocates for battered women suggests that both injunctive relief and expanded law enforcement duties are useful tools in stopping domestic violence.[4]

The earlier statutes, such as the 1976 Pennsylvania law[5] and the 1978 Massachusetts law,[6] provided the template on which other laws have been constructed. Legislatures have amended the laws to correct problems that were not anticipated by the original drafters. The more complex and detailed character of recent statutes[7] is attributable, at least in part, to the experience gained from states that enacted abuse laws during the 1970's.

The goals of the various state laws are similar but the actual relief available and the procedures stipulated vary significantly. Some states articulate more clearly and specifically the remedies provided to a victim of domestic abuse.

This Article explores some of the most effective existing laws and suggests new approaches to resolve issues not yet addressed

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FAM. CODE ANN. § 71.11, adding TEX. FAM. CODE ANN. § 3.581, and adding TEX. PENAL CODE ANN. § 25.08); Act of May 20, 1983, ch. 878, 1983 Tex. Sess. Law Serv. 3857 (Vernon) (amending TEX. FAM. CODE §§ 71.01–.06, 71.13); UTAH CODE ANN. § 30-6-1 to -6-8 (Supp. 1983) (protection order); VT. STAT. ANN. tit. 15, §§ 1101–1107 (Supp. 1981) (protection order), *amended by* Act of Apr. 27, 1982, No. 218, 1982 Vt. Acts 362; J. Res. of Feb. 28, 1978, Va. Acts 1920 (police intervention); WASH. REV. CODE ANN. §§ 10.99.010–.070 (1980 & Supp. 1982) (police intervention); W. VA. CODE §§ 48-2A-1 to -10 (1980 & Supp. 1982) (protection order); WIS. STAT. ANN. §§ 767.23, 813.025(2)(a) (West 1981 & Supp. 1982–1983) (protection order); WYO. STAT. §§ 35-21-101 to -107 (Supp. 1982) (protection order). Extensive legislation is currently pending in South Carolina.

[2] *See supra* note 1. *See generally* Lerman & Livingston, *supra* note 1, at 6–9 (forty-four states and the District of Columbia have enacted protection order laws).

[3] *See, e.g*, ALASKA STAT. § 18.65.510–.20 (1981 & Supp. 1982) (police officer must use all means necessary to prevent further abuse); ME. REV. STAT. ANN. tit. 19, §§ 769–770 (1981 & Supp. 1982–1983) (police officer must stay until the victim is no longer in danger). *See generally* Lerman & Livingston, *supra* note 1, at 4, 10–11 (thirty-nine states have some new laws on police to wife abuse).

[4] *See generally* L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE (1981); S. SCHECTER, WOMEN AND MALE VIOLENCE (1982).

[5] Act of Oct. 7, 1976, No. 218, 1976 Pa. Laws 1090 (codified as amended at 35 PA. CONS. STAT. ANN. §§ 10,182–10,190 (Purdon 1977 & Supp. 1982–1983)).

[6] Act of July 17, 1978, ch. 447, 1978 Mass. Acts 547 (codified at MASS. GEN. LAWS ANN. ch. 208, § 34C, ch. 209A, §§ 1–6, ch. 266, § 120, ch. 276, §§ 28, 42A (West Supp. 1982–1983)).

[7] *See, e.g*, ALASKA STAT. § 25.35.10–.060 (1983); Illinois Domestic Violence Act §§ 101–501, ILL. ANN. STAT. ch. 40, ¶¶ 2301–2305-1 (Smith-Hurd Supp. 1982), *amended by* Act of Aug. 18, 1983, Pub. Act No. 83-101, § 1, 1983 Ill. Legis. Serv. 1103 (West); N.J. STAT. ANN. 2C:25-1 (West 1982).

in any statute. This Model Act is to be used to expand the options available to drafters; it is not intended to be adopted in toto by legislatures. The practical or political feasibility of individual provisions will vary depending on local conditions. The Model Act focuses on substantive drafting options; it considers only briefly the political considerations that affect drafting.[8]

To develop the Model Act, I collected all of the existing domestic violence laws. With the assistance of a group of students, I examined existing law addressing each subject topic by topic to identify statutory language that provides maximum relief to victims of domestic violence. I then developed a draft incorporating some of the language and concepts of existing law. The draft was distributed to an advisory board of approximately twenty people who have drafted or assisted in implementing domestic violence laws.[9] Their comments were incorporated, and further revisions were made. Finally, I wrote commentary explaining the policy issues relevant to selected sections of the statute.

The model law does not address all of the legal issues affecting victims of domestic violence. It covers a constellation of issues relating to injunctive relief and police protection in the context of domestic violence.[10] While the remedies created are made available for child abuse as well as adult abuse, this Article does

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[8] For a more detailed discussion of the politics of lobbying for abuse legislation, see J. HAMOS, STATE DOMESTIC VIOLENCE LAWS AND HOW TO PASS THEM (1980)

[9] The Advisory Board included the following: Maggie Arzdorf-Schubbe, Director of Programs and Services for Battered Women, Minnesota Department of Corrections; Ann Marie Boylan, Esq.; Sally Buckley, Esq., former Coordinator of the Battered Women's Project, City Attorney's Office, Seattle, Washington; Chris Butler, Esq., Boston, Massachusetts; Marjory D. Fields, Esq., Director of the Family Law Unit, Brooklyn Legal Services Corp. B, Brooklyn, New York; Major Patricia Halsey, Esq., United States Marine Corps, Washington, D.C.; Julie E. Hamos, Esq., Assistant State's Attorney, Cook County, Illinois; Barbara J. Hart, Esq., Harrisburg, Pennsylvania; Donna Hildreth, Legal Services of New Jersey, Inc., New Brunswick, New Jersey; Nancy Loving, Police Executive Research Forum, Washington, D.C.; Catherine G. Lynch, Director, Advocates for Victims, Miami, Florida; Susan May, former Executive Director, Council on Battered Women, Atlanta, Georgia; Marilyn G. Miller, Executive Director, Governor's Commission on Women, Salem, Oregon; Deborah Shaw Rice, Esq., Portland, Maine; Sherrill L. Rosen, Esq., Bogler & York, Kansas City, Missouri; Joanne Schulman, Esq., National Center on Women and Family Law, New York, New York; Marcia Walsh, Esq., Kansas City, Missouri; Laurie Woods, Esq., Executive Director, National Center on Women and Family Law, New York, New York. While most members of the Advisory Board had some input into the content of the statute, and some gave extensive and detailed comments, they have not approved the final product. Therefore, it should not be assumed that the views expressed in the Article are those of the Advisory Board.

[10] *See generally* Lerman & Livingston, *supra* note 1.

not consider the social service intervention model, a common legislative response to child abuse. Similarly, the data collection provisions of this draft are based on pertinent provisions of the adult abuse laws, and do not reflect the mandatory reporting system frequently used in child abuse laws.[11]

Also outside of the scope of the Model Act are recent developments in shelter funding. However, most states have recently enacted new laws to fund shelters for battered women. In approximately twenty states, "shelter" funds are generated through the imposition of a surcharge on marriage licenses.[12] Though this Act covers legislative changes in law enforcement policy and procedure, recent changes in criminal laws on spousal rape[13] and spousal assault[14] are not considered.

Most of the domestic abuse laws have been enacted largely as a result of the work of legal services attorneys and staffs of battered women's shelters.[15] In the present period of budget reductions for social service agencies, fewer resources are available for work on legislation. This Model Act was written to share the expertise of those who provide services to battered women with others who are in a better position to write legislation but who have less information about what is needed.

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[11] *See generally* Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse of the Future: A Critical Analysis of the Development of the Child Abuse Reporting Statutes,* 54 CHI.-KENT L. REV. 641 (1978); Sussman, *Reporting Child Abuse: A Review of the Literature,* 8 FAM. L.Q. 245 (1974).

[12] *See, e.g.,* ALA. CODE § 30-6-11 (Supp. 1982); FLA. STAT. ANN § 741.01(2) (West Supp. 1983); NEV. REV. STAT. § 122.060(4) (1981). *See generally* Lerman & Livingston, *supra* note 1, at 12–13.

[13] The trend toward abolishing the spousal exemption in the sexual assault laws is tremendously important because, for the first time, the law has begun to recognize that sexual assault is a form of aggression and that consent to sex is a meaningful concept, even in marriage. *See generally* D. RUSSELL, RAPE IN MARRIAGE (1982). Further information on spousal rape is available from the National Center on Women and Family Law, 799 Broadway, Room 402, New York, New York 10003.

[14] While several states have enacted special spouse assault laws, these are of limited significance because they duplicate other criminal laws and fail to establish any improved enforcement procedures. *See, e.g.,* ARK. STAT. ANN. §§ 41-1653 to -1659 (Bobbs-Merrill 1983); OHIO REV. CODE ANN. § 2919.25 (Page 1982); TENN. CODE ANN. § 39-2-105 (1982).

[15] From 1979 to 1981, while I was Staff Attorney for the Family Violence Project of the Center for Women Policy Studies, and since that time, I have received calls and letters from legal services lawyers and shelter staff who were drafting or lobbying for domestic abuse laws in Alabama, Arkansas, Georgia, Maine, Missouri, New Jersey, Ohio, South Carolina, Tennessee, Texas, Vermont, and many other states. I received only occasional calls from state legislators or private attorneys.

A MODEL STATE ACT: REMEDIES FOR DOMESTIC ABUSE

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Section 1.00. SHORT TITLE.

This statute may be cited as the Remedies for Domestic Abuse Act.

COMMENTARY: The title of this statute is similar to the titles of most state abuse laws and indicates the purpose and scope of

the law. The fundamental purpose of the law is to protect victims of domestic abuse by providing them with injunctive relief and police protection.

The term "domestic abuse" is used to refer to any physical violence that occurs in the context of an intimate relationship. The terms "wife abuse" and "woman abuse" were rejected as being too restrictive. The remedies provided by this law also may be invoked to prevent or reduce physical or sexual abuse of children, abuse of parents by adult children, and violence in any ongoing relationship regardless of the sex, sexual preference or marital status of the participants.

The premise of this Model Act is that violence is *caused by* and is *the responsibility of* the perpetrator; violence is not the product of a relationship or the result of the interaction of the individuals. Therefore the term "family violence" was rejected. Although victims of domestic abuse may engage in behavior that triggers violence, such as making dinner late, buying the wrong brand of cigarettes or becoming angry if their mate comes home late, they are not responsible for the violent acts of their assailants.

Section 2.00. FINDINGS AND PURPOSES.

The legislature of this state finds that:
Thousands of persons in this state are regularly beaten and abused and some are killed by their spouses, other family members, or sexual partners;[16]
Many pregnant women are subject to repeated beatings;
Children are often physically assaulted or witness violence against one of their parents and suffer deep and lasting emotional harm from victimization and from exposure to domestic violence;
Domestic violence is a major health and law enforcement problem in this state and one that affects people of all racial and ethnic backgrounds and all socioeconomic classes;
Domestic violence can be deterred, prevented, or reduced by legal intervention;
Tacit acceptance of domestic violence by courts and law enforcement agencies has resulted in underenforcement of criminal law when the offender and victim are intimates even though criminal law does not distinguish between violence against strangers and friends or men and women;

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[16] Forty percent of female homicide victims are killed by family members or boyfriends. U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1979, 10, 11 (1980). In at least one state, survey results indicated that one in ten women experiences some form of violence from her husband each year. M. SCHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY 13 (1979).

Victims of domestic violence presently experience substantial difficulty in gaining access to police or court protection, particularly in obtaining prompt police and court response to emergencies;[17] and
Battered women and other victims of domestic violence have a right to be safe in their homes.
This Act shall be liberally construed and applied to promote the following purposes:[18]
To assure victims of domestic violence the maximum protection from abuse that the law can provide;[19]
To create a flexible and speedy remedy to discourage violence and harassment against family members or others with whom the perpetrator has continuing contact;
To expand the ability of law enforcement officers to assist victims, to enforce the law effectively in cases of domestic violence, and to prevent further incidents of abuse; [20]
To develop a greater understanding of the incidence and causes of domestic violence through data collection;[21]
To facilitate equal enforcement of criminal law by deterring and punishing violence against family members and others who are personally involved with the offender; and
To recognize that battering is a crime that will no longer be excused or tolerated.[22]

COMMENTARY: This section states the basic premises of the Model Act. Several of the more recent abuse laws, notably those of Illinois,[23] Maine,[24] and New Jersey[25] have findings and purposes sections similar to the one included here. A section of this type can educate legislators who are unaware of the scope of the problem of domestic abuse. Also, since few states maintain any formal legislative history, an explicit "findings and purposes" section can provide guidance as to legislative intent.

In collecting data for a findings section, reference to conser-

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[17] U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE (1982).

[18] *See* N.J. STAT. ANN. § 2C: 25-2 (West 1982).

[19] *Id.*

[20] Maine law directs law enforcement officers to use "all reasonable means to prevent further abuse." Suggested options include remaining on the scene as long as the officer reasonably believes that the physical safety of a victim or possible victim is in danger, assisting victims to obtain necessary medical treatment, giving the victim notice of her rights, and, if appropriate, arresting the abuser. ME. REV. STAT. ANN. tit. 19, § 770(6) (1981).

[21] *Id.* tit. 19, § 770(1).

[22] *See* Illinois Domestic Violence Act § 102, ILL. ANN. STAT. ch. 40, ¶ 2301-2 (Smith-Hurd Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 761 (1964).

[23] *See* Illinois Domestic Violence Act § 102, ILL. ANN. STAT. ch. 40, ¶ 2301-2 (Smith-Hurd Supp. 1982)

[24] ME. REV. STAT. ANN. tit. 19, § 761 (1981).

[25] N.J. STAT. ANN. § 2C: 25-2 (West 1982).

vative national sources such as those cited here may be useful; however, it is more important for drafters to collect whatever statewide or local data exists on the incidence of domestic abuse and the need for improved response by the justice system. Extreme caution should be exercised in the selection of data to be cited in a bill to ensure that the data are accurate and not misleading.

Most existing data on the incidence of domestic abuse have been haphazardly collected and may be easily discredited.[26] Drafters may wish to consult with a social scientist regarding the validity of the statistics selected. In making findings about the inadequacy of remedies available to battered women and other victims of domestic abuse, drafters may wish to refer to national reports[27] and to identify particular problems in their own states. National reports cover issues that are not geographically defined; local analysis of the problem is also essential. In a largely rural state, for example, the appropriate or feasible law enforcement response may be quite different than in an urban state. In some states there have been no comprehensive studies of the incidence of or the response to domestic violence. Drafters also may examine newspaper or magazine articles or unpublished reports produced by shelters for battered women or legal services offices.

The finding that victims of abuse have a right to be safe in their homes might seem too obvious to mention. However, domestic abuse often causes women to flee their homes, or to stay as virtual or actual prisoners, too terrified to escape and in constant danger. The right to be safe in one's home also reflects the long-established constitutional principle that "a man's home is his castle."[28] This principle has led to important restrictions

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[26] One example is Lenore Walker's statement that "some observers, including myself, estimate that as many as fifty per cent of all women will be battering victims at some point in their lives." L. WALKER, THE BATTERED WOMEN ix (1979). Among those data most widely discredited are the studies by Straus, Gelles, and Steinmetz on husband beating. Some of their research has concluded that husband beating is almost as frequent as wife beating. *See* Straus, *Wife Beating: Causes, Treatment and Research Needs*, in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 463, 468–70 (1978). These conclusions are contrary to the experience of service providers and the studies of other sociologists working on domestic violence. *See, e.g.*, S. SCHECTER, *supra* note 4, at 214 (1982) (discussion and critique of Straus data).

[27] *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, *supra* note 17.

[28] *See, e.g.*, Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970) ("freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment"), *cited in* Payton v. New York, 445 U.S. 573, 589 (1980).

on police entry into the home for purposes of criminal law enforcement,[29] and has been part of the family law doctrine of discouraging state interference in domestic matters.[30] The growing recognition of the state's obligation to protect women and children from their mates or relatives extends this privacy principle to require intervention for reasons similar to those given for the historic intervention on intervention.

The purposes section suggests that violence in domestic situations can be stopped by providing police and court assistance tailored to the needs of the victims. Little research has been conducted concerning the effectiveness of the abuse laws[31] since 1976, when this package of remedies was first enacted in Pennsylvania;[32] much remains to be done. In the meantime, thousands of victims of abuse flock to courthouses and call the police, looking for protection. In Philadelphia, for example, the Women Against Abuse Legal Center receives approximately four thousand calls and visits per year from battered women seeking legal assistance.[33] In Cleveland, about 15,000 women called the police to request help in situations classified as domestic disturbances during nine months in 1979.[34] In states that have enacted protection order laws, victims, attorneys, and law enforcement officials have observed that some batterers are affected by the issuance of an order prohibiting abuse.[35] Rather than waiting for definitive research to be conducted, legislators in most states have chosen to respond to a long-neglected problem.

The purpose of this law is to stop violence. The goal is neither to keep violent families together nor to force a separation be-

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[29] Payton v. New York, 445 U.S. 573 (1980).

[30] The view that the state should keep families together by leaving them alone still has a tremendous influence on family law in this country. *See generally Developments in the Law--Family Law* 93 HARV. L. REV. 1157 (1980).

[31] *See infra* note 35.

[32] Act of Oct. 7, 1976, No. 218, 1976 Pa. Laws 1090 (codified as amended at 35 PA. CONS. STAT. ANN. §§ 10,182–10,190 (Purdon 1977 & Supp. 1982–1983)).

[33] Interview with Joan Kuriansky, Director, Women Against Abuse, in Philadelphia (Dec. 15, 1981).

[34] Interview with Grace Kilbane, Director of the Cleveland Witness/Victim Assistance Program, in Cleveland (Jan. 15, 1981).

[35] To date, no published study has focused on the effectiveness of protection orders. Several agencies have conducted follow-up interviews with victims of abuse who obtain protection orders, and have observed a substantial deterrent effect. *See, e.g.*, Unpublished Follow-Up Study on Women Who Obtain Restraining Orders (n.d.) (available from W.O.M.A.N., Inc, 2940 16th St., San Francisco, CA. 94103). All of the battered women interviewed by Lenore Walker who had obtained restraining orders found them useful. L. WALKER, *supra* note 26, at 212 (1979).

tween people in violent relationships. The Model Act is designed to increase the possibility that a person being victimized can make herself safe, either by removing herself or the abuser from the situation, or by asking the court system to require that the violence stop. The primary issue is not whether the relationship continues but whether the violence stops.

Section 3.00. DEFINITIONS.

As used in this Act:

3.01. *Domestic Violence*: means the occurrence of any of the following acts, attempts, or threats against a person who may be protected under this Act under section 3.02:

(A) *Battery*: causing physical harm to another with or without a deadly weapon;[36]

(B) *Assault*: purposely or knowingly placing or attempting to place another in fear of physical harm;[37]

(C) *Coercion*: compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage;[38]

(D) *Sexual Assault*: causing or attempting to cause another to engage involuntarily in any sexual act by force, threat of force, or duress;[39]

(E) *Harassment*: engaging in a purposeful, knowing, or reckless course of conduct involving more than one incident that alarms or causes distress to another person and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner. Such conduct might include but is not limited to:

(1) following another about in a public place or places;

(2) peering in the window or lingering outside the residence of another;

but does not include constitutionally protected activity;[40]

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[36] *See* W. VA. CODE § 48-2A-2(a)(1) (1980).

[37] *See* N.H. REV. STAT. ANN. § 173-B:1(b) (Supp. 1979).

[38] *See* WASH. REV. CODE. ANN. § 9A.36.070(1) (1977).

[39] *See* MASS. GEN. LAWS ANN. ch. 209A, § 1 (West Supp. 1982–1983).

[40] *See* CAL. CIV. PROC. CODE § 527.6(b) (West 1979 and Supp. 1983); N.Y. PENAL LAW § 240.25 (McKinney 1980). The California statute provides the basis for a substantial portion of the Model Act's definition of harassment. The Act expands the requisite course of conduct to include recklessness; the California statute requires that conduct be knowing. The California law also defines a course of conduct as "a series of acts evidencing a continuity of purpose." The New York law includes "following another about" in the definition of harassment.

(F) ***Unlawful Imprisonment*: holding, confining, detaining or abducting another person against that person's will;**[41]

(G) ***Unlawful Entry*: entering or remaining in the dwelling or on the property of another against the wishes of the dweller or owner;**[42]

(H) ***Damage to Property*: causing damage to the property of another or to property jointly owned by the perpetrator and another;**[43]

(I) ***Theft*: taking or attempting to take or appropriate property belonging to another or jointly owned by the perpetrator and another;**[44]

(J) ***Other Conduct*: any other conduct that could be punished as a criminal act under the laws of this state.**[45]

COMMENTARY: The definition of domestic violence serves two functions. The first describes what conduct of the abusive party will enable a person subjected to domestic violence to obtain a protection order. Second, the definition is also referred to in the section on violation of protection orders. That section indicates that commission of any act listed in the definition of domestic violence may subject the abuser to criminal penalties.

As to the first function, the definition in the model law makes it very easy for a victim[46] to get a protection order. Most existing abuse laws require that the victim show that she has been subjected to physical assault, threats of assault, or attempted assault.[47] Under the model law, other types of criminal conduct that commonly occur in abusive relationships may provide the basis for a request for a protection order. For example, under the model law, if a person is victimized by being imprisoned in her home for a period of time, she may seek a protection order even if she suffered no physical abuse.

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[41] *Cf.* WASH. REV. CODE § 9A.40.040 (1981) (defining unlawful imprisonment as knowing restraint of another person).

[42] *Cf.* WASH. REV. CODE § 9A.52.010 (1981) (defining unlawful entry as entry by one not licensed, invited, or privileged to enter or remain).

[43] *See* WOMEN'S LEGAL DEFENSE FUND'S PROPOSED AMENDMENTS TO D.C. CODE ANN. § 16-1001 (1981) [hereinafter cited as WLDF AMENDMENTS]. This draft legislation is available from Women's Legal Defense Fund, 2000 P Street, N.W., Suite 400, Washington, D.C. 20036.

[44] *See* WLDF AMENDMENTS, *supra* note 43, § 16-1001.

[45] This approach to defining domestic violence is adapted from the laws in Washington and New Jersey, whose abuse laws cross-reference numerous criminal code sections. N.J. STAT. ANN. § 2C: 25-3, (West 1982); WASH. REV. CODE ANN. § 10.99.020 (Supp. 1983–1984).

[46] Because most victims of domestic violence are female and most abusers are male, feminine pronouns are used in the commentary to refer to victims of domestic abuse and masculine pronouns are used to refer to abusers. The Act, however, is gender neutral; it is designed to protect all persons who are victims of domestic violence, regardless of gender, age, sexual preference, or relationship to the abuser.

[47] *Cf.* D.C. CODE ANN. § 16-1001(5) (Supp. 1983) (definition of intrafamily offense); OR. REV. STAT. § 107.705(2) (1981) (definition of family or household members).

The definition of domestic violence is adapted from language used in state criminal codes.[48] This reflects the fact that one of the purposes of the statute is to prevent crime. Most of the conduct which could lead to issuance of a protection order could be the subject of criminal charges in most states. The simultaneous availability of civil and criminal relief is explained in the section on nonexclusive relief.

The Model Act grants judges tremendous discretion in fashioning appropriate relief. It is contemplated that the extent of remedies granted in each case will reflect the seriousness of the danger in each situation. Since a protection order may be limited to an injunction prohibiting conduct that is already prohibited by criminal law, there is no reason to restrict the issuance of orders to circumstances in which serious physical violence has already occurred.

Section 4.07 of the Model Act, which addresses violation of protection orders, requires that commission of a listed act be proven beyond a reasonable doubt before any criminal penalties may be imposed. To obtain a protection order, however, the same act need be proven only by a preponderance of the evidence. The effectiveness of the protection order depends in part on easy filing and proof requirements, so that victims need not hire attorneys or prepare extensively.

Most abuse laws contain definitions of domestic violence that are too narrow.[49] This broader definition is intended to cover all the varieties of cruel and bizarre conduct that are commonly encountered in battering relationships.[50]

Alternative 1

3.02. ***Victims of Domestic Violence.*** **A victim of domestic violence who may be protected under this Act shall include any person who has been subjected to domestic violence (as defined in section 3.01) by a spouse, former spouse, a parent, a child, or any other person related by blood or marriage, a present or former household member, a person with**

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[48] *See supra* notes 36–45 for specific references.

[49] *See, e.g.*, PA. CONS. STAT. ANN. § 10,182 (Purdon Supp. 1982–1983) (defining abuse to include "the occurrence of one or more of the following acts between family members or household members who reside together: (i) attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with a deadly weapon; (ii) placing by physical menace another in fear of imminent serious bodily injury; (iii) sexually abusing minor children pursuant to the Child Protective Services Law"). It fails to include harassment, property destruction, theft, eavesdropping, or unlawful entry.

[50] *See generally* D. MARTIN, BATTERED WIVES (1976).

whom the victim has a child in common, or a person who is or has been in an intimate relationship with the victim.[51]

Alternative 2

3.02. ***Victims of Domestic Violence.*** **A victim of domestic violence who may be protected under this Act shall include any person who has been subjected to domestic violence (as defined in section 3.01) by another person who has or had some ongoing personal relationship with the victim, regardless of their marital or blood relationship (or lack thereof) or living arrangements.**

COMMENTARY: The remedies created by the law must be made available to as broad a group of victims as possible. Chronic violence occurs in many intimate relationships directed toward spouses, children, parents, lovers, siblings, and others. Often the violence continues and even escalates after a relationship is terminated. Patterns of violence may develop in relationships in which the parties are not and have never been cohabiting.[52] Laws that fail to provide broad coverage might be interpreted as legislative condonation of violence in the excluded relationships.

The first alternative, a long specific list of relationships in which domestic violence occurs, is the more common formulation. The second alternative is admittedly broad, but it attempts to avoid the possibility that some victims might be deprived of a remedy because of imprecision in drafting or because of political compromises made during the drafting process. One risk of a broad definition is that some attorneys might attempt to use the law to remedy domestic relations or landlord-tenant prob-

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[51] *Cf.* D.C. CODE ANN. § 16-1001(5) (Supp. 1983) (covering persons related by blood or marriage, any person with whom the victim has a child in common, a person with whom the victim shares or within the last year shared residence, and any person with whom the victim maintains or maintained an intimate relationship); OR. REV. STAT. § 107.705(2) (1981) (covering "adult persons related by blood or marriage," or persons who cohabited within one year of the date of filing the petition).

[52] Almost every existing abuse law requires present or former cohabitation with the abuser for the victim to be eligible for relief. The only exceptions to this requirement are that in a few states if the abuser and victim are related by blood or marriage, no present or former coresidency requirement is imposed. *See, e.g., supra* note 51. *See generally* Lerman & Livingston, *supra* note 1, at 6–7, 14 at n.45. States which require cohabitation may deny relief to a large number of victims. One study of emergency room records found that 72% of the victims of domestic violence in the sample were not living with the abuser at the time of the assault. E. STARK, A. FLITCRAFT, D. ZUCKERMAN, A. GREY, J. ROBESON & W. FRAZIER, WIFE ABUSE IN THE MEDICAL SETTING (1980) (published by the Office of Domestic Violence of the U.S. Dep't of Health and Human Services).

lems in cases where there has been no domestic violence. This general definition also creates a risk of narrow interpretation by judges to whom petitions for protection orders are presented.

The definition of a victim of domestic violence frequently has been the most controversial issue in legislative debate of the abuse laws. Some conservative legislators, fearful of condoning cohabitation, object to the enactment of any law that appears to sanction it. In addition, many legislators do not understand that violence occurs in all types of relationships and want to simplify the rights conferred by the law by narrowing the group of people who might be protected.[53] In any case, a long specific list of relationships is likely to elicit a debate on this subject.

3.03. *A Protection Order* is any injunction issued under this Act for the purpose of preventing acts of domestic violence. The term refers to both temporary and final orders issued by civil and criminal courts, whether obtained by filing an independent action or as a pendente lite order in another proceeding.[54]

COMMENTARY: The term "protection order" has been selected to describe the injunction authorized by the statute because most abuse laws use this or similar terms to describe the injunctions authorized by this section.[55] Other frequently used terms, including restraining order, protective order, and temporary restraining order, may be confused with other injunctive remedies available in court.

In some jurisdictions the order is called a civil protection order.[56] The word "civil" is not used in the Act because the order contemplated could be issued as an independent civil remedy or as part of another civil or criminal proceeding. In addition, since some violations of the order may lead to criminal penalties, the remedy is quasi-criminal. Reference to it as a civil remedy might be misleading.

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[53] Compare conflicting language on coverage of unmarried victims in TENN. CODE ANN. §§ 36-1201 to -1295 (Supp. 1979). The language at the end of the statute restricting applicability to spouses was added as an amendment.

[54] *See* Illinois Domestic Violence Act § 103(3), ILL. ANN. STAT. ch. 40, ¶ 2301-3 (Smith-Hurd Supp. 1982).

[55] *See, e.g.*, MINN. STAT. ANN. § 518B.01 (West Supp. 1983) ("order of protection"); MO. REV. STAT. §§ 455.010–.085 (Supp 1983) ("order of protection"); N.H. REV. STAT. ANN. §§ 173-B:1 to -B:11 (Supp. 1979) ("protective order"); OHIO REV. CODE ANN. §§ 1901.18–.19, 1909.02 (Page Supp. 1982) ("protection order"); 35 PA. CONS. STAT. ANN. §§ 10,182–10,190 (Purdon 1977 & Supp. 1982–1983) ("protection order").

[56] *See, e.g.*, D.C. CODE ANN. §§ 16-1001 to -1006 (1981 & Supp. 1983).

Section 4.00. PROTECTION ORDERS.

4.01. *Jurisdiction.*

(A) *Courts*

(1) All district (circuit, superior, municipal, county, probate, criminal, family, domestic relations, etc.) courts shall have concurrent jurisdiction over all proceedings under this chapter.[57]

(2) A protection order may be sought:

(a) as an independent civil action, or joined with any other civil action;

(b) as a part of the preliminary, final, or post-judgment relief in any civil action; or

(c) during a criminal action at the request of the prosecutor or the victim as a condition of pretrial release, as a condition of diversion, or as a condition of probation or parole.[58]

COMMENTARY: The purpose of this section is to require all trial-level state courts that have any power to grant injunctive relief to hear petitions for protection orders. The section also rejects classification of domestic violence as solely civil or criminal in nature and terminates the historic tradition of relegating wife abuse exclusively to domestic relations courts.

(B) *Venue.* **A petition for a protection order may be filed in any district where**

(1) the petitioner resides,

(2) the respondent resides,

(3) the alleged abuse occurred, or

(4) the victim is temporarily located if she has left her residence to avoid further abuse.

COMMENTARY: This section gives courts broad discretion to hear petitions for protection orders, and affords victims of abuse easy access to the nearest or most convenient court.

(C) *Convenience.* **Convenience of the forum shall be determined by the preference of the petitioner.**

COMMENTARY: This section prohibits transfer of petitions to other courts on grounds of forum non conveniens. Many victims

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[57] *See* N.H. REV. STAT. ANN. § 173-B:2I (Supp. 1981).

[58] *See* Illinois Domestic Violence Act § 202(a), ILL. ANN. STAT. ch. 40, ¶ 2302-2 (Smith-Hurd Supp. 1982).

of abuse move away from their abusers in search of safety and then seek court protection at the new location. This section prohibits the courts from conditioning protection on a victim's return to a court near her residence.

(D) *Non-Exclusive Relief*

(1) The remedies and procedures provided in this Act are in addition to and not in lieu of any other available civil or criminal remedies. Petitioners shall not be barred from relief under this Act because of other pending proceedings or existing judgments.[59]

(2) Relief shall be available under this Act without regard to whether the petitioner has initiated divorce proceedings or sought other legal remedies.

(3) As to domestic relations proceedings, if custody or support has already been adjudicated, the terms of a previous court order may be incorporated into a protection order. Custody or visitation arrangements specified in an existing order may be modified in a protection order upon a showing of changed circumstances for the purpose of preventing further domestic violence.

COMMENTARY: This section notifies both judges and parties that the courts' remedial powers are very broad. The statute does not replace existing remedies but expands the alternatives available to the victim.

Issuance of a protection order is preferable to criminal prosecution in many cases because in a protection order hearing the court focuses on the protection of the victim rather than on the punishment or rehabilitation of the offender. The protection order, however, is not intended to serve as an alternative to or a substitute for prosecution. In some cases, victims elect to pursue civil and criminal remedies simultaneously. In other cases, particularly if a protection order has not been effective, prosecution is a logical next step.

Judges sometimes hesitate to act on petitions for protection orders in cases in which other criminal or domestic relations proceedings are pending.[60] This section directs courts to act on protection order petitions regardless of other pending proceedings because many petitions are frequently filed in emergency

[59] *See* MASS. GEN. LAWS ANN. ch. 209A § (3) (West Supp. 1982–1983); OHIO REV. CODE ANN. § 3113.31(G) (Page 1980 & Supp. 1982).

[60] In New York it was formerly the case that if relief had been sought in domestic relations court, the criminal court could not act. If a case had been referred for criminal action, no protection order could be issued. *See In re* Ruth S. v. George S., 63 Misc.2d 1, 10, 311 N.Y.S.2d 169, 178 (1970).

situations and the backlog of cases in many domestic relations courts is often very long.

Copies of protection orders must be included in the files of any other ongoing proceedings. The petition form requires listing of other proceedings; therefore, the judge need only examine the petition when issuing an order and add any court that is handling a related matter to the list of places to which copies of the order will be sent. This process may be facilitated by using order forms with multiple carbon copies.

The section on domestic relations proceedings attempts to balance the cursory nature of the protection order proceedings and the consequent risk of error against the need for immediate action to prevent physical danger to victims of domestic abuse or their children. The risk of error would suggest deference to any existing domestic relations order which may have been the conclusion of a far more deliberative process. But the need for immediate action suggests that a protection order should supersede an existing domestic relations order. If, for example, the custodial parent had begun sexually abusing a child and was preparing to leave the country with the child to reside elsewhere, a protection order could prohibit the removal of the child from the jurisdiction and make a temporary transfer of custody to the other parent. The increasing frequency of child-snatching makes emergency remedies in such circumstances particularly important.[61]

(E) *Full Faith and Credit*

(1) Any protection order issued pursuant to this Act shall be effective throughout the state in all districts and counties.[62]

(2) Any protection order issued by the court of another state shall be accorded full faith and credit and enforced as if it were an order of this state.

COMMENTARY: The purpose of this section is to facilitate intrastate and interstate enforcement of protection orders. The section directs police to enforce any protection order issued within the state, even if they have had no contact with the court that issued it. It also warns assailants that they may not escape enforcement of a protection order by seeking out the victim in another jurisdiction.

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[61] *See generally* P. HOFF, CHILD SNATCHING: INTERNATIONAL CHILD CUSTODY LITIGATION (1981) (discussion of child-snatching and available remedies).

[62] N.H. REV. STAT. ANN. § 173B:11-a (Supp. 1981).

If a protection order is issued in one state, and the victim then moves to another, the court in the second state must enter a judgment on the order before it may be enforced in the second state.[63] This clause directs courts presented with foreign orders to enforce them even if the relief granted is different from or broader than the relief available under the law of the state in which enforcement is sought.

This section is necessary because victims of abuse frequently flee their abusers to another state or locality, only to be pursued to their new location and victimized again.[64]

4.02. ***Commencement of Action.***

(A) *Filing a Petition*

(1) An action for a protection order may be commenced by filing a verified petition with the clerk of the court or if the courts are closed, with the judge, as described in section 4.03(E).

(2) Protection order petitions shall be available from the clerk of the court at no charge to the parties.

(3) Protection order petitions may be filed either typed or legibly handwritten.

(4) Protection order petitions used in civil proceedings shall use the following form:[65]

I respectfully request that the Court enter an order protecting me and/or other members of my household from abuse. In support of this request, I state the following facts and swear that they are true:

1. Name(s), address(es), and telephone number(s) of persons needing protection from abuse (DO NOT LIST ADDRESS OR TELEPHONE NUMBER IF DOING SO WOULD ENDANGER THE VICTIM): _____.

2. Home and work addresses and telephone numbers of the abuser (the respondent): _____.

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[63] United States v. Pearson, 258 F. Supp. 686 (S.D.N.Y. 1966) (filing of Virgin Islands judgment in New York Supreme Court clerk's office did not by itself render the action enforceable); Bank of Sun Prairie v. Hovig, 218 F. Supp. 769 (W.D. Ark. 1963) (holding that judgment in one state did not become enforceable in another state until a default judgment was entered in the second).

[64] "If the wife does manage to escape, her husband often stalks her like a hunted animal. He scours the neighborhood, contacts friends and relatives, goes to all the likely places where she may have sought refuge, and checks with public agencies to track her down . . . .

"Unless she can afford to leave town and effectively to disappear, a woman is never quite safe from a stalking husband. Sometimes the harassment, the threats and the beatings continue for years after a wife has left." D. MARTIN, note 50, at 78 (1978). *See* S. SCHECTER, *supra* note 4, at 223.

[65] These forms are similar to forms that will appear in *Seeking Ex Parte Relief,* in 1 MATRIMONIAL & FAM. L. PRAC. (MB) (1984).

3. Relationship between victim and abuser (indicate any blood relationship, present or former marriage, or present or former cohabitation or dating relationship): _____.

Date of beginning (and end if applicable) of relationship: _____.

4. On or about _____, 19____, the Respondent:

_____Physically abused the Petitioner or other victim.

_____Committed some other act of domestic violence against the Petitioner or other victim: Threat / Coercion / Sexual Assault / Harassment / Involuntary Confinement / Unlawful Entry / Damage to Property / Theft / Other: _ (circle act committed),

at the following location: _____by the following acts (describe the incident in detail): _____.

5. The Respondent has been abusing the victim for _____months / years (circle one) about _____times per week / month / year (circle one). The police have been called _____times; the victim has needed medical treatment for injuries _____times. Explain any relevant history. _____

Based on the incident described in paragraph 4, the following legal action has been initiated or concluded (check if applicable):

_____Criminal Prosecution: [date started] [date of final order]

_____Divorce: [date started] [date of final order]

_____Another petition for protection from abuse: [date started] [date of final order]

_____Custody: [date started] [date of final order]

_____Other: _____[date started] [date of final order].

6. The Respondent continues to be a threat to the safety of the victim because:

_____They share a residence;

_____The Respondent may become violent again;

_____Other: _____.

7. To protect the victim from further abuse, I request that the following relief be granted:

A. _____ That the Respondent be ordered not to abuse, harass, or threaten the victim, or to commit any other domestic violence;

B. _____ That the Respondent be excluded from a shared residence and that the victim be granted exclusive possession (NOTE: you may ask for exclusive possession even if the residence is solely owned or leased by the respondent; this order will have no effect on title);

C. _____ That the Respondent be ordered to stay away from the following places, where the victim regularly goes (DO NOT LIST ANY ADDRESS WHICH WOULD FURTHER ENDANGER THE VICTIM):

_____Residence: _____

_____Place of employment: _____

_____School attended by victim or children: _____

_____Other place(s): _____;

D. _____ That the Respondent be ordered not to communicate with the victim(s), in person, in writing, or by telephone, except that the Respondent be permitted to communicate under the following circumstances: _____;

E. _____ That the Respondent, if ordered to vacate a shared residence, be ordered to make or to continue to make rent or mortgage payments on the residence in the amount of $_____ payable to _____;

F. _____ If the victim left or wishes to leave a shared residence to avoid abuse, that the Respondent be ordered to pay the victim $_____ per month for rent at a new residence;

G. _____ If the victim is unable to provide support for herself/himself or for her/his children, that the Respondent be ordered to make support payments of $_____ per month (attach financial statement if requesting support);

H. _____ That the court grant to the victim temporary custody of the following minor children: _____[Names] [Ages];

I. _____ That the Respondent be permitted to visit with the children only on the following day(s), at the following place(s) and time(s), under the supervision of the following person(s): _____;

J. _____ That the Respondent be ordered to compensate the victim for the following expenses, incurred as a result of the abuse:

Medical care:	$_____
Lost earnings:	$_____
Property taken or damaged:	$_____
Moving expenses:	$_____
Travel expenses:	$_____
Attorneys' fees:	$_____
Court costs:	$_____
TOTAL:	$_____;

K. _____ That the Respondent be ordered to give the following personal property to the victim: (circle) automobile / checkbook / credit cards / keys / other: _____;

L. _____ That the Respondent be ordered not to transfer, encumber, or dispose of property owned by the victim or jointly owned;

M. _____ That the Respondent be ordered to participate in a counseling program designed to control violent behavior, by contacting _____ at _____within two days of the date of this order, and that Respondent submit a report from his counselor to the Court once every four weeks from the date of this order until the program is completed;

N. _____ That the Respondent be ordered to pay the cost of counseling for himself/herself, the victim, or others affected by the violence (circle one or more);

O. _____ That a police officer serve and execute the protection order, including supervising the Respondent in returning to the residence that Respondent has been ordered to vacate to collect personal belongings;

P. _____ That a police officer be ordered to accompany the victim to a residence occupied by the Respondent to obtain physical custody of children or to collect personal belongings;

Q. _____ That the Respondent be ordered to pay a fee of $_____ to a shelter for victims of domestic violence where the victim has resided or is residing;

R. _____ Other relief, as follows: _____.

(5) Protection order petitions used in criminal proceedings shall use the following form:

_____, the Complaining Witness / Prosecutor / Arresting Officer (circle one) in the above-captioned case, moves that a protection order be issued to prevent injury to or intimidation of the Complaining Witness, _____.

In support of this motion, it is stated that:

1. The Defendant has been charged with / convicted of (circle one) a violation of _____;

2. The relationship between the Complaining Witness and the Defendant is (indicate any blood relationship, present or former marriage, or present or former cohabitation or dating relationship): _____;

Dates of beginning and end of relationship: _____;

3. On or about _____, 19_____, the Defendant:

_____Physically abused the Complaining Witness.

_____Committed some other act of domestic violence against the Complaining Witness: Threat / Coercion / Sexual Assault / Harassment / Involuntary Confinement / Unlawful Entry / Damage to Property / Theft / Other: _____ (circle act committed),

at the following location: _____, by the following acts (describe the incident in detail): _____.

4. The Defendant has been abusing the victim for months / years (circle one) about _____times per week / month / year (circle one). The police have been called _____times; the victim has needed medical treatment for injuries _____ times. Explain any relevant history. _____

Based on the incident described in paragraph 3, the following legal action has been initiated or concluded (check if applicable):

_____Divorce: [date started] [date of final order]

_____A petition for protection from abuse: [date started] [date of final order]

_____Custody: [date started] [date of final order]

_____Other: _____[date started] [date of final order].

5. The Defendant continues to be a threat to the safety of the Complaining Witness because:

_____They share a residence;

_____The Defendant may become violent again;

_____Other: _____.

THEREFORE, _____requests that the Court require the Defendant:

1. _____ Not to abuse, harass, or threaten the Complaining Witness, or commit any other domestic violence;

2. _____ To vacate a residence shared with the Complaining Witness and allow her/him exclusive possession of the residence (NOTE: this relief may be requested even if the residence is solely owned or leased by the Defendant; the order will have no effect on title);

3. _____ To stay away from the following places, where the Complaining Witness regularly goes (DO NOT LIST ANY ADDRESS WHICH WOULD FURTHER ENDANGER THE COMPLAINING WITNESS):

_____Residence: _____

_____Place of Employment: _____

_____School attended by the Complaining Witness or children: _____;

_____Other place(s): _____;

4. _____ Not to communicate with the Complaining Witness, in person, in writing, or by telephone, except that the Defendant be permitted to communicate under the following circumstances: _____;

5. _____ To make or continue to make rent or mortgage payments on a residence that the Defendant is ordered to vacate in the amount of $_____ payable to _____;

6. _____ To pay the Complaining Witness $_____ per month for rent at another residence;

7. _____ To make support payments in the amount of $_____ per month to the Complaining Witness if she/he is unable to provide adequate support for herself/himself or for her/his children (attach financial statement if requesting support).

It is further requested:

8. _____ That the Court grant temporary custody of the following minor children to the Complaining Witness: _____[Names] [Ages];

9. _____ That the Defendant be permitted to visit with the children only on the following day(s), and only at the following place(s) and time(s), under the supervision of the following person(s) _____;

10. _____ That the Defendant compensate the Complaining Witness for the following expenses, incurred as a result of the crimes charged:

Medical care:	$_____
Lost Earnings:	$_____
Property taken or damaged:	$_____
Moving expenses:	$_____
Travel expenses:	$_____
Attorneys' fees:	$_____
Court costs:	$_____
TOTAL:	$_____;

11. _____ That the Defendant be ordered to give to the Complaining Witness the following personal property: (circle) automobile / checkbook / credit cards / keys / other: _____;

12. _____ That the Defendant not transfer, encumber, or dispose of property owned by the Complaining Witness or jointly owned;

13. _____ That the Defendant participate in a counseling program designed to control violent behavior, by contacting _____ at _____ within two days of the date of this order, and that Defendant submit a report from the counselor to the Court once every four weeks from the date of this order until the program is completed;

14. _____ That the Defendant pay the cost of counseling for himself/herself, the Complaining Witness, or others affected by the violence (circle one or more);

15. _____ That a police officer serve and execute the protection order, including supervising the Defendant in returning to a residence that the Defendant has been ordered to vacate to collect personal belongings;

16. _____ That a police officer accompany the Complaining Witness to a residence occupied by the Defendant to obtain physical custody of children or to collect personal belongings;

17. _____ That the Defendant be ordered to pay a fee of $_____ to a shelter for victims of domestic violence where the Complaining Witness has resided or is residing;

18. _____ Other relief, as follows: _____.

(6) A petitioner seeking a protection order shall not be required to reveal any current address or place of residence except to the judge in camera for the purpose of determining jurisdiction and venue. The petitioner may be required to provide a mailing address unless the petitioner alleges that he or she would be endangered by such disclosure would endanger the victim or others.

COMMENTARY: This section attempts to facilitate speedy relief by keeping procedures as simple as possible. Many abuse laws now require filing of several forms, motions, and/or affidavits to initiate an action for a protection order. This statute contemplates a simple, easy-to-read form on which the basis for jurisdiction and the relief requested can be presented by a petitioner with no legal background. Under the Model Act, the clerk of court would provide petitioners with the short form and offer limited clerical assistance in completion of the forms.

The section permitting nondisclosure of the victim's address is an attempt to protect a victim who has moved to a location unknown to the abuser. Most battered women's shelters in the United States keep their addresses secret. Victims should not be required to choose between requesting legal protection from the court and keeping their addresses secret from assailants.

(B) ***Who May File a Petition***

(1) A person may seek an order of protection:

(a) for herself or himself;

(b) on behalf of a minor child, if the alleged abuser and/or the child is a relative or a household member of the petitioner;

(c) on behalf of any person prevented by physical or mental incapacity from seeking an order of protection;

(d) on behalf of any household member who has been subject to domestic violence, if the petitioner is endangered or adversely affected by the abuse alleged against the household member.[66]

(2) A petitioner shall not be denied relief under this Act because:

(a) the petitioner used reasonable force in self defense against violence by the respondent;[67] or

(b) the petitioner or the respondent is a minor.

(3) Voluntary intoxication shall not be a defense to a proceeding involving issuance or enforcement of a protection order under this Act, except as otherwise provided by law.[68]

COMMENTARY: This section explains who may seek a petition for a protection order, as distinguished from who may be covered under an order. In most cases of adult abuse, victims are able to file on their own behalf. There are, however, many cases of domestic abuse that involve children or incapacitated adults. In such circumstances the law authorizes other concerned or affected persons to bring the situation to the attention of the court and to request relief on behalf of the victim. The Model Act provides a private right of action for any victim. It allows any person who is living with or related to the victim or the abuser to file a petition on behalf of a minor child. The statute does not permit social service agencies to petition for protection orders for children or adults. If, however, a child abuse case were assigned to a social service worker who felt that a protection order would be a useful option, he or she might encourage relatives or household members of the victim to seek an order. Although allowing the agencies to petition might be very useful in some child abuse cases, the risks of such a procedure might outweigh the benefits. Remedies may best be used by adults who are very familiar with the child's situation. The Model Act seeks to avoid further expansion of the social service intervention model.

Subsection (c) provides that anyone can file a petition on behalf of an adult who is incapacitated. This is a less intrusive

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[66] *See* Illinois Domestic Violence Act § 202(b), ILL. ANN. STAT ch. 40, ¶ 2302-2(b) (Smith-Hurd 1982).

[67] *See* ME. REV. STAT. ANN. tit. 19, § 769 (1981).

[68] *Id.*, § 768(4).

variant of the most common child abuse laws which mandate intervention by disinterested outsiders because children are often unable to seek help. If an adult is able to assert his or her own rights, there is a privacy interest in avoiding intervention that is not requested by the victim. Where the adult cannot request help, the interest in preventing violence must take priority over the privacy interest.

Subsection (d), which gives a right of action to a person not abused but adversely affected by the respondent's abuse of another person, is addressed to a situation in which the victim is less willing or able to take steps to stop the abuse than other household members or relatives. While the law does not allow a stranger to intervene on behalf of any victim, it does allow intervention by intimates of victims who are affected by the abuse. This provision generally follows a policy articulated in *Lucke v. Lucke*.[69] In that case, the North Dakota Supreme Court upheld the lower court's issuance of a protection order to an eighteen-year-old girl whose three sisters had been sexually abused by their father. The order protected all of the daughters.

Subsection (2) states that eligibility for relief is unaffected by violent action taken by the petitioner in self-defense. The courts may not interpret the law to allow relief only to petitioners with "clean hands." In a situation involving "mutual combat" or in which petitions are filed by each party against the other, the court should, under this provision, grant relief to the party who was more seriously injured or has been battered more frequently. Only in a rare case should protection orders be granted to each party against the other.

A harder case is presented when a petition is filed by the abusive party but not by the victim. In such circumstances the court has no power to issue an order against the petitioner. It can only decline relief and advise the respondent of her right to relief.

Petitions may be filed by minors under the model law. In many situations, a child may be the only person other than the parties who knows the extent of the violence being perpetrated by one parent against another. Exposure to domestic abuse is harmful to children.[70] Those who are sufficiently literate and mobile to go to the courthouse and fill out a petition should not

[69] Lucke v. Lucke, 300 N.W.2d 231 (N.D. 1980).

[70] *See generally* Sussman, *supra* note 11; Thomas, *Custody Litigation Strategies for Battered Women*, 8 WOMEN'S RTS. L. REP. (1984) (in press).

be deprived of the remedy on the basis of age. If a child requests protection for an adult and the adult objects, in many cases the court might decline to grant relief. However, it might be appropriate to evict a man who abuses his wife and his children even if the wife objects to the order. The woman would be required to give her children's safety priority over her emotional attachment to the abuser.

The Model Act points out that intoxication does not excuse abusive behavior. Many people engaged in patterns of violence against family members only become violent when they are drunk. One researcher suggests that abusers drink in order to give themselves permission to be violent, and that the physiological effects of the alcohol are not the cause of the violence.[71]

(C) *Right to Proceed Pro Se; Court Clerk Assistance*

(1) Each party may proceed with or without legal representation at any or all stages of protection order proceedings.[72]

(2) Clerks of court shall provide all parties with information about:

(a) the availability of protection orders;

(b) procedures for filing petitions for protection orders;

(c) the right of parties to proceed with or without legal representation as they may choose;

(d) the procedures for waiver of filing and service of process fees; and

(e) the right of the petitioner to have her place of residence remain secret.

(3) Clerks of court or other persons designated by the court shall assist the parties in completing and filing the petition, affidavits, summons, answer, petition to proceed in forma pauperis, and other papers and pleadings necessary to initiate or respond to a petition for a protection order.

(4) The clerks of court shall not render advice or services to parties in protection order proceedings that call for the professional judgment of a lawyer.[73]

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[71] *See* A. GANLEY, COURT-MANDATED COUNSELING FOR MEN WHO BATTER: A THREE-DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS 34–35, 53–54 (1981).

[72] *See* HAWAII REV. STAT. § 585–3 (Supp. 1980).

[73] *See* Lerman & Livingston, *supra* note 1, at 6–7. *See generally* ME. REV. STAT. ANN. tit. 19, § 764(2) (1981); MO. ANN. STAT. § 455.025 (Vernon Supp. 1983) (clerk may explain forms to unrepresented litigants; this does not constitute practicing law); N.J. STAT. ANN. § 2C:25-12(c) (West 1982); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1976).

COMMENTARY: The law must be structured to allow pro se proceedings to make protection orders available to indigent victims of abuse who seek court assistance. Poor women who are battered seek help from the police more than twice as often as women with higher incomes.[74] Unless the law also allows clerks to explain to petitioners that they may seek waiver of court filing fees, petitioners may wrongly believe that they cannot afford to go to court.

To allow pro se petitions is not to disparage the value of representation in a protection order proceeding. Particularly in situations in which temporary custody or support is sought, or in which visitation restrictions are requested, legal assistance may help the victim to understand and assert her rights. If the victim proceeds without counsel, she might request less support than she is entitled to, and inevitably, such an award might influence a subsequent support award in a divorce proceeding. But the cutbacks in legal services and the rising cost of private legal assistance effectively foreclose the preferred option of providing counsel for all victims of abuse. Therefore, the procedural requirements of the Model Act are extremely simple and may be understood by someone with no legal training.

Many state laws now require that clerks of court provide minimal assistance to pro se parties.[75] This provides the parties with access to someone who can answer questions about the procedure for obtaining a protection order and facilitates smooth proceedings. Despite the acceptance of this practice in federal courts and in small claims courts, a constitutional challenge was made to a provision in the Minnesota abuse act requiring clerk assistance to victims. In *State v. Errington*,[76] the Supreme Court of Minnesota interpreted the legislative requirement that "the court" assist victims of domestic abuse to require assistance by the court clerk rather than the judge. The court further held that this provision did not violate the separation of powers doctrine or create a biased court by mandating assistance only to victims of abuse and not to respondents.

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[74] One major study conducted in Kentucky found that 14% of incidents of spouse abuse involving lower income women (household income below $7500) were reported to the police, and only 6% of incidents were reported when the victims lived in households earning $15,000 or more. M. SCHULMAN, *supra* note 16, at 36 (1979).

[75] *See, e.g.*, ALA. CODE §§ 30-5-1 to -11 (Supp. 1982); CAL. CIV. CODE § 4359 (West 1983); CAL. CIV. PROC. CODE §§ 545–553 (West Supp. 1983). *See generally* Lerman & Livingston, *supra* note 1, at 6–7.

[76] 310 N.W.2d 681 (Minn. 1981).

In the Model Act, however, the clerks are directed to assist both petitioners and respondents, so that neither need be represented by counsel, and so that both parties will have access to information about court procedures.

Court clerks, however, may not render legal advice without a license to practice law. The line between clerical assistance and legal advice is not an easy one to draw. Subsection (4) prohibits court clerks from giving legal advice to parties. If the assistance offered is limited to explaining court procedures, explaining how to fill out forms, or in the case of illiterate parties, acting as a scribe, no question of unauthorized practice is presented.[77] More difficult questions arise when a petitioner is literate but cannot write a coherent statement of facts, or when a petitioner asks the clerk if her relationship to her assailant would make her eligible for a protection order. To the extent that questions can be answered or assistance offered without the exercise of the type of professional judgment which requires legal training, clerks may facilitate the conduct of expedient court proceedings without violating the unauthorized practice laws. But if, for example, the petitioner requests an analysis of a point of law that is susceptible of varied interpretation, the clerk should decline to respond because such assistance would constitute legal advice.[78]

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[77] Ethical Consideration 3-5 states:

> It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer . . . . Where this professional judgment is not involved, non-lawyers, such as court clerks, . . . [and others] may engage in occupations that require a special knowledge of law in certain areas.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1976).

[78] In Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979), a secretary was found to have engaged in the unauthorized practice of law by providing customers with do-it-yourself divorce kits and by helping them to fill out forms and to prepare for pro se court appearances. The clerk assistance authorized by the Model Act is similar in some respects to the conduct found illegal in *Furman* but is clearly distinguishable.

Several factors distinguish the clerk assistance provisions of the Model Act from the situation addressed by the Florida Supreme Court in *Furman*. Most important, in *Furman* there was no explicit statute authorizing the conduct in question. The clerk assistance in the Model Act is quite literally authorized and therefore not illegal. Under the MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983), the question of whether the assistance contemplated in the Act may be authorized is indirectly addressed:

> A lawyer shall not:
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
>
> Comment: The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice

Alternative 1

(D) *Filing and Service Fees: Petitions of Poor Persons*

(1) A petitioner may file an affidavit stating that he or she is seeking a protection order and lacks the funds to pay for filing and service. If such an affidavit is filed, the petition shall be filed and service shall be made without payment of costs or prior leave of the court to proceed in forma pauperis.

(2) When the petition is filed without payment of costs, the court shall determine at the hearing on the petition whether the petitioner or the respondent is indigent. If the court finds that the petitioner is not indigent, the court may order the petitioner to pay the court costs. If the respondent is found not to be indigent and the petitioner prevails on the merits, the respondent may be ordered to pay court costs.

(3) In determining whether a petitioner has the funds available to pay the costs of filing and service under this Act, the income of the respondent shall not be considered.[79]

Alternative 2

(D) *Filing and Service Fees: Petitions of Poor Persons.* **No fees shall be charged for forms, filing of petitions, service of petitions or orders, copies of orders, or other services provided by this Act.**[80]

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of law to members of the bar protects the public against rendition of legal services by unqualified persons.

This suggests that a state has some discretion to define what is or is not the practice of law, and to authorize some assistance to non-lawyers by persons not admitted to the bar. The Model Act takes care to prohibit clerks from offering advice on legal matters which involve judgment calls because such opinions require professional judgment. This is consistent with the purpose stated in the Proposed Rules for prohibiting unauthorized practice.

Second, the services in *Furman* were offered by a business for profit. The business included no one with legal training or with the duties of an officer of the court. In the Model Act, advice would be offered by non-lawyers who are court employees. They would not be paid by those to whom they offered advice, and would be advising primarily those who could not afford to pay for the advice of a lawyer. These differences mean that the services offered are in the public interest, that the clerks are not competing for business with the private bar. Clerks offering advice, because they work in the courts, are likely to have a clear sense of the limits of their authority, and to have access to professional advice about what assistance they may or may not offer.

A final distinction betweeen *Furman* and the clerk assistance provisions of this Act is that there is a longstanding tradition of court assistance to pro se petitioners, both to ensure that citizens have access to court even if they cannot afford to pay lawyers, and to assist the court in processing the often unpolished claims filed by pro se petitioners. In *Furman*, the primary purpose of the service was to generate income; in the Model Act, the purpose is to help indigent citizens and to provide ministerial functions necessary to the administration of the courts.

[79] *See* Illinois Domestic Violence Act § 207(a), ILL. ANN. STAT. ch. 40, ¶ 2302-7 (Smith-Hurd Supp. 1982).

[80] *See* N.H. REV. STAT. ANN. § 173-B:3(II) (Supp. 1981).

COMMENTARY: This subsection presents two alternative methods of fee waiver. The first enables the court to determine eligibility for fee waiver on a case-by-case basis; the second is automatic and applies in all cases. The option of fee waiver, like the pro se provisions, may determine whether the remedy will be available to those who need it or whether most victims will be unable to enforce their legal rights due to lack of funds. In some courts the cost of filing and service is as high as sixty to one hundred dollars.[81] The need for fee waiver provisions is stronger in states in which the courts impose high filing fees.

Several considerations are relevant in determining if the state abuse law should waive fees in all abuse cases or should require case-by-case determination. Most important, because victims of abuse frequently will file pro se, each additional procedural requirement will deter some people from requesting relief. A blanket fee waiver would not maximize victims' access to legal protection. A legislature should also consider whether the court system can afford to subsidize protection order proceedings and whether the additional cost to the court of processing and determining in forma pauperis petitions would be greater than the income received from fees paid. If in forma pauperis petitions would be filed and granted in a high percentage of abuse cases, the income received from filing fees might be small.

Alternative 1 requires that respondent's income not be attributed to the petitioner in determining eligibility for fee waiver. In many abusive relationships, the batterer controls family finances and the victim has no access to cash, bank accounts, or credit cards. Many abusers will go to great lengths to prevent their victims from calling the police, going to court, or seeking other help. Therefore, the victim must have the option to file a petition in secret, without asking her abuser for money to go to court.

4.03. ***Hearings: Civil Proceedings.***

(A) ***Emergency Conditions.*** **The respondent is entitled to notice and hearing prior to issuance of a protection order unless the petitioner demonstrates the existence of an emergency by:**

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[81] Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RTS. L. REP. 271, 279 (1980). In particular, some courts in California, Kentucky, Ohio, and Texas charge high filing fees. Fees often vary widely among courts within a particular state.

(1) A showing that the petitioner or other victim was recently the victim of an act or acts of domestic violence committed by the respondent that resulted in physical or emotional injury or damage to property; or

(2) Alleging that the petitioner or others are likely to suffer harm if the respondent is given notice.[82]

COMMENTARY: In many abuse cases, victims seek help at a point of dire emergency, during or immediately after an abusive incident.[83] Often a protection order must be issued before giving notice to the respondent because of the imminent danger of further harm.

The purpose of this section is to define when an emergency exists. "Emergency" is defined to include situations in which some harm has recently been inflicted — as evidence of possible future or continuing harm — as well as instances in which there is an evident danger of serious harm unless an order is issued without the delay that would be necessary to give the respondent notice. The second part of the definition recognizes that if the victim of abuse tells the abuser that she might seek help, he may respond by threatening more serious violence.[84] These threats may prevent the victim from leaving the situation or from seeking protection. By punishing the victim for filing a protection order petition, the abuser may persuade her to withdraw the petition or simply to fail to appear on the court date.

Most existing laws are less specific than the model law in their articulation of what may be included as an emergency situation justifying ex parte relief. Most of the statutes simply authorize ex parte relief whenever there is "immediate and present danger of abuse". In some jurisdictions, conservative judges have refused to grant ex parte orders because they view the remedies provided by the law as inappropriate.[85] The specificity of this draft is designed to overcome judicial reticence that might narrow the definition of "emergency". More explicit statutory direction is more difficult to misinterpret.

Ex parte orders that involve deprivations of liberty or prop-

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[82] *See* WLDF AMENDMENTS, *supra* note 44, § 16-1003(b) (referring to bodily harm).

[83] Walker points out, however, that some women are immobilized by the abuse and do nothing for a few days after a beating. L. WALKER, *supra* note 26, at 64, 66.

[84] D. MARTIN, *supra* note 50, at 77–81.

[85] For example, in Memphis, Tennessee, after a state protection order law was enacted in 1979, the judges joined together not only in refusing to enforce the law, but in working to repeal it. "Judges Ignore Law Shielding Abused Wives," Memphis Press-Scimitar, Oct. 27, 1979, at 1. This attempt was unsuccessful.

erty (such as eviction of the respondent from his residence and restrictions on visitation with children) are consistent with the Due Process Clause only if notice and opportunity for a hearing are postponed rather than cancelled, and if procedural protections are provided to minimize the deprivation.

The section defining emergency conditions restates current due process doctrine.[86] Ex parte orders may be issued only when harm would result from prior notice and hearing. The orders must be issued by judges and there must be a showing that harm might result from delay. The notice and opportunity for hearing must be provided as soon as possible after the order is issued.[87]

(B) *Ex Parte Relief.* If an emergency exists, a petition for a protection order shall be heard ex parte or granted based on the allegations contained in the petition and affidavit. Such petitions shall be given priority over all other docketed matters and shall be decided by a judge available for emergency proceedings the same day the petition is filed, or the following morning if the petition is filed after 4:00 p.m. If the judge finds that the petitioner for ex parte relief has proven by a preponderance of evidence[88] that emergency conditions

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[86] *See* U.S. CONST. amend. XIV, § 1. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-14 (1978).

[87] *Cf.* Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (upholding the constitutionality of ex parte procedures contained in the Missouri Adult Abuse Act against state and federal due process challenges). For an extensive discussion of the due process issue as it relates to remedies for battered women, see Taub, *Equitable Relief in Cases of Adult Domestic Violence*, 6 WOMEN'S RTS. L. REP. 241 (1981).

[88] The preponderance standard as it is used here means that "the existence of a contested fact is more probable than its nonexistence." C. MCCORMICK, MCCORMICK ON EVIDENCE (E. Cleary 2d ed. 1972). Although this standard is generally applied in a comparative fashion to find one set of evidence more convincing than opposing evidence, it would be applied in an ex parte hearing to determine whether affirmative evidence of domestic violence was convincing by itself. The petitioner is required to prove more facts in an ex parte hearing (i.e., she must prove the presence of conditions requiring emergency action), but the standard of proof is the same whether the respondent is present or not. That standard is that the trier of fact must find it somewhat more likely than not that the acts in question occurred.

While some states might wish to impose a standard of "clear and convincing" proof before issuing ex parte protection orders, the case law suggests that a lower standard is permissible. In Addington v. Texas, 441 U.S. 418 (1979), the Supreme Court held on the facts that clear and convincing proof was required to commit involuntarily an individual to a mental institution for an indefinite period of time. In protection order proceedings, the low risk of erroneous decision and the rapid opportunity for correction of any error makes application of a less demanding standard of proof appropriate.

To apply a higher standard of proof would be to subvert the intention of the law because so many women come into court in emergency circumstances without having had a chance to prepare formally to prove their allegations. The higher standard might operate to deny relief in many of the cases for which the ex parte provisions are intended.

The Court explained in *Addington* that the burden of proof functions to "allocate the risk of error between the litigants." *Id.* at 423. When the burden of proof is a preponderance of evidence, "[t]he litigants share the risk of error in roughly equal fashion." *Id.* This seems a fair approach in this case because an error in denying needed relief

are present and that an act of domestic violence has occurred, the judge shall grant any of the requested relief contained in section 4.05(A) No Further Abuse, (B) Exclusive Possession, (C) Stay Away, (D) No Communication, (I) Temporary Custody and Visitation, and (O) Police Supervision of Return to Residence. In an emergency situation, the judge may grant any other necessary relief.[89] The ex parte protection order will remain in effect pending a full hearing. If a hearing is continued, the ex parte order may be extended until the hearing is completed.

COMMENTARY: This section establishes procedures for issuing emergency orders. The language of the Model Act is largely original. Most advocates for battered women believe that to provide effective protection the protection order law must contain simple proof requirements and provide for almost contemporaneous relief.[90]

The requirement that the ex parte hearing be held the same day a petition is filed was suggested by several reviewers who agreed that a prompt response to the needs of victims of domestic violence is crucial. A delay of one or two days between petition and order could be dangerous to many petitioners.

In contrast to proceedings for child custody or support, the petitioner is not required to submit detailed proof of her entitlement to each type of relief requested. Once she establishes that she is a victim of domestic violence, she need only prove that the relief is needed to protect her from subsequent violence.

The nature of the relief granted should be related to the seriousness of the alleged abuses. For example, a judge might decline to grant an eviction order absent a showing that there had been or was likely to be serious physical abuse. If a petitioner demonstrates that she has been injured, a judge might grant her temporary custody of her children merely upon a

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could cost the petitioner her physical well-being or even her life. An erroneous grant of relief would at worst exclude the respondent from his residence for a few days or a week.

Finally, the relief granted in protection orders has consequences far less drastic and permanent than those cases in which the Supreme Court has previously required proof by clear and convincing evidence. Even if the abuser is asked to vacate his residence for a year (after a final hearing) the deprivation is far less than that imposed by involuntary indefinite hospitalization in a mental institution, *id.*, by deportation, Woodby v. INS, 385 U.S. 276 (1966), or by denaturalization, Chaunt v. United States, 364 U.S. 350 (1960).

[89] *See* OHIO REV. CODE ANN. § 2919.26(C) (Page Supp. 1982).

[90] Most state laws require only a showing of threats of imminent violence rather than proof that violence has already occurred. *See, e.g.*, ALA. CODE §§ 30-5-1 to -11 (Supp. 1982); D.C. CODE ANN. §§ 16-1001 to -1006 (1981 & Supp. 1983).

showing that continued coresidence of the parties would create a continuing danger. No hard lines should be drawn here; the circumstances of abusive relationships vary so widely that broad judicial discretion is necessary.

In many jurisdictions where these remedies exist, it has been necessary to educate the private bar and the judiciary that relief should not be requested under the abuse law except to protect individuals from domestic violence. Attorneys who are unfamiliar with the abuse laws sometimes petition for a protection order to expedite temporary resolution of support, custody, or visitation issues in domestic relations cases in which there has been no violence. This may be a particular problem in jurisdictions with crowded dockets and long backlogs. If the private bar is not educated and inappropriate petitions are filed, some judges may become suspicious of legitimate petitions and become more reluctant to grant relief.

Alternative 1: Required Second Hearing.

(C) *Due Process*

(1) The court shall schedule a full hearing within fourteen days after the date that any ex parte order is issued. If the respondent wishes to be heard sooner than the date set by the court, then after at least two days notice to the petitioner, or after such shorter notice as the court may prescribe, the respondent may appear and move for the dissolution or modification of that order. The court shall hear such motion as expeditiously as possible.[91]

(2) If after the hearing the court finds that allegations of abuse have been proven by a preponderance of the evidence, a final protection order shall be issued that may include the relief granted in the ex parte order and any additional relief requested by the petitioner.

Alternative 2: Optional Second Hearing.

(C) *Due Process*

(1) When an ex parte order is issued, the respondent may file a request for a hearing with the clerk of the court within twenty days after being served with the order. Such hearings shall be scheduled after at least two days notice to the petitioner or after such shorter notice as the court may prescribe.

[91] Illinois Domestic Violence Act § 204, ILL. ANN.STAT. ch. 40, ¶ 2302-4 (Smith-Hurd Supp. 1982)

(2) A full hearing may also be requested by the petitioner if all of the relief requested in the ex parte hearing is not granted or for other appropriate reasons. Such hearings shall be scheduled after at least five days notice to the respondent or after such shorter notice as the court may prescribe.[92]

(3) If the judge issuing the ex parte order determines that a full hearing is necessary, he or she may order sua sponte that a full hearing be held at which both parties may present evidence. Such hearing shall be scheduled after at least five days notice to both parties or after such shorter notice as the court may prescribe.

(4) If after hearing evidence from both parties, the court is satisfied that allegations of abuse have been proven by a preponderance of the evidence, the court shall issue a final protection order.

(5) If a full evidentiary hearing is not ordered by the judge, and none is requested by the petitioner or the respondent within twenty days after proof of service is filed, the ex parte order shall become a final order.[93]

COMMENTARY: Most jurisdictions require that a full hearing be held before a final order may be issued. A minority of states, however, provide that ex parte orders will become final unless a hearing is requested. The former alternative is the recommended approach in the Model Act. The section requires that a full hearing be scheduled within fourteen days after the order is issued, or sooner if the respondent so requests.

Requiring a second hearing before issuing a final order is desirable for several reasons. First, the law may be less vulnerable to a constitutional challenge if the burden to request a hearing is not imposed on the respondent. The laws that require no second hearing should be able to survive a constitutional challenge if appropriate due process protections are included, but the more conservative approach may be less likely to elicit a challenge.

Second, the law provides that only some of the listed relief may be included in the ex parte order (no abuse, stay away, eviction, custody, and visitation) because other relief is less responsive to the immediate danger, and because a more formal hearing is appropriate to determine whether certain available relief (e.g., support, monetary compensation, two-year eviction) shall be granted.

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[92] *See* Illinois Domestic Violence Act § 204(c), ILL. ANN. STAT. ch. 40, ¶ 2302-4(c) (Smith-Hurd Supp. 1982); N.H. REV. STAT. ANN. § 173-B:6 (Supp. 1979).

[93] *See* ME. REV. STAT. ANN. tit. 19, § 765 (1981).

Finally, protection orders that are issued after a hearing at which the abuser is present may be more effective than those which are issued ex parte. If the judge confronts the abuser in public with the prohibitions contained in the order and emphasizes the consequences of violation, the abuser may take the order more seriously.[94] In many cases, the abuser will not appear for the full hearing, at which time all of the relief provided in the law becomes available on default, subject to ex parte proof.

The second alternative provides that after an ex parte order is granted, a hearing may be requested by the petitioner or the respondent any time within twenty days after the order is issued. It provides that hearings shall be held within five days after the party not requesting the hearing receives notice. A hearing may also be ordered by the judge even if not requested by either party. If no one requests that a full hearing be held at which both parties may present evidence, the temporary order automatically becomes a final order.

This optional second hearing approach was included in the Model Act for several reasons. First, it imposes less of a burden on courts and parties by not requiring that a hearing be held unless one of the parties or the judge deems it necessary. Judicial efficiency in these matters is necessary because of the high volume of petitions for protection orders.

Second, this section is premised on the notion that where sufficient evidence of abuse has been put forward to demonstrate the need for an emergency order, it is likely that continued court protection is necessary. Research has demonstrated that most violent relationships go through cycles — each assault may be followed by a period of calm, but the violence tends to recur and to escalate over time.[95] Victims often believe promises that "it will never happen again" and abandon court action they have initiated, not realizing that the peace is only temporary. Victims also may be subject to retaliation after a temporary order is issued and may be coerced not to appear at any subsequent proceedings. By requiring a second appearance to get more than a few weeks' relief, the legislature essentially dares the abuser to try to abort further proceedings.

Finally, the benefit of a longer period of protection generally outweighs the possible harm from allowing maturation of an ex

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[94] I have observed the deterrent effect of verbal interaction between judges and offenders in the District of Columbia Superior Court.

[95] A. GANLEY, *supra* note 71, at 16.

parte order into a final order. Many orders merely prohibit conduct that is already illegal. At any time either party can file a petition for modification of an order. This would enable the court to correct any error made by continuance of an order without a full hearing.

Because second hearings will not be held in many cases, relief should be granted ex parte with the knowledge that the order may remain in effect without modification for a specified period of up to two years. Each order should specify what relief will be added in the final order and what the duration of the final order will be if no further hearing is held in the case.

Under Alternative 2, the victim is permitted to request a full hearing for two reasons. First, sometimes the victim knows that the abuser will not obey the order unless he is told in person by a judge that he must do so. In some cases, the victim will be granted some but not all of the relief she requested in an ex parte petition. Thus, the petitioner may request a full hearing in order to obtain all of the relief for which she initially applied. In either of these circumstances, it is appropriate that the respondent be given notice and a full hearing be held.

This Act permits a judge to order a full hearing sua sponte because in some cases ex parte proof is inadequate to justify long-term relief. Particularly in cases in which the petitioner requests temporary child custody, possession of substantial property, or support for herself or her children, the judge may wish to hear evidence from both parties.

When second hearings are to be held, the statute provides that ex parte orders must remain in effect until after the full hearing in cases. If the ex parte order expires before a final order is issued, the abuser may view that gap in legal protection as permission from the court to violate the terms of the order.

(D) ***Protection Orders*** **issued under this Act shall use the following forms:**

(1) ***Ex Parte Order of Protection and Notice of Hearing***

After reviewing the verified petition requesting an ex parte order of protection, this Court finds that there is good cause to believe that the petitioner and/or others are in immediate danger of abuse and that such an order should be issued.

THEREFORE THE COURT ORDERS AS FOLLOWS:

That respondent, _____,

1. _____ Not abuse or threaten the Petitioner or other alleged victims, or commit any other act of domestic violence, including battery, assault, coercion, sexual assault, harassment, unlawful imprisonment, unlawful entry, damage to property, theft, or other acts prohibited by the criminal code of this State;

2. ____ Vacate the residence at _____ and relinquish temporary possession of that residence to the victim(s) (this order will not affect title to the property);

3. ____ Stay away from the following places frequented by the victim(s) (list addresses):

A. Residence: _____

B. School: _____

C. Workplace: _____

D. Other: _____;

4. ____ Avoid all communication with the victim(s) in writing, in person, or by telephone, except that communication is permitted under the following limited circumstances: _____;

5. ____ That custody of the minor children listed below be granted to the Petitioner: _____[Names] [Ages];

6. ____ That Respondent may visit with children only on the following day(s), and only at the following place(s) and time(s), and under the supervision of the following person(s): _____;

7. ____ That this order be served and executed by a police officer including supervising the Respondent in returning to his residence to collect personal belongings; and

8. ____ That a police officer be ordered to accompany the victim to a residence occupied by a Respondent to obtain physical custody of children or to collect personal belongings.

WILLFUL VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT OF DOMESTIC VIOLENCE, INCLUDING ENTRY INTO A RESIDENCE IN VIOLATION OF A VACATE ORDER, IS A MISDEMEANOR PUNISHABLE BY UP TO TWELVE MONTHS IMPRISONMENT AND/OR A FINE OF UP TO $1,000. A SECOND VIOLATION IS A FELONY PUNISHABLE BY NOT LESS THAN SEVENTY-TWO HOURS IMPRISONMENT AND NOT MORE THAN TWO YEARS, AND/OR A FINE OF UP TO $2,000.

VIOLATION OF THIS ORDER OTHER THAN BY ABUSIVE BEHAVIOR IS CONTEMPT OF COURT AND PUNISHABLE IN ACCORDANCE WITH LAW.

Notice of Hearing

A full hearing on the Petition will be held at the above-listed Court at ____ on _____, 19____. At that time you may appear with or without counsel and present testimony. Failure to appear may result in a default judgment for the petitioner.

You are entitled to request an immediate hearing on this matter. To request a different hearing date, go to the Clerk's office at _____ and request an application for hearing. The petitioner must be notified at least two days prior to the date set.

Copies of this order shall be furnished by the Clerk to the _____ (law enforcement agency).

(2) *Full Civil Protection Order*

After reviewing the verified petition requesting an order of protection, and properly notifying the respondent that a hearing was scheduled on this matter, and hearing the testimony of (the parties / the petitioner, upon default by the respondent), this Court finds that the petitioner has proven the allegations of domestic violence by a preponderance of the evidence.

THEREFORE THE COURT ORDERS AS FOLLOWS:

That respondent, _____,

1. ____ Not abuse or threaten the petitioner or other alleged victims, or commit any other act of domestic violence, including battery, assault, coercion,

sexual assault, harassment, unlawful imprisonment, unlawful entry, damage to property, theft, or other acts prohibited by the criminal code of this State;

2. _____ Vacate the residence at _____ and relinquish temporary possession of that residence to the victim(s) (this will not affect title to the property);

3. _____ Stay away from the following places frequented by the victim(s) (list addresses):

A. Residence: _____

B. School: _____

C. Workplace: _____

D. Other: _____;

4. _____ Avoid all communication with the victim(s) in writing, in person, or by telephone, except that communication is permitted under the following limited circumstances: _____;

5. _____ Make or continue to make rent or mortgage payments on the residence vacated in the amount of $_____ payable to _____;

6. _____ Pay the victim $_____ per month for rent on a separate residence from the Respondent;

7. _____ Provide support for the victim and/or minor children in the amount of $_____ per month;

8. _____ Give physical custody of minor children to the Petitioner, on _____, at _____;

9. _____ Visit with the children only on the following day(s), at the following places and times, and under the supervision of the following person(s): _____;

10. _____ Compensate the victim in the amount of $_____ for expenses incurred as a result of the abuse;

11. Give possession of the following items of personal property to the Petitioner or other specified victims: _____;

12. _____ Not transfer, encumber, or otherwise dispose of property owned by the victim or jointly owned;

13. _____ Participate in a counseling program designed to control violent behavior by contacting _____ at _____within two days of the date of this order, and that Respondent submit a report from the counselor to the Court once every four weeks from the date of this order until the program is completed;

14. _____ Pay the costs of counseling for himself/herself, or for _____;

15. _____ Pay a fee of $_____ to a shelter for victims of domestic violence where the victim has resided or is residing;

16. _____ Other relief as follows: _____.

THE COURT FURTHER ORDERS THAT:

17. _____ Custody of the minor children listed below will be granted to the Petitioner: _____[Names] [Ages];

18. _____ That a police officer shall accompany the Petitioner to a residence occupied by Respondent to obtain physical custody of children or to collect personal belongings;

19. _____ A police officer shall serve and execute the protection order, including supervising the Respondent in returning to a residence that the Respondent has been ordered to vacate to collect personal belongings;

20. _____ Other relief, as follows: _____.

This Order shall remain in effect for _____ months, until _____ but may be renewed, extended, or modified upon motion of either party.

WILLFUL VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT OF DOMESTIC VIOLENCE, INCLUDING ENTRY INTO A RESIDENCE IN VIOLATION OF A VACATE ORDER, IS A MISDEMEANOR PUNISHABLE BY UP TO TWELVE MONTHS IMPRISONMENT AND/

OR A FINE OF UP TO $1,000. A SECOND VIOLATION IS A FELONY PUNISHABLE BY NOT LESS THAN SEVENTY-TWO HOURS IMPRISONMENT AND NOT MORE THAN TWO YEARS, AND/OR A FINE OF UP TO $2,000.

VIOLATION OF THIS ORDER OTHER THAN BY ABUSIVE BEHAVIOR IS CONTEMPT OF COURT AND PUNISHABLE IN ACCORDANCE WITH LAW.

(3) *Full Criminal Protection Order*

The Defendant, _____, has been charged with / convicted of (circle one) a violation of _____, against a person protected under the Remedies for Domestic Abuse Act. The Court, finding it likely that the Defendant may injure or intimidate the victim in the future,

ORDERS, as a condition of release / probation that:

The Defendant, _____,

1. _____ Not abuse or threaten the Complaining Witness or other alleged victims, or commit any other act of domestic violence, including battery, assault, coercion, sexual assault, harassment and unlawful imprisonment, unlawful entry, damage to property, theft, or other acts prohibited by the criminal code of this State;

2. _____ Vacate the residence at _____and give temporary possession of that residence to the Complaining Witness (this will not affect title to the property);

3. _____ Stay away from the following place(s) frequented by the Complaining Witness (list addresses):

A. Residence: _____

B. School: _____

C. Workplace: _____

D. Other: _____;

4. _____ Avoid all communication with the Complaining Witness in writing, in person, or by telephone, except that communication is permitted under the following limited circumstances: _____;

5. _____ Make or continue to make rent or mortgage payments on the residence vacated in the amount of $_____ per month payable to _____;

6. _____ Pay the Complaining Witness $_____ per month for rent on a separate residence from the Defendant;

7. _____ Provide support for the Complaining Witness and/or minor children in the amount of $_____ per month;

8. _____ Give possession of minor children to the Complaining Witness on _____, at _____, and visit with children only on the following day(s), and only at the following place(s) and time(s), and under the supervision of the following person(s): _____;

9. _____ Compensate the Complaining Witness in the amount of $_____, for expenses incurred as a result of the abuse;

10. _____ Give possession of the following items of personal property to the Complaining Witness: _____;

11. _____ Not transfer, encumber, or otherwise dispose of property owned by the Complaining Witness or jointly owned;

12. _____ Participate in a counseling program designed to control violent behavior, by contacting at _____within two days of the date of this order, and that Defendant submit a report from the counselor to the Court once every four weeks from the date of this order until the program is completed;

13. _____ Pay the costs of counseling for himself/herself, or for _____;

14. _____ Pay a fee of $_____ to a shelter for victims of domestic violence where the Complaining Witness resides or has resided;

15. _____ Other relief, as follows: _____.

THE COURT FURTHER ORDERS THAT:

16. _____ Custody of the minor children listed below will be granted to the Complaining Witness: _____[Names] [Ages];
17. _____ A police officer shall accompany the Complaining Witness to a residence where the Defendant resides to obtain physical custody of children or to collect personal belongings;
18. _____ A police officer shall serve and execute the protection order, including supervising the Defendant in returning to a residence that the Defendant has been ordered to vacate to collect personal belongings.
19. _____ Other relief, as follows: _____.

This Order shall remain in effect until the above-indicated case has come to trial and the Defendant has been sentenced if found guilty, or, if a condition of probation, until _____, when the period of probation expires. The order may be modified upon motion of either party.

WILLFUL VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT OF DOMESTIC VIOLENCE, INCLUDING ENTRY INTO A RESIDENCE IN VIOLATION OF A VACATE ORDER, IS A MISDEMEANOR PUNISHABLE BY TWELVE MONTHS IMPRISONMENT AND/OR A FINE OF UP TO $1,000. A SECOND VIOLATION IS A FELONY PUNISHABLE BY NOT LESS THAN SEVENTY-TWO HOURS IMPRISONMENT AND NOT MORE THAN TWO YEARS, AND/OR A FINE OF UP TO $2,000.

VIOLATION OF THIS ORDER OTHER THAN BY ABUSIVE BEHAVIOR IS CONTEMPT OF COURT AND PUNISHABLE IN ACCORDANCE WITH LAW.

COMMENTARY: No comment.

(E) *Non-Emergency Conditions*: **In those cases that do not present emergency conditions, a hearing upon the petition shall be scheduled within fourteen days after the petition for protection from abuse is filed. If after the hearing the court is satisfied that allegations of abuse have been proven by a preponderance of the evidence, a final protection order shall be issued.**[96]

COMMENTARY: In some cases protection is needed but the danger of domestic abuse is not immediate. For example, the victim recently may have moved to a different city and may fear that, even if the abuser does not know where she is, he will eventually find out and pursue her. The urgency of obtaining an order might be reduced if the abuser is out of town for a period of time, or if other circumstances indicate that immediate violence is unlikely. If there is no emergency, other matters on the docket need not be displaced in order to provide immediate relief.

(F) *Emergency Jurisdiction*

(1) When the courts that handle protection orders in the locality where the petitioner seeks relief are closed, the petitioner may apply

[96] *See* ME. REV. STAT. ANN. tit. 19, § 765(1) (1981).

for ex parte relief to any available judge whose court has jurisdiction to issue protection orders. Upon a showing that emergency conditions exist, the court may order ex parte any relief authorized under section 4.05.

(2) Any order issued under this section and any supporting documentation shall be forwarded immediately to the clerk of any court selected by the petitioner that has jurisdiction and venue in the action. Such action shall have the effect of commencing proceedings under section 4.02.

(3) The respondent, upon being served with an order, may request a hearing to show why the order should be dissolved or modified pursuant to section 4.03(C). If a full evidentiary hearing is not requested within twenty days after proof of service is filed, the emergency order shall become a final order.[97]

COMMENTARY: This section is addressed to situations of extreme emergency. The Model Act provides for issuance of ex parte orders at night and on weekends by any available judge, either a judge on call for emergencies, or any judge who can be reached if the jurisdiction has no emergency assignment rotation. The section then establishes a procedure for transferring papers to the appropriate court invoking the due process procedures.

(G) *Duration of Orders*: Any final protection order issued under section 4.03 of this Act shall be effective for a fixed period of time not to exceed twenty-four months, except that such order may be extended, renewed, or modified by order of the court as described in section 4.03(H).[98]

COMMENTARY: No comment.

(H) *Motions for Renewal, Extension, or Modification of Protection Orders*

(1) A petitioner to whom a protection order has been issued may by request motion that the order be renewed or extended for up to twenty-four months, or that any terms of the order be modified to address unanticipated problems or changed circumstances. Hearings on such motions shall be scheduled within ten days after proof of service on the respondent is filed. If emergency circumstances are shown, motions shall be heard ex parte the same day they are filed.

COMMENTARY: This section is addressed to two frequent problems. First, women are often battered the day after a protection

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[97] *See id.* § 765(3).

[98] *Cf.* N.H. REV. STAT. ANN. § 173-B:4 (III) (Supp. 1981).

order expires. The victim may be in a good position to predict the abuser's likely response to the expiration of the order and may avoid the situation by asking for renewal or extension before it expires.

Second, in many cases the parties' relationship continues after a protection order is issued despite a long history of violence.[99] The issuance of an eviction order allows a temporary separation. In some cases the parties decide that they would like to resume cohabitation. To make clear that a protection order remains in effect even if an eviction order is no longer observed, the court should encourage parties in such circumstances to file a motion for modification of the order. The order may be changed to impose realistic restrictions to reduce the risk of injury to parties who are in an ambivalent relationship and have a history of violence. The judge cannot prohibit cohabitation even if there has been serious violence, but the judge can indicate an assesment of the risks involved by refusing to dissolve an order prohibiting violence. Some couples are anxious to pretend that there was never a breach between them; a continuing protection order can be a useful reminder that the respondent has a responsibility to cease violent behavior.

(2) *Proof.* **The court shall evaluate requests for renewal, extension or modification using the same standards of proof imposed in initial proceedings for protection orders. The petitioner may request additional relief based on facts proven or admitted in the original hearing.**

(3) *Effect of Reconciliation.* **Only the court can modify an order issued under this Act and reconciliation of parties shall not affect the validity of a protection order.**[100]

COMMENTARY: This section makes clear that consensual violation of part of a protection order does not void the entire order. As discussed above, many victims of abuse separate from their assailants for a period of time and then decide to resume coresidence. Optimally, if the protection order requires that the respondent vacate a residence shared with the victim, the order should be modified to reflect a change in the parties' arrangements. Where the parties agree to resume coresidence or contact

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[99] Abused women who leave their abusers often seek help from a legal or social service agency. Most return at least once after leaving because of reconciliation, fear of reprisals, or other reasons. *See* D. MARTIN, *supra* note 50, at 73–76; L. WALKER, *supra* note 26, at 65–70.

[100] *See* N.H. REV. STAT. ANN. § 173-B:4 (VI) (Supp. 1981).

without requesting modification of a protection order, however, the other provisions of the order should remain in effect and be enforceable.

4.04. *Hearings: Criminal Proceedings.*

(A) Upon the filing of any criminal action involving domestic violence, the prosecuting attorney shall request by motion that a protection order be issued as a condition of pretrial release or diversion to protect the complainant or others affected by the action and to prevent the defendant from attempting to interfere with the proceedings by intimidating witnesses.

(B) Motions for protection orders in criminal cases shall use the form provided at section 4.02(A)(5) of this statute.

(C) The procedures prescribed for obtaining a protection order in an independent civil action shall be used in criminal proceedings. The court may grant any relief described in section 4.05. The criminal court may elect not to issue a final order regarding a request concerning child custody, support, or involving personal property. In such cases, the court may issue an interim order providing limited relief and forward the petition to civil court for determination of remaining issues.

(D) A protection order issued as a condition of pretrial release under this section shall not be construed as a finding that the alleged offender committed the alleged offense, and shall not be admissible to prove commission of the offense charged.

(E) A protection order issued as a condition of pretrial release is effective only until the disposition of the criminal complaint under which it was filed. If the defendant is convicted of or pleads guilty to the offense charged, a protection order may be issued as a condition of probation or parole or included in any other disposition.[101]

COMMENTARY: This section makes the protection orders available in civil proceedings available in criminal proceedings as conditions of release, diversion, or as a condition of probation.[102] Battered women need the same protection from harm when prosecution is initiated as they do absent criminal action; the filing of charges affords no automatic protection to any crime victim. The need for protection may be even greater during criminal proceedings because of the threatening effect of prosecution and the consequent risk of reprisals.

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[101] This section is influenced by the structure of the Ohio abuse law. *See* OHIO REV. CODE ANN. § 2919.26(E) (Page Supp. 1982).

[102] *Id.*

Use of protective injunctions in criminal proceedings is common practice. As in domestic relations proceedings, orders restricting the parties' conduct during the proceedings are frequently issued, but they often are not put in writing and are often issued without any consultation with the victim. Violations of such orders are rarely penalized. This section strengthens this long-established remedy.

The most important difference between protection orders in civil and criminal court is the basis for the court's jurisdiction. In a criminal proceeding, the court may require or prohibit certain conduct during the pendency of criminal charges in order to prevent intimidation of witnesses and to ensure orderly administration of justice. If prosecution of the charge is deferred based on the defendant's agreement to comply with certain conditions, a protection order may be included as a condition of deferral. If the defendant pleads guilty or is convicted, a protection order may be issued as part of the defendant's sentence. In civil court, the basis of the court's power is to settle private conflicts between individuals.

Because the basis of jurisdiction in criminal court is related to the pendency of charges or to post-conviction penalties, the initial order must expire when the charge is disposed and a new order must be issued. Although this procedure is complicated, it is less complicated than requiring the petitioner to initiate a separate court action to get protection.

The Model Act provides that all the relief available in civil proceedings may be included in a criminal order. In many cases, support, child custody, visitation, and property issues are integrally related to the safety of victims of abuse. Visitation may be used as an opportunity to abuse the victim again.[103] An award of temporary custody would allow a woman to take her children with her if she fled for safety to another city. Authority over property issues would allow the court to require the abuser to return the victim's car or credit cards to her.

Despite the relevance of these issues, some criminal judges will not be comfortable ruling on such a broad range of issues. To prevent judges from avoiding these problems by issuing narrow orders, the statute allows criminal court judges to issue interim orders and to transfer protection order petitions to civil judges for rulings on remaining issues.

[103] See Thomas, *supra* note 70, for suggestions on how to structure visitation to protect the safety of the victim.

4.05. *Available Relief.* In both civil and criminal proceedings in which petitions for protection orders are filed, the court shall grant relief that is necessary to prevent further abuse.[104] Final relief may include but shall not be limited to ordering the following:

COMMENTARY: No comment.

(A) *No Further Abuse*: restraining the assailant from subjecting the victim(s) to domestic violence, as defined in section 3.01;[105]

COMMENTARY: No comment.

(B) *Exclusive Possession*: granting exclusive possession of the residence or household to the petitioner or other resident regardless of whether the residence is jointly or solely owned or leased by the parties or others.[106]

COMMENTARY: Exclusive possession is the most important of the listed remedies. It addresses the fundamental issue of who should bear the expense and inconvenience resulting from the violence between two people who live together. The provision, in effect, creates for the victim the right to be safe at home. Although the exclusion of a man from his own home may appear to be a radical form of relief, the remedy has been authorized in most states.[107] An order for exclusive possession is available regardless of which party is named in the deed or lease. The order, however, does not affect title to any property.[108]

(C) *Stay Away*: ordering the respondent not to enter the residence, school, or place of employment of the victim or other family or household members of the victim[109] and to stay away from any specified place that is frequented regularly by the victim or other family or household members;

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[104] *See* PA. CONS. STAT. ANN. tit. 35, § 10,186(a) (Purdon 1977 & Supp. 1983).

[105] *See* ALASKA STAT. § 09.55.600(b)(1) (Supp. 1982); PA. CONS. STAT. ANN. tit. 35, § 10,186(a)(1) (Purdon 1977 & Supp. 1983).

[106] *See* CAL. CIV. CODE § 4359(a)(3) (West 1983); *see also* ALASKA STAT. § 09.55.600(b)(2) (Supp. 1982); KANSAS STAT. ANN. § 60-3107(a)(2) (Supp. 1982).

[107] *See, e.g.*, Illinois Domestic Violence Act § 208(c)(2), ILL. ANN. STAT. ch. 40, § 2302-8 (Smith-Hurd Supp. 1982); MASS. GEN. LAWS ANN. ch. 209A, § 3(c) (West Supp. 1982); OHIO REV. CODE ANN. § 3113.31(E)(1)(b) (Page Supp. 1982). *See generally* Lerman & Livingston, *supra* note 1, at 6 (identifying over forty states with provisions for eviction orders). Some eviction provisions vary depending on whether the petitioner must have an interest in the property or a right to support to be eligible to obtain an order for exclusive possession. *See, e.g.*, PA. CONS. STAT. ANN. tit. 35, § 10,186(a)(2)–(3) (Purdon Supp. 1983) (granting exclusive possession to petitioner where petitioner has joint or sole interest in the residence or where respondent has sole interest in the residence and owes petitioner a duty to support); N.J. STAT. ANN. § 2C:25-13(b)(4) (West 1982) (sole ownership of residence by respondent-spouse shall not bar a grant of exclusive possession to the petitioner-spouse).

[108] *See infra* text accompanying note 144.

[109] *See* OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (Page Supp. 1982).

COMMENTARY: This remedy is intended to enable the victim to move freely without encountering her assailant. An order under the provision might be most effective if it included a list of the addresses or localities that the defendant must avoid.

Including the victim's workplace is especially important. If the victim has separated from the abuser, her safety, independence, and ability to earn a living are all inextricably linked. Abusers may harass their victims at work so frequently that the victims may lose their jobs. This section addresses this specific problem.

(D) *No Communication*: ordering the respondent to avoid any communication whatsoever, including personal, written, or telephone contact, with the victim or others with whom communication would create a danger that acts of domestic violence would be committed, or specifying limited circumstances in which communication is permissible;[110]

COMMENTARY: No comment.

(E) *Rent and Mortgage Payments*: ordering a respondent to make or to continue to make rent or mortgage payments on a residence occupied by the victim if the respondent is found to have a duty to support the victim or other dependent household members;

COMMENTARY: No comment.

(F) *Alternative Housing*: ordering the respondent to pay the victim's rent at a residence other than the one previously shared by the parties if the respondent is found to have a duty to support the victim and the victim requests alternative housing;[111]

COMMENTARY: In some cases, the victim must leave her residence to be safe from her assailant. The abuser, in such a case, may be ordered to pay the rental expenses incurred by the victim as a result of the alternative living arrangements. The subsection provides that the payment of such rent shall be at the victim's option.

(G) *Nonadmission*: recommending to the victim or other household members that they not invite the respondent to the residence and that they decline any request or demand to admit the respondent

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[110] *Cf.* ALASKA STAT. § 09.55.600(b)(3) (Supp. 1982) (court may restrain respondent from direct or indirect communications with petitioner).

[111] *See* Illinois Domestic Violence Act § 208(c)(2), ILL. ANN. STAT. ch. 40, § 2302-8 (Smith-Hurd Supp. 1982); KAN. STAT. ANN. § 60-3107(a)(3) (Supp. 1982). *Cf.* OHIO REV. CODE ANN. § 3113.31(E)(1)(c) (Page 1982) (respondent may provide alternative housing through consent agreement).

while an order evicting the respondent or requiring the respondent to stay away from the residence of the victim is in effect;[112]

COMMENTARY: The court has no power to restrict the conduct of the victim, unless the repondent files a petition against her. The judge, in pursuit of an effective remedy for a violent situation, can recommend to the victim not to admit the respondent if he appears at her residence after being ordered to stay away. By issuing such an order, the judge may reduce the likelihood that the respondent will try to persuade the petitioner to allow him to violate the order.

(H) *Payment of Support*: ordering the respondent to pay for the support of the victim or other dependent household members if the respondent is found to have a duty to provide such support, and ordering that payments be made through the court clerk if necessary;[113]

COMMENTARY: This provision, as well as those that follow, is intended to provide comprehensive, short-term relief that will give victims of abuse protection from and alternatives to living in a chronically violent relationship. The provision allows the petitioner to seek support payments for herself or for children. The petitioner, however, has a higher burden of proof for obtaining relief under this provision than for obtaining other relief under this section. She must establish not only that she or the children are victims of domestic violence under section 3.02(A), but also that the respondent owes her or the children a duty of support. In the case of obtaining support for herself, a finding that the respondent owes the petitioner a duty of support would be established under applicable state law.[114] In the case of obtaining support for children, an uncontested allegation that the respondent is the father of the children may be sufficient to show respondent's duty of support.[115]

A support award that is part of a protection order should not be treated as a substitute for a more thorough inquiry into the financial relationship between the parties but as a temporary measure to provide emergency financial help to victims of abuse who are extricating themselves from violent relationships. Nor

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[112] *Cf.* OHIO REV. CODE ANN. § 3113.31(E)(2) (Page 1980 & Supp. 1982) (court may prohibit respondent from returning to residence and may prohibit petitioner from admitting respondent to residence).

[113] *See* OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Page 1980 & Supp. 1982).

[114] *See, e.g.*, D.C. CODE ANN. § 16-916(b) (1981) (explaining duty to support spouse).

[115] *See, e.g.*, D.C. CODE ANN. § 16-916(c) (1981) (explaining duty to support children).

should this section be used as a speedy alternative to a complaint for divorce, separation, support, or custody.

(I) ***Temporary Custody and Visitation*: granting temporary custody of children to the victim upon a determination by the court that it has jurisdiction under the Uniform Child Custody Jurisdiction Act,[116] and specifying arrangements for visitation by the respondent and requiring third-party supervision of visitation if necessary to protect the victim or the children.[117]**

(1) For the purpose of determining jurisdiction, if the petitioner alleges that disclosure of the children's current address, pursuant to section 9 of the Uniform Child Custody Jurisdiction Act, would endanger the victim or the children, or would disclose the confidential address of a shelter for victims of domestic violence, then such disclosure shall be made orally and in camera.[118]

(2) In determining temporary custody and visitation rights under this section, the court shall presume that a person who has committed an act or acts of domestic violence against any other family member is unfit to be a custodial parent and that the best interest of the children is served by an award of temporary custody to the nonabusive parent. This presumption may be rebutted by a showing of abuse or neglect of the children by the nonabusive parent, or by a showing that the abusive parent is the children's primary caretaker and is the more fit parent. If the presumption is rebutted, the court may decline to award custody as part of a protection order.

COMMENTARY: In addition to providing protection to children who may be exposed to domestic violence, this section attempts to prevent an abuser from using the custody of his children as a bargaining chip to persuade his victim to remain in the relationship or to spend time with him. When a victim of abuse separates from a violent mate or takes legal action to stop the violence, the abuser often reacts by persuading or coercing the victim to resume the relationship.[119] In recent years, men increasingly have resorted to snatching children from their mates in an effort to persuade their mates to return to them.[120] Some

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[116] UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1979). *See* Illinois Domestic Violence Act § 208(c)(3), ILL. ANN. STAT. ch. 40, § 2302-8 (Smith-Hurd Supp. 1982).

[117] *See* N.J. STAT. ANN. § 2C:25-13(b)(5) (West 1982).

[118] *See* National Center for Women and Family Law, *Confidentiality of Address in Custody Cases: A Needed Protection for Battered Women*, THE WOMEN'S ADVOCATE, Sept. 1982, at 4, 8.

[119] *See generally* D. MARTIN, *supra* note 50, at 72–79.

[120] *Cf.* P. HOFF, J. SCHULMAN, A. VOLENKI & J. O'DANIEL, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 6-6 to

men use their visitation rights with children as an excuse to see their estranged mates. Because the relationship of the batterer to the children is so integrally connected with the safety of the victim, temporary custody and visitation arrangements must be available as part of a protection order.

This section includes a presumption of the abusive party's unfitness as a custodial parent for several reasons. First, men who are violent toward one family member frequently become violent toward others.[121] Second, such a presumption makes it more difficult for the abuser to use the law to obtain custody of his children and thereby manipulate his victim into returning to him. Finally, the presumption is needed to counteract the growing trend toward awards of joint and paternal custody. Even if children are not victimized by the abuser, they are often aware of the violence in the home and become fearful of the abuser. In most cases, the parent who is not abusive is a better caretaker and can provide a more stable environment for the children.[122] Many courts, however, currently fail to recognize "primary caretaker" as a critical determinant of a child's best interest and instead award custody to the parent who is in a better financial position to support the child.[123] These patterns often operate to deprive women (including battered women) of custody of their children.[124]

(J) *Monetary Compensation*: **ordering the respondent to pay the victim or the petitioner monetary compensation for the losses suffered as a direct result of the abuse, including but not limited to medical expenses, loss of earnings or other support, cost of repair or replacement of real or personal property damaged or taken, moving or other travel expenses, attorney's fees, and court costs;**[125]

COMMENTARY: This provision compensates the victim or the petitioner for the immediate and tangible losses caused by acts

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6-7, 15-8 to 15-9 (1982) (a manual discussing the need for increased lawyer awareness of the dangers posed to victims of domestic abuse and their children as a result of parental kidnapping).

[121] *See* Thomas, *supra* note 70.

[122] *See generally* A. GANLEY, *supra* note 71, at 16.

[123] *See* Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982).

[124] Presentations of Nancy Polikoff and JoAnne Schulman at the Fourteenth National Conference on Women and the Law, Washington, D.C. (Apr. 8, 1983). *See generally* Nat'l Center on Women and Family Law, Battered Women and Custody (Jan. 1983) (unpublished materials available from the National Center on Women and Family Law, 799 Broadway, Room 402, New York, N.Y. 10003).

[125] *See* Illinois Domestic Violence Act § 208(c)(8)–(9), ILL. ANN. STAT. ch. 40, § 2302-8 (Smith-Hurd Supp. 1982). *But see* ME. REV. STAT. ANN. tit. 19, § 766(1)(I) (1981) (limiting compensatory losses to loss of earnings or support, reasonable expenses incurred for personal injuries or property damage, and reasonable moving expenses).

of domestic violence. Although a majority of states have abolished interspousal immunity in personal injury actions, those lawsuits are long and costly and therefore are not a realistic option for most battered women. This section makes possible a simple and expedient claim for damages.[126]

(K) ***Possession of Personal Property*: ordering that the victim be given temporary possession of specified personal property belonging to either party such as automobiles, checkbooks, keys, and other personal effects;**[127]

COMMENTARY: Often violence in a close relationship represents the desire of the batterer to control the victim.[128] Sometimes, this quest for control is expressed not only through physical abuse, but also through the appropriation of the victim's personal possessions, especially those items which give the victim economic freedom or geographic mobility.[129] This section is designed to preserve such freedom and mobility.

(L) ***Nondisposition of Property*: prohibiting the respondent from transferring, encumbering, or otherwise disposing of specified property mutually owned or leased by the parties;**[130]

COMMENTARY: No comment.

(M) ***Counseling*: ordering the respondent to participate in a minimum of sixty hours of a court-approved counseling program which is designed specifically to help batterers stop violent behavior, and requiring the respondent to provide the court at four-week intervals with documentation of participation in such program;**[131]

COMMENTARY: Court-mandated counseling for abusers has been widely used in criminal proceedings.[132] Where the courts have ordered counseling in civil cases involving domestic rela-

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[126] For a discussion of personal injury actions filed by women against abusive mates, see Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 157–60 (1977).

[127] *See* KAN. STAT. ANN. § 60-3107(a)(8) (Supp. 1982).

[128] Russell and Rebecca Dobash explain that "the use of physical force against wives should be seen as an attempt on the part of the husband to bring about a desired state of affairs." R. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 23–24 (1979); *see* A. GANLEY, *supra* note 71, at 16.

[129] The author has spoken with numerous battered women who have reported that their mates appropriated wallets, checkbooks, credit cards, car keys, money in joint checking accounts, automobiles, and other personal property.

[130] *See* Illinois Domestic Violence Act § 208(c)(6), ILL. ANN. STAT. ch. 40, § 2302-8 (Smith-Hurd Supp. 1982).

[131] *See* N.J. STAT. ANN. § 2C:25-11 (West 1982). *See generally* ALASKA STAT. § 09.55.600(b)(7) (Supp. 1982).

[132] *See generally* L. LERMAN, *supra* note 4, at 91–115 (discussing various criminal diversion programs for abusers).

tions, they have traditionally referred parties to couples counseling or family therapy, focusing on the preservation of the marital relationship. Recent experience indicates that group counseling for batterers is more likely to be an effective treatment than counseling couples or individuals.[133] Careful tracking of counseling orders is necessary to ensure that the orders will be obeyed.[134]

(N) ***Payment of Costs of Counseling*: ordering the respondent to pay the cost of counseling mandated under section 4.05(M) or the cost of counseling for the victim, or other household members affected by the violence;**

COMMENTARY: In some places, public funding is available to pay the costs of establishing a treatment program for abusers. In most jurisdictions, however, the participants must absorb the costs.[135] If other family members seek counseling on issues related to the abuse, that expense should be borne by the perpetrator of the violence.

Under the Model Act, the court cannot order the victim to undergo counseling; to allow the court to issue such orders would imply victim responsibility for the violence. Victims of abuse, however, may wish to seek counseling on their own. This section makes counseling possible for victims who can not afford to pay for therapy.

(O) ***Supervision of Return to Residence by Law Enforcement Officers*: ordering that the protection order be served and executed by law enforcement officers, or that law enforcement officers accompany the victim to her residence to collect personal belongings, or both;[136]**

COMMENTARY: Many police officers regard domestic violence as fundamentally a civil matter and therefore outside their law enforcement jurisdiction.[137] The section of the Model Act on police duties requires that police supervise the return of the victim to the residence to collect belongings and that officers

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[133] *See* A. GANLEY, *supra* note 71, at 68–70.

[134] *See generally* A. GANLEY, *supra* note 71, at 89–91.

[135] Iowa and North Dakota authorize government payment for counseling programs but only if the parties are indigent. *See* IOWA CODE § 236.5(1) (1981); N.D. CENT. CODE § 14-07.1-02(4)(d) (1981). *See generally* Lerman & Livingston, *supra* note 1, at 12.

[136] *See generally* D.C. CODE ANN. § 16-1005(c)(9) (Supp. 1983) (authorizing the court to order appropriate police action with regard to the issuance of the protective order).

[137] *See* D. MARTIN, *supra* note 50, at 92–99. Martin quotes the former policy of the police department of Oakland, Cal.: "The police role in a dispute situation is more often that of a mediator and peacemaker than enforcer of the law." *Id.*, at 93.

supervise a respondent's departure from a residence when exclusive possession has been granted to the petitioner.[138] These functions may be specifically ordered as part of a protection order; this enables the court to reinforce the mandate of the law.

Police service and execution is particularly important when an ex parte eviction order is issued because the respondent, upon learning of such action, may become angry and need restraint. Police assistance may also be necessary when a victim who has decided to move to another residence returns to her original residence to collect personal belongings or children who were left behind. It can be dangerous for a victim to confront her abuser alone immediately after deciding to separate from him.[139]

(P) ***Payment of Shelter Expenses*: ordering the respondent to pay a reasonable fee for housing and other services that have been provided or that are being provided to the victim by a shelter for victims of domestic violence;**

COMMENTARY: Most shelters for battered women and for runaway children operate on minimal budgets and often have no stable source of funds. The withdrawal of limited federal funds from LEAA, CETA, Title XX, Community Development Block Grants, and other programs, which had been available for battered women's shelters, has caused the closing of many such shelters.[140] Alternative funding mechanisms are now being explored, including the use of revenue from surcharges on marriage licenses or filing fees for divorce, or from fines imposed on abusers convicted of crimes.[141] Since most shelter residents are poor women, a fee-for-service arrangement is unlikely to work. If the petitioner has been staying in a shelter as a result

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[138] *See infra* § 5.02.

[139] According to Joan Kelly, a psychologist, many nonviolent couples experience an incident of violence at the point of separation. Such violence may be the result of the intense emotions that the individuals experience during that transition. Presentation by Joan Kelly, Panel Discussion on Custody and Domestic Violence, Nat'l Women Judges Ass'n Conference, San Francisco, Cal. (Oct. 8, 1983). For couples with histories of violence, the risk of violence during separation may be even higher.

[140] *See Federal Budget Cuts Jeopardize Domestic Violence Programs: A National Survey Report*, RESPONSE, May–June 1983, at 1 (available from the Center for Women Policy Studies, 2000 P St., N.W., Suite 508, Washington, D.C. 20036).

[141] *See, e.g.*, ARIZ. REV. STAT. § 11-554(A)(16) (Supp. 1983) (surcharge imposed on marriage licenses); IND. CODE § 4-23-17.5-4(b) (Supp. 1981) (surcharge on filing of an action for dissolution of marriage); WIS. STAT. ANN. § 973.055(1)(a) (West Supp. 1982) (surcharge of 10% of fine imposed for criminal violation of abuse laws).

of the respondent's violence, then the respondent should pay the costs of housing the petitioner in the shelter if he is financially able to do so.

(Q) ***Other Relief*: granting any other requested relief necessary or appropriate to prevent or reduce the likelihood of subsequent domestic violence.**[142]

COMMENTARY: Section 4.05 provides an array of remedies that address the typical problems for which a victim of abuse might go to court for assistance. No list of this sort, however, could be complete. Some abusers are strangely sadistic toward intimates and engage in forms of cruelty which are unimaginable to most of us.[143] Therefore, this section allows the victim to fashion specific remedies for abuse that are not provided for in the statute.

(R) ***Effect on Title*: No order under this Act shall in any manner affect title to any real property.**[144]

COMMENTARY: No comment.

(S) ***Ex Parte Relief*: Ex parte relief granted before the respondent is notified and given an opportunity for a hearing may include (A) No Further Abuse, (B) Exclusive Possession, (C) Stay Away, (D) No Communication, (I) Temporary Custody and Visitation, (O) Police Supervision of Return to Residence, and other relief necessary on an emergency basis.**

COMMENTARY: Only some of the relief allowed under section 4.05 is available as part of an ex parte order issued before the abuser has received notice or had an opportunity to appear.

As a general rule, the necessities of the emergency determine the appropriateness of issuing an order ex parte. Issues connected with the immediate safety of the victim and her children

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[142] *Cf.* TEX. FAM. CODE ANN. §71.11(a)(7) (Vernon Supp. 1982) (court may prohibit a party from doing specific acts or may require a party to do specific acts necessary or appropriate to prevent or reduce the likelihood of family violence).

[143] Lenore Walker described the types of serious injuries that had been inflicted on 120 women whom she had interviewed:

> Major physical assaults included: slaps and punches to the face and head; kicking, stomping, and punching all over the body; choking to the point of consciousness loss; punching and throwing across a room, down the stairs, or against objects; severe shaking; arms twisted or broken; burns from irons, cigarettes, and scalding liquids; injuries from thrown objects; forced shaving of pubic hair; forced violent sexual acts; stabbing and mutilation with a variety of objects, including knives and hatchets; and gunshot wounds.

L. WALKER, *supra* note 26, at 79.

[144] ME. REV. STAT. ANN. tit. 19, § 766(4) (1981); N.J. STAT. ANN. § 2C:25-13(b)(4) (West 1982); OHIO REV. CODE ANN. § 3113.31(E)(4) (Page 1980 & Supp. 1982).

should be decided ex parte. Issues that can wait a week or two should not be decided ex parte. In most cases, it would be inappropriate to order support or compensation, to decide other property issues, or to order counseling as part of an ex parte order. These limitations, however, are intended only as guidelines.

4.06. ***Notification and Service of Orders.***

(A) The court shall order a law enforcement agency to serve the respondent personally with a protection order issued pursuant to this Act and to file proof of service with the clerk of the court by the end of the next weekday after service is made.[145]

(B) Within twenty-four hours of the issuance of a protection order, the clerk of the court shall forward a copy of the order to the local law enforcement agency with jurisdiction over the residence of the petitioner, and to any other law enforcement agencies with jurisdiction over the addresses listed in a stay away order.[146]

(C) The clerk of the court shall issue, without fee, a copy of any protection order to the petitioner and the respondent.[147]

COMMENTARY: Service of protection orders on respondents has been a chronic problem in implementing protection order laws.[148] Law enforcement agencies often abdicate responsibility for serving orders and insist that the petitioner pay a private agency to perform the service.[149] Some law enforcement agencies charge fees to victims for the service of protection orders.[150] Service and enforcement of protection orders also may be difficult to obtain because some male law enforcement officers may identify more readily with the male abuser than with the female victim.[151]

The most appropriate and available law enforcement agency to handle service may vary from state to state. Yet personal

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[145] *See* ME. REV. STAT. ANN. tit. 19, § 766(6) (Supp. 1982).

[146] *Cf.* MINN STAT. § 518B.01(13) (1980) (protection order forwarded to local agency upon petitioner's request, and order made available to any other agency so needing it).

[147] *See* ALASKA STAT. § 09.55.630 (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 767 (1981).

[148] *See generally* Lerman, *Civil Protection Orders: Obtaining Access to Court*, RESPONSE, Apr. 1980, at 1 (available from the Center for Women Policy Studies, 2000 P St., N.W., Suite 508, Washington, D.C. 20036).

[149] *Id.*

[150] *Id.*

[151] *See* Presentation by John Dean, District of Columbia Police Officer, at Baltimore County Criminal Justice Conference on Domestic Violence, Towson, Md. (Mar. 29, 1983).

service by a law enforcement officer is critical if the respondent is to perceive the protection order as a serious matter.

To facilitate enforcement of protection orders, copies of all orders should be provided to the petitioner, the respondent, and the law enforcement agency most likely to respond to a call regarding a violation of the order. Because the protection order contains information about the respondent's previous assaults, police officers who have copies of such orders may be better prepared to encounter the respondent if called upon for enforcement. Providing police with a copy of each protection order also permits the officers to enforce the order even if the victim's copy of the order has been lost or destroyed.

4.07. ***Violation of Protection Orders.***

(A) A respondent who has received notice of a protection order issued against the respondent and who violates the order by commission of an act of domestic violence, as defined in section 3.01, is in contempt of court and is subject to criminal charges, as defined in section 4.07(C) and as defined in the criminal code of this state.

(B) A respondent who has received notice of a protection order issued against the respondent and who violates the order by conduct other than domestic violence is in contempt of court.

(C) Commission of an act of domestic violence, as defined in section 3.01, in violation of a protection order is a misdemeanor of the first degree, punishable by up to twelve months imprisonment or a fine of up to $1000, or both.

(D) Commission of an act of domestic violence, as defined in section 3.01, in violation of a protection order by a person previously convicted under section 4.07(C) of a violation of a protection order is a fourth degree felony, punishable by not less than seventy-two consecutive hours of imprisonment. This offense may be punished by up to two years imprisonment or a fine of up to $2000, or both. The minimum sentence may not be suspended and probation or parole may not be granted until the minimum sentence is served.

(E) Any violation of a protection order places the respondent in contempt of court.[152] The court may require a respondent found in contempt of court to remedy the violation in accordance with law.

(F) Upon finding probable cause that a respondent has violated a protection order by commission of an act of domestic violence, as defined in section 3.01, the court shall, if the respondent has not been arrested for the alleged violation, issue an arrest warrant and

[152] *See* N.J. STAT. ANN. § 2C:25-15(b) (West 1981).

a summons requiring the respondent to appear for a hearing within fourteen days at which the court shall determine whether the respondent is guilty of the alleged violation.

(G) If the respondent is alleged to have violated a protection order by conduct other than domestic violence, as defined in section 3.01, the court shall issue a summons requiring the respondent to appear at a hearing within fourteen days at which the court shall determine whether the respondent has violated the order.[153]

(H) Criminal violations of protection orders shall be prosecuted by the city, county, or district attorney in criminal court.

(I) Any protection order issued under this section shall indicate in a clear and conspicuous manner the consequences of violation of the order.[154]

(J) Prosecution of a respondent for violation of a protection order shall not preclude prosecution for other crimes arising out of the incident in which the protection order is alleged to have been violated, but all such charges shall be brought in one proceeding.

(K) Revenues collected from fines imposed for violation of protection orders shall be deposited into a trust fund to be used to fund shelters and other services for victims of domestic violence and treatment programs for abusers.[155]

COMMENTARY: Some jurisdictions treat the violation of a protection order as contempt of court, others treat it as a criminal offense, while a third group treats some violations as criminal offenses and other violations as contempt of court.[156] This Model Act uses the last alternative primarily because some violations involve acts that are criminal offenses under most state codes, while other violations involve far less damaging misconduct.

To facilitate the enforcement of protection order laws, it is important to prescribe penalties for violation of protection orders within the domestic violence statute. It is also necessary to tailor penalties and remedies to fit the particular violations. A respondent may violate a protection order by committing a serious assault or some other act that could be prosecuted. The

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[153] *Cf.* N.H. REV. STAT. ANN. § 173-B:8 (Supp. 1981) (authorizing a court summons for any violation of a protection order).

[154] *See* ME. REV. STAT. ANN. tit. 19, § 766(3) (1981).

[155] *See* FLA. STAT. ANN. § 741.30(4) (West Supp. 1983).

[156] *See, e.g.*, D.C. CODE ANN. § 16-1005(f) (1981) (violation of protection order punishable as contempt); Illinois Domestic Violence Act § 212, ILL. ANN. STAT. ch. 40, § 2302-12 (Smith-Hurd Supp. 1982) (violation of protection order punishable as contempt or misdemeanor); WIS. STAT. ANN. § 940.33 (West Supp. 1982) (violation of protection order punishable as misdemeanor). *See generally* Lerman & Livingston, *supra* note 1, at 8–9.

Model Act provides for criminal prosecution of such violations. To treat such violence as less than a criminal offense would suggest that this conduct, when committed within an intimate relationship, is less serious than when committed against a stranger. Inclusion of criminal penalties for violation of protection orders puts respondents, law enforcement officials, and others on notice that the statute contemplates serious enforcement efforts.

In other cases, a respondent may violate a protection order by failing to appear at a counseling session, by failing to pay monetary compensation to the petitioner, or by committing some other act which, while flaunting the order of the court, might be inappropriate for criminal prosecution or a jail sentence. This type of violation of a protection order should be treated as a civil contempt of court, which may be remedied by the issuance of additional court orders.

The penalties listed for criminal violations become increasingly severe for repeat violations. In some cases, violence may be deterred by issuance of an injunction; in other cases, it may be deterred only by imposing a penalty. As a result, a respondent who violates an initial protection order may take subsequent orders more seriously because of the mandatory jail sentence and felony charges attached to subsequent violations.

The Model Act states that prosecutors should handle criminal violations. Existing abuse laws do not require this treatment, and only in a few jurisdictions have prosecutors handled criminal violations of protection orders.[157] Because of the confusion about the quasi-criminal nature of most protection order laws, some jurisdictions treat criminal violations as civil matters, while in others civil courts impose criminal penalties without the use of proper criminal procedures. To avoid this confusion, this statute makes a clear distinction between civil contempt violations and criminal violations and ensures that criminal violations of protection orders will be prosecuted by persons familiar with the protections accorded to criminal defendants.

4.08. ***Court Duties.***

(A) The administrative offices of those courts that have jurisdiction to issue protection orders shall maintain a record of all requests for

[157] In Ventura County, Cal., for example, the District Attorney's Office participates in obtaining and enforcing protection orders. *See generally* VENTURA COUNTY DIST. ATT'Y, DOMESTIC VIOLENCE TEMPORARY RESTRAINING ORDER MANUAL (1981).

orders pursuant to this Act. This record shall include the following information:

(1) the names, genders, and relationship (blood relationship or living arrangements) of the parties;

(2) the abuse alleged, whether the abuse alleged involved weapons or resulted in injuries, and whether injuries inflicted required medical attention; and

(3) the effective date and terms of each order issued.

(B) All case records maintained and names of parties shall be confidential and shall not be made available except as otherwise provided by law.

(C) If practicable, the court administrative officer shall tabulate incidence data using the information maintained pursuant to section 4.08(A). Parties shall not be identified in such tabulated data. Reports generated from court records shall be submitted to the governor, the state legislature, the state bureau of investigation, and the state coalition of shelters for victims of domestic violence.[158] If tabulation of data by an officer of the court is impracticable, other persons wishing to prepare a report based on court records shall be permitted access to those records but shall be required not to disclose the identity of the parties named in the records.

COMMENTARY: Empirical data are useful in generating information about the scope of the problem of domestic violence in any community and in assessing the effectiveness of a legislative scheme. In some states, the courts have access to a computer system that would facilitate the maintenance and tabulation of relatively detailed data. In other states, the police department has access to such a system. The record-keeping requirements imposed on the courts, like some of the other data collection systems prescribed by the Model Act, are aspirational in nature. The requirements are not intended for rote adoption by any legislature. Instead, they should be considered by legislatures to evaluate which types of data should be collected and analyzed.

4.09. ***Applicable Rules of Procedure.***

Except as otherwise stated in this chapter, hearings regarding the issuance of protection orders and hearings on alleged civil violations of orders shall be governed by the rules of civil procedure of this state. Except as otherwise stated in this chapter, hearings on alleged criminal

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[158] *See generally* N.J. STAT. ANN. § 2C:25-16 (West 1981) (providing for the maintenance of similar records on petitions and orders and for the compilation of annual reports based on such records).

violations of this chapter shall be governed by the rules of criminal procedure of this state.

COMMENTARY: No comment.

Section 5.00. LAW ENFORCEMENT RESPONSE TO DOMESTIC VIOLENCE.

5.01. ***Duty to Respond to Calls for Assistance.***

(A) Law enforcement agencies shall respond to every request for assistance or protection, from or on behalf of a victim of alleged domestic violence, whether or not a protection order has been issued against the alleged abuser.[159]

(B) Law enforcement agencies shall not assign lower priority to calls involving alleged incidents of abuse or violation of protection orders than is assigned in responding to like offenses involving strangers. Existence of any of the following factors shall be interpreted by police dispatchers as indicating a need for immediate response:

(1) the caller indicates that violence is imminent or in progress;

(2) a protection order is in effect; or

(3) the caller indicates that incidents of domestic violence have occurred previously between the parties.[160]

COMMENTARY: The prevalence of domestic abuse is caused in part by underenforcement of the criminal law in domestic abuse cases.[161] Many police departments treat domestic violence as the least important aspect of police work,[162] even though many cases of domestic abuse involve the commission of violent crimes that pose serious risks to the lives of the victims. It often takes the police longer to respond to abuse calls than to other types of calls; sometimes the police fail to appear at all, even after urgent calls for help.[163]

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[159] *See* WLDF AMENDMENTS, *supra* note 43, § 16-1006(b).

[160] *See* MO. ANN. STAT. § 455.080(2) (Vernon Supp. 1983). The provisions on police response are taken both from existing state laws and from consent decrees signed by police departments in New York City, Oakland, Cal., and other cities where police have been sued for failure to protect battered women. *See* Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 27–28, 32 (1979) [hereinafter cited as Woods (1979)]. The language of the Model Act also reflects the concerns addressed in an exhaustive analysis of police policy on domestic abuse. *See generally* N. LOVING, RESPONDING TO SPOUSE ABUSE AND WIFE BEATING: A GUIDE FOR POLICE (1980) [hereinafter cited as N. LOVING, A GUIDE FOR POLICE].

[161] *See generally* R. DOBASH & R. DOBASH, *supra* note 128, at 207–22. One thesis of this book is that wife abuse is perpetuated by inadequate response by institutions from which abused women seek help.

[162] *See generally* N. LOVING, A GUIDE FOR POLICE, *supra* note 160, at 4.

[163] One study indicated that police did not respond to 17% of reported incidents of domestic abuse. M. SCHULMAN, *supra* note 16, at 40.

Enforcement of the criminal law against those who victimize their intimates is critical to the reduction of domestic abuse and requires no substantive change in existing law.[164] This section merely restates the obligation of police officers to respond to the scene of all "disturbance" calls that involve domestic violence as they respond to other calls for police assistance.[165] This statutory mandate encourages law enforcement officers to respond more frequently and quickly to abuse calls and may provide battered women with a basis for negotiation with or litigation against a police department whose practices fail to conform to the law.

Subsection (B) lays out criteria for police dispatchers to use in determining when calls involving domestic abuse need immediate response. These criteria are spelled out to aid police dispatchers in distinguishing disturbances that are routine in nature from those requiring immediate response. The presence of any one item on the list should result in the call's being assigned emergency priority.

5.02. ***Duties of Police Officers Responding to Calls.***

(A) ***Duties of Protection*: If a police officer has any reason to believe that a person is a victim of domestic violence, the officer shall use all reasonable means to prevent further domestic violence and to ensure the victim's safety, including:**

(1) exercising arrest powers pursuant to section 5.03 of this Act;

(2) removing the offender from the household, if there is probable cause to make an arrest and an arrest is not made, and if the victim perceives continuing danger;

(3) attempting to persuade the offender to leave the household if there is not probable cause to make an arrest and the victim perceives continuing danger;

(4) filling out and filing a domestic violence offense report using the form prescribed in section 5.05(B);

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[164] Fields, *Wife Beating: Government Intervention Policies and Practices*, in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 228, 267 (1978).

[165] Abuse calls generally are classified as "disturbance" calls and are accorded low priority. Disturbance calls include a wide range of problems, some trivial and some serious, from a call complaining of loud neighborhood noise to a woman's report that her husband is outside her locked bedroom door with a loaded gun. The FBI defines disturbance calls to include "family quarrels, man with gun calls, bar fights, etc." FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 41 (1982).

(5) interviewing the parties in separate rooms to ensure that the victim has an opportunity to speak freely;

(6) providing or arranging transportation for the victim to a safe place or shelter if such transportation is desired;

(7) providing or arranging transportation for the victim to the nearest hospital or medical facility for treatment of injuries if such care is needed or desired;

(8) reading the victim the oral notice of rights to protection as provided under section 5.02(B) and written information about the nearest shelter or other agency providing service to victims of domestic violence;

(9) advising the victim of the importance of preserving evidence and of the types of evidence that should be preserved;

(10) taking photographs of any visible injuries or property damage whenever necessary or appropriate;

(11) remaining on the scene of an incident of domestic violence as long as the victim remains in danger;

(12) accompanying the victim to a previous residence to remove personal belongings; and

(13) supervising the court-ordered removal of an abuser from a residence shared with a victim.[166]

COMMENTARY: Subsection (A) imposes thirteen specific duties under the general mandate requiring the police to protect victims of domestic violence. The statute uses the word "shall" in describing the duties of the police. Thus, the police officer is required to take the measures listed to protect the victim, and the victim may sue the police department if this statutory duty is violated.[167]

This section requires the police officer to exercise his or her arrest powers pursuant to section 5.03. Depending upon which alternative is adopted under section 5.03(A), the officer's arrest power may be mandatory or permissive. Although many state legislators may be reluctant to remove police discretion not to make arrests, a recent study by the Police Foundation indicated that reincidence of violence is less likely if the police arrest an

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[166] *See generally* Illinois Domestic Violence Act § 304(a), ILL. ANN. STAT. ch. 40, § 2303-4 (Smith-Hurd Supp. 1982); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1982); UTAH CODE ANN. § 30-6-8(2) (Supp. 1981); WLDF AMENDMENTS, *supra* note 43, § 16-1006(c).

[167] The Oregon Supreme Court recently held that a victim injured as a result of an officer's failure to fulfill his duty to arrest (as determined by statute) may sue the police department for damages. Nearing v. Weaver, 295 Or. 702 (1983).

abuser than if they separate the parties or mediate the "dispute."[168]

The duty to remove the offender from the household under certain circumstances is an extension of the traditional police response to wife abuse, which was to walk the offender around the block. The section contemplates that the officer might persuade the abuser to move to another place of lodging for the night and that the officer would accompany the abuser to the place chosen. The final decision on appropriate action, however, is left to the officer rather than to the victim, because some victims are unaware of or unable to express their need for protection. In some circumstances, the officer should act to protect a victim of abuse even over her own objection.

The requirement that incident reports be filed simply restates an existing duty of police officers that is generally ignored in practice. One survey of police officers found that thirteen percent of those interviewed said that they did not write reports in family disturbances, while seventy percent said that they completed written reports on between one to four incidents out of twenty.[169] Filing a report creates a useful record when a police department receives subsequent calls from the same residence. It also may be used to verify the parties' accounts of an abusive incident when a case goes to court.

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[168] The Police Foundation study focused on whether police should use law enforcement procedures or social work techniques in responding to disturbance calls. It was designed to determine through an experiment using real cases whether arrest, informal mediation, or temporary separation of the parties was most effective in deterring subsequent assault.

The participating officers were divided into three groups. Each officer responded to a sample of actual wife abuse cases according to the instructions the officer's group had been given. One-third of the officers made arrests, one-third separated the parties, and one-third mediated the disputes.

A six-month follow-up study found that there had been a recurrence of violence in 24 percent of the cases in which the police had separated the parties for eight hours, a 17 percent recurrence in cases which were mediated, and only a 10 percent reincidence of violence in cases in which an arrest was made. The researchers found that the data on arrest and separation was statistically significant and the data on mediation was close to being statistically significant.

The study revealed the dramatic deterrent effect of arrest on domestic abuse compared to the effect of other, more common police responses to abuse cases. As of 1977, 70% of police departments with 100 or more officers trained their officers to use mediation rather than arrest in abuse cases. The Police Foundation study may lead to a major shift in police policy away from "crisis intervention" (or mediation) and toward more traditional law enforcement. L. Sherman & L. Berk, Police Responses to Domestic Assault: Preliminary Findings (1983) (unpublished manuscript available from the Police Foundation, Washington, D.C.).

[169] CRIMINAL JUSTICE EVALUATION UNIT, SAN DIEGO ASS'N OF GOV'TS, EVALUATION OF DOMESTIC VIOLENCE IN THE SAN DIEGO REGION 5 (1981).

Clauses (5) through (11) are common sense forms of assistance that battered women can receive from police officers who arrive at a residence during or immediately following a battering incident. Some police departments have improved their policies regarding response to domestic violence as a result of internal policy changes,[170] while others have done so as a result of litigation[171] or the enactment of new legislation.[172]

Clause (12) requires police officers to accompany victims who request assistance in retrieving personal belongings from residences that they are temporarily or permanently leaving. These situations may involve extreme danger to victims, because batterers often become violent when their mates attempt to separate from them.[173]

Finally, the section requires police officers to supervise court-ordered evictions of domestic abusers for the reasons explained in the commentary to section 4.05(O).

(B) *Requirements of Notice*:

(1) In giving notice to a victim of the victim's rights as provided in section 5.02(A)(8), the officer shall read the following statement aloud and provide the victim with a card bearing the same information: My name is Officer _____; my badge number is _____. The law requires that I offer the following services to persons such as yourself who are victims of domestic violence:

(a) if a crime has been committed against you, I must arrest the suspect immediately, or I must remove the suspect from the household or try to persuade him to leave the household;

(b) I must drive you or help you find transportation to the nearest hospital or medical facility for treatment of injuries if you need or want treatment;

(c) if you want to leave the residence, I must drive you or help you find transportation to the nearest shelter for victims of domestic violence or to any other nearby place where your safety will be assured; and

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[170] *See, e.g.*, Philadelphia Police Department Directive 90, Protection from Abuse (Nov. 15, 1983).

[171] *See* Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39, 39–40 (1981) (discussing changes in police practices in New York City, Oakland, Cal., and other cities) (this article is an updated version of the Woods (1979) article cited *supra* note 160).

[172] *See, e.g.*, Illinois Domestic Violence Act § 304(a), ILL. ANN. STAT. ch. 40, § 2303-4 (Smith-Hurd Supp. 1982); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1982); UTAH CODE ANN. § 30-6-8(2) (Supp. 1981).

[173] *See supra* note 139.

(d) I must make all reasonable efforts to make sure that you are safe.

(2) In addition, the officer shall give the victim a written copy of the following statement in English, Spanish, or any other language commonly used in the community:

(a) The law provides that you may seek a court order prohibiting further abuse of yourself, your children, or anyone in your household, if you are affected by the abuse or if the victim is unable to seek help. You do not need to hire a lawyer to get a protection order.

(b) The protection order may order the person who abused you to move out of the residence where you live, to pay your rent there or elsewhere, or to pay support for you or your children. The order may give you custody of your children. It may order the abuser to stay away from your workplace or other places you regularly go. The order may require the abuser not to call you or write you letters. It may order the abuser to pay your medical bills or to participate in counseling. You may request any or all of these things, or ask for other protection, as part of a protection order.

(c) To get a protection order, go to room number _____ at the courthouse, which is located at _____. Ask the clerk of the court for protection order forms. If you are in immediate danger you usually can get an order the day you file the petition.

(d) If the person who assaulted you violates this order, that person may be arrested and punished or required to remedy the violation.

(e) You also have the right to request that the prosecutor file a criminal complaint against the person who assaulted you. If convicted of a crime, the abuser may be placed on probation and ordered to see a counselor, or the abuser may be put in jail or fined.

(f) On nights, weekends, and holidays, when the courts are closed, you may obtain emergency assistance by calling the police or by calling _____ to find a judge.[174]

COMMENTARY: This section requires that victims be given notice of their rights under the law. Notice provisions of this sort appear only in a relatively small number of states, but are included in many of the newer laws.[175] The Model Act requires

[174] *See* ALASKA STAT. § 18.65.520 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1982).

[175] *See, e.g.*, ALASKA STAT. § 18.65.520 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West 1982). *See generally* Lerman & Livingston, *supra* note 1, at 10–11.

officers to read aloud a short notice to ensure that the victim will receive information about her right to police protection while the officer is present. Also, reading the notice aloud will remind officers of their statutory duties under the law. The police officers must also provide the information contained in the oral notice to the victim in writing.

As a practical matter, it is necessary that the oral notice be brief and include only information that is immediately relevant. The police department, however, is often the first and only agency that a victim of abuse contacts. Therefore, officers have a responsibility to educate the victim about what legal remedies for abuse are available. Hence, the statute requires police officers to provide the victim with written information about the remedies available to her under the law.

5.03. ***Arrest Powers of Police Officers Responding to Domestic Violence Calls.***

Alternative 1

(A) A police officer shall make an arrest without a warrant if:

(1) the officer has probable cause to believe that a misdemeanor or felony involving domestic violence, as defined in section 3.01, has been committed by the suspect in violation of a protection order or in violation of any criminal statute of this state; and

(2) the suspect is present at the scene when the police arrive or the suspect can be located. Such arrest shall be made whether or not the offense was committed in the presence of the officer.[176]

Alternative 2

(A) A police officer may make an arrest without a warrant if the officer has probable cause to believe:

(1) that the suspect has committed a felony;

(2) that the suspect has committed a misdemeanor involving domestic violence, as defined in section 3.01;

(3) that the suspect has committed a misdemeanor and the officer

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[176] *See generally* OR. REV. STAT. §§ 133.055(2), 133.310(3) (1981) (providing that a police officer may make a warrantless arrest based on probable cause that a misdemeanor has been committed and that an officer must make a warrantless arrest if the officer has probable cause to believe that a protection order has been violated); WLDF AMENDMENTS, *supra* note 43, § 16-1006(d) (imposing on the officer a duty to arrest unless the complainant objects to the arrest).

has reason to believe that the suspect presents a continuing danger if he or she is not immediately arrested; or

(4) that the suspect has committed a misdemeanor in the presence of the officer.[177]

COMMENTARY: At present very few abuse calls lead to arrest.[178] Police must arrest more wife abusers to inform communities that such conduct will not be tolerated. Without the exercise of police power on behalf of battered women, court orders become empty threats. Without immediate arrest, the likelihood of any successful criminal prosecution decreases.

Statutory changes are necessary in most states to allow police to make warrantless arrests for serious domestic assaults.[179] Most police perceive criminal conduct in domestic cases as misdemeanors, and arrest laws frequently require that a warrant be obtained in order to make an arrest for a misdemeanor committed out of the officer's presence.[180] In addition, serious injuries often are not apparent to officers who arrive immediately after an assault; bruises may not appear for a few hours, and injuries may be internal or concealed by clothing.

Subsection (A) is presented in two versions. The first imposes upon police officers a duty to arrest in all domestic abuse cases in which probable cause is present. The section abolishes the in-presence requirement and allows arrest even if a protection order has not been issued. This provision clearly states the policy that arrest is the appropriate response when a crime of domestic violence is committed.

The second alternative, which retains the police officer's discretionary authority to arrest, may be a necessary compromise in some states for two reasons. First, some legislators may be unwilling to make substantial changes in the arrest laws as they are currently written. Alternative 2 uses a structure similar to

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[177] *See generally* Illinois Domestic Violence Act § 301, ILL. ANN. STAT. ch. 40, § 2303-1 (Smith-Hurd Supp. 1982).

[178] In Cleveland, Ohio, during nine months in 1979, police made only 460 arrests in responding to domestic disturbance calls, despite a new law allowing warrantless arrests for misdemeanor spousal assault. *See* OHIO ATT'Y GEN., THE OHIO REPORT ON DOMESTIC VIOLENCE 1979, 71. The Attorney General's report listed the number of arrests made, as well as the number of official reports filed (700). The report, however, did not list the number of disturbance calls made to the police, which for that period was estimated at 15,000. Interview with Grace Kilbane, Director of the Cleveland Witness/Victim Assistance Program, in Cleveland (Jan. 15, 1981).

[179] *See generally* Lerman, *Expansion of Arrest Powers: A Key to Effective Intervention*, 7 VT. L. REV. 59, 63–64 (1982).

[180] For a more complete explanation of this issue, see *id.* at 59, 63–67

some existing statutory language on warrantless arrest and therefore does not dramatically alter the current law.[181] Second, many state legislators may be unwilling to impose a duty to arrest on the police. The law is likely to be less effective if the language is permissive,[182] but such language is preferable to retaining the in-presence requirement for misdemeanors.

It is not clear whether there is a meaningful distinction between permissive and mandatory language.[183] If permissive statutory language is interpreted to impose a duty to arrest, victims of abuse may have a legal remedy against police departments whose officers fail to make the necessary arrests.

(B) *Determination of Probable Cause.*

(1) Any clear and specific written statement by a person alleging the commission of domestic violence against that person or alleging that he or she witnessed an act of domestic violence against another constitutes probable cause for an officer to believe that the offense was committed and probable cause to believe that the suspect committed the offense.[184]

(2) In the absence of such a statement, the officer shall consider the following factors in determining whether probable cause exists:

(a) whether a victim or a witness alleges that an incident of domestic violence occurred;

(b) whether there are visible injuries, torn clothing, disruption of physical surroundings, or other physical evidence of domestic violence; and

(c) whether the dispatcher indicated a report of imminent violence or violence in progress.[185]

(3) The existence of any of the following circumstances shall not be considered in any determination of probable cause to believe that a crime was committed by a person alleged to have committed it:

(a) that the victim knows the accused;

(b) that the victim has not made efforts to obtain a divorce or a protection order or to flee the residence;

(c) that the officer believes that the victim will not pursue crim-

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[181] *See, e.g.*, Illinois Domestic Violence Act § 301, ILL. ANN. STAT. ch. 40, § 2303-1 (Smith-Hurd Supp. 1982).

[182] Woods (1979), *supra* note 160, at 28–29.

[183] *See generally* A. M. BOYLAN & N. TAUB, ADULT DOMESTIC VIOLENCE: CONSTITUTIONAL, LEGISLATIVE AND EQUITABLE ISSUES 235 (1980) (discussing how permissive language has sometimes been interpreted so as to require affirmative action).

[184] *See* OHIO REV. CODE ANN. § 2935.03(B) (Page 1982).

[185] *See generally* WLDF AMENDMENTS, *supra* note 43, § 16-1006(e).

inal prosecution, or that the prosecutor will refuse to file charges based on the alleged incident;

(d) that the officer believes that reconciliation is preferable to arrest;

(e) that there are no witnesses to the incident;

(f) that the suspect is not in an agitated or argumentative state; or

(g) that the victim has called the police on previous occasions.[186]

COMMENTARY: The states may define the scope of police power to arrest so long as the statute does not abolish the constitutional requirement of probable cause.[187] In some jurisdictions, legislation or police directives specify the circumstances under which an officer might find probable cause.[188] These directives may foster more uniform police conduct and may narrow the subjective judgment that is necessarily a part of any decision to take a suspect into custody.

Subsection (B)(1) is an adaptation of the definition of the probable cause requirement in the Ohio abuse law.[189] It states that an officer may make an arrest based solely on the statement of the alleged victim that a crime has been committed against her by the alleged assailant or on the statement of a witness that a crime has been committed against someone else.[190] Abusers frequently deny that any incident occurred, and police officers must decide which party, the victim or the assailant, is more credible. This section aids in that assessment.

It is possible that a few improper arrests would be made using these guidelines. In general, however, police will not make an arrest if they do not believe a crime has been committed, and it is unlikely that the victim's words would be the sole basis of that assessment.

Drafters should be cautious about including this provision in a law that uses mandatory arrest language; the combination of

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[186] *See generally id.* § 16-1006(f).

[187] Probable cause means that the arresting officer must have "reasonably trustworthy information" in light of any "facts and circumstances" that would lead a reasonably cautious person to believe that an offense has been or is being committed. Draper v. United States, 358 U.S. 307, 318 (1959).

[188] *See* N. LOVING, A GUIDE FOR POLICE, *supra* note 160, at 163 app. (order resulting from consent agreement of Oakland Police Department).

[189] *See* OHIO REV. CODE ANN. § 2935.03(B) (Page 1982).

[190] According to a recent Supreme Court decision, the "totality of the circumstances" would in the end determine if the sole statement by the victim is sufficient to establish probable cause. *See* Illinois v. Gates, 103 S. Ct. 2317 (1983).

the two would impose a duty of arrest whenever a person signed a statement alleging that he or she or someone else had been abused.

Subsection (B)(2) lists factors that would favor a finding of probable cause. Subsection (B)(3) lists factors that are not to be included in an officer's judgment about whether to make an arrest. It is adapted from consent judgments in lawsuits against the police departments of Oakland, California, and New York City.[191] It is intended to negate the reasons most often offered by police officers to explain why arrests are avoided in domestic abuse cases.

5.04. ***Limitation of Liability.***

Law enforcement agencies and officers shall not be liable for personal injuries or property damage that occurs in the course of any good-faith effort to protect a victim of domestic violence, including but not limited to action taken during the course of an arrest, an attempt to separate the parties or to enforce a court order, or action taken during the transportation of the victim to a shelter, hospital, or other authorized place.[192]

COMMENTARY: This section is intended to encourage zealous enforcement of the law by police officers by shielding them to some extent from lawsuits by persons against whom the laws are enforced. Police have expressed concern that, as a result of implementing new domestic violence laws, they will be deluged with litigation brought by irate husbands. Under the Model Act, police are protected from civil liability for damages if the injury to the abuser resulted from a good-faith effort to enforce the law.

Many states have included similar language in their abuse laws to encourage police support for a proposed law that imposes new duties on police officers.[193] This immunity clause, however, does not (and could not) prohibit suits for violations of the federal civil rights laws.[194]

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[191] For the orders and guidelines issued by the two police departments as a result of the consent agreements, see N. LOVING, A GUIDE FOR POLICE, *supra* note 160, at 163–68 app. The agreements resulted from the following two cases: Scott v. Hart, No. C76-2395 (N.D. Cal. filed Nov. 9, 1979), and Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (subsequent history of *Bruno* not affecting the consent agreement entered into by the police department).

[192] *See* N.H. REV. STAT. ANN. § 173-B:11 (Supp. 1981).

[193] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3602(L) (Supp. 1983); COLO. REV. STAT. § 14-4-104 (Supp. 1982); Illinois Domestic Violence Act § 305, ILL. ANN. STAT. ch. 40, § 2303-5 (Smith-Hurd Supp. 1982).

[194] *See* 42 U.S.C. § 1983 (1976).

5.05. ***Reporting and Data Collection by Law Enforcement Agencies.***

(A) Law enforcement agencies shall maintain complete and systematic records of all protection orders in effect. The agencies shall use the records to inform dispatchers and law enforcement officers responding to domestic violence calls of the existence, terms, and effective dates of protection orders in effect as well as of prior incidents of domestic violence.[195]

(B) The state bureau of investigation shall develop a domestic violence offense report form that shall include but not be limited to the following information:

(1) the names, addresses, ages, races, genders, occupations, and relationship of the parties, and whether the victim was pregnant at the time of the incident;

(2) the time the complaint was received and the times the officer responded to the call and left the scene of the incident;

(3) a detailed description of the incident that led to the call, including the nature and extent of the alleged acts of violence;

(4) a detailed description of the injuries inflicted, including photographs of visible injuries;

(5) the number and type of weapons involved;

(6) the effective date and terms of any protection order in effect;

(7) a summary of the victim's account of the frequency and severity of prior incidents of abuse, calls to the police, and prior court action;

(8) all action taken by the responding officers to protect the victim or to prevent subsequent violence;

(9) if no arrest was made, the reason for failure to make an arrest;

(10) a list of names, addresses, and statements of any witnesses to the abuse, including a summary of statements of witnesses to the incident; and

(11) any other information necessary for a complete analysis of the incident.[196]

(C) Within ten days following a call concerning an incident of domestic violence, the police department shall forward a copy of the completed incident report to the prosecutor's office.[197]

(D) The state bureau of investigation shall tabulate annually, by county

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[195] *See* Illinois Domestic Violence Act § 302(b), ILL. ANN. STAT. ch. 40, § 2303-2 (Smith-Hurd Supp. 1982).

[196] *See generally* Illinois Domestic Violence Act § 303(a), ILL. ANN. STAT. ch. 40, § 2303-3 (Smith-Hurd Supp. 1982); N.J. STAT. ANN. § 2C:25-8 (West 1982).

[197] *See* WASH. REV. CODE ANN. § 10.99.030(5) (Supp. 1983).

and by metropolitan area, the data from domestic violence offense reports and shall present a report of such data to the governor, the state legislature, the administrative officer of the courts, and the state coalition of shelters for victims of domestic violence. The report shall include but not be limited to the following information:

(1) the total number of domestic violence calls received, by category of classification;

(2) the number of calls received broken down by the sex, age, relationship, and race of victims and of abusers;

(3) the number of cases in which weapons were used or in which visible injuries were inflicted;

(4) the number of cases in which the victim was pregnant at the time of abuse;

(5) a breakdown of cases according to the number of times victims called the police or sought help in court;

(6) the number of reports filed by police;

(7) the number of arrests made;

(8) the number of cases in which criminal charges were filed, and a breakdown of the types of charges filed;

(9) the reasons commonly reported by police for failure to make arrests;

(10) the number of cases in which police officers removed one party from the residence in lieu of arrest and the number of cases in which police officers provided victims with transportation to a hospital or shelter; and

(11) the average amount of time between a call to the police department and the arrival of police officers at the scene of the incident.[198]

COMMENTARY: This is the most important data collection section included in the Model Act. Advocates, police officers, prosecutors, and courts may use the information generated by recordkeeping to prevent subsequent abuse. While the individual information may be useful in particular court proceedings, the tabulated data increase police accountability and aid in social policymaking on domestic violence. Moreover, the police department can implement most easily the statute's recordkeeping provision, since police officers have more contact with battered women than do members of any other official agency. The type of recordkeeping contemplated by the statute requires only mod-

[198] *See* N.J. STAT. ANN. § 2C:25-8(c) (West 1982).

erate adaptations of the data collection systems existing in most police departments.[199]

Subsection (A) requires each agency to keep current records of the protection orders in effect in their precinct and to provide the information to officers responding to calls. Such information is essential to the enforcement of protection orders. Police might otherwise refuse to enforce protection orders unless the victims have certified copies of the orders available. This section would prevent this practice.

Subsection (B) contemplates the development of a report form for domestic violence offenses. In some states, it may be possible to use the state's existing general report forms with only minor revisions. The domestic abuse reports, however, must be easily identifiable to facilitate the tabulation of data contemplated by this section.

The Model Act requires that the police department transmit copies of all incident reports in abuse cases to the prosecutor's office, regardless of whether an arrest was made. Prosecutors then may screen the reports and contact victims if an incident appears to warrant prosecution. This arrangement has been effective in some jurisdictions[200] and responds to a common complaint of prosecutors that they cannot file charges in abuse cases because they are rarely notified of incidents.

The information to be compiled under subsection (D) is adapted from the system used in Ohio, where the state Attorney General's Office produces an annual report of all the tabulated data. This report provides information on how the law is being enforced and facilitates the comparison of institutional behavior in different cities.[201]

5.06. ***Training of Police Officers.***

(A) Law enforcement agencies shall establish an education and training program for police officers designed to acquaint them with:

(1) the nature, extent, and causes of domestic violence;

(2) the legal rights of and remedies available to victims of domestic violence;

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[199] Most police departments participate in the recordkeeping requirements imposed by the FBI Uniform Crime Reports. The Model Act would require adding only a few lines to the forms already in use.

[200] *See* L. LERMAN, *supra* note 4, at 38–39 (identifying Seattle, Wash., and Westchester Co., N.Y.).

[201] *See, e.g.*, OHIO ATT'Y GEN., *supra* note 178, at 70–71.

(3) the services and facilities available to victims and batterers;

(4) the legal duties imposed on police officers to make arrests and to offer protection and assistance; and

(5) techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and promote the safety of the victim.[202]

(B) Training shall stress the enforcement of criminal law in domestic violence cases and the use of community resources. Law enforcement agencies and community organizations shall cooperate in all aspects of the training. Representatives of shelters or other community groups shall be invited to assist in planning and presentation of training.[203]

(C) Basic training completed by police officers prior to permanent appointment shall include no less than twenty hours of training in responding to domestic violence calls.[204]

(D) Advanced eight-hour in-service training programs for all veteran officers shall include sessions on responding to domestic violence calls. The primary purpose of these sessions will be to familiarize officers with this Act and any subsequent legislation on the protection of victims of domestic violence.[205]

COMMENTARY: This section reverses a longstanding tradition of providing limited or inappropriate training to recruits and veteran officers on the handling of domestic violence calls.[206] The need for more extensive training is evident. Many departments report that about one-third of police time is spent responding to calls involving domestic abuse.[207] More officers are injured responding to disturbance calls than any other type of call.[208]

The statute contemplates twenty hours of training for recruits and periodic in-service training for veterans. The statute is quite general but indicates specific subject areas that should be cov-

[202] *See generally* ALASKA STAT. § 18.65.510(a) (1981); WLDF AMENDMENTS, *supra* note 43, § 16-1006(i); N. LOVING, A GUIDE FOR POLICE, *supra* note 160, at 113–27.

[203] *See* N.J. STAT. ANN. § 2C:25-4 (West 1982).

[204] *See* N. LOVING, A GUIDE FOR POLICE, *supra* note 160, at 122. *See generally* OHIO REV. CODE ANN. § 109.73(4)(5) (Page Supp. 1982) (providing for 15 hours of training).

[205] *See* OHIO REV. CODE ANN. § 109.73(6) (Page Supp. 1982).

[206] For a discussion of traditional police policies in abuse cases, see Note, *supra* note 126, at 144–49.

[207] O'Reilly, *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23.

[208] In 1982, the FBI reported that 34% of officers assaulted while on duty were responding to "disturbance" calls. FBI, U.S. DEPT. OF JUSTICE, *supra* note 165, at 41. The homicide data in the same report breaks down disturbances into two categories, "domestic disturbances" and "other disturbances," and found that of ninety-two officers killed, only seven, or eight percent of the total, were killed while responding to domestic disturbance calls. *Id.* at 17.

ered. The training should focus on law enforcement rather than on crisis intervention, which dominates much of current police training on abuse.[209] The mediation approach involves teaching police officers communication skills that enable the officers to defuse a dispute. These skills are necessary to good police work, but the emphasis on interpersonal skills in domestic situations promotes the notion that the primary task in responding to an abuse call is to mediate rather than to protect the victim from abuse. Optimally, police trainers should focus on law enforcement rather than on mediation in training on responding to domestic violence.[210]

Section 6.00. DIVERSION.

6.01. *Definition.* Diversion is a procedure that defers prosecution, conviction, or sentencing of a criminal defendant under this Act pending the defendant's voluntary completion of a program designed to prevent further violence or other criminal conduct. Successful completion of a diversion program will result in dismissal of criminal charges.

COMMENTARY: This section of the statute recommends a prosecutorial option that may be established either by statute or by internal policy in a prosecutor's office. Advocates for battered women disagree about the desirability of diversion. Some advocates believe that diversion sanctions the underenforcement of the criminal law. These advocates therefore prefer that criminal defendants in abuse cases be prosecuted and punished.[211] Some offices that have established diversion programs, however, find that diversion can be effective in stopping violence.[212] It is also argued that diversion is more responsive to the objectives of battered women who become criminal complainants, because the victim's primary goal in most criminal abuse cases is to stop the violence rather than to punish the offender. Abusers who participate in diversion programs are often more closely monitored than other defendants convicted of abuse charges, and the conditions of diversion are often tailored to the goal of stopping violence.

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[209] *See generally* N. LOVING, A GUIDE FOR POLICE, *supra* note 160, at 33–38.

[210] For an example of a lesson plan which encourages a stronge law enforcement policy, see N. LOVING, SPOUSE ABUSE: A CURRICULUM GUIDE FOR POLICE TRAINERS (1981).

[211] *See generally* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 17, at 61–76.

[212] L. LERMAN, *supra* note 4, at 110 (discussing the findings of statistical studies and of participants in an LEAA-sponsored conference on programs for men who batter).

Finally, diversion of defendants charged with domestic abuse may drastically reduce case attrition. According to most prosecutors, victim withdrawal from participation is the chief obstacle to successful prosecution.[213] Diversion avoids this problem because the initial "disposition" of the case occurs immediately after charges are filed and because the abuser enters diversion voluntarily.

Diversion procedures place the suspect in a closely monitored counseling program in which the primary goal is to stop violence. The accused batterer enters the program without prior conviction; therefore, careful attention was given to the protection of participants' constitutional rights. The guidelines also provide for the protection of the victim through the issuance of a protection order during the period of diversion.

6.02. ***Eligibility Requirements.***

(A) The prosecuting attorney shall screen all cases involving allegations of domestic violence, as defined in section 3.01, to determine the defendant's eligibility to participate in a diversion program.

(B) The defendant may be diverted only if:

(1) the defendant voluntarily agrees to participate in the program;

(2) the victim consents to the defendant's participation in the diversion program during a consultation out of the defendant's presence;

(3) a protection order is issued to prevent abuse during the period of diversion;

(4) the defendant has not been convicted of any offense involving violence during the seven years preceeding the current charge;

(5) the defendant's record does not indicate that probation or parole has ever been revoked;

(6) the defendant has not been diverted pursuant to this chapter within five years preceding the current charge; and

(7) the defendant has not been diverted more than once before.[214]

(C) If a defendant satisfies the conditions listed above, the district attorney's office shall assess whether the defendant is likely to complete the diversion program successfully.

(D) Discretion to admit the defendant to the diversion program may be exercised if:

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[213] *Id.* at 18.

[214] *See generally* CAL. PENAL CODE §§ 1000.6–.7 (West Supp. 1983).

(1) the defendant demonstrates motivation to stop battering; and

(2) other factors indicate the defendant would benefit from counseling.[215]

(E) Discretion to pursue prosecution may be exercised if:

(1) the injury inflicted upon the victim is severe;

(2) the victim indicates an extensive history of previous incidents of domestic violence by the defendant; or

(3) the defendant has a significant criminal record.

(F) No admission of guilt shall be required as a condition of eligibility for diversion.[216]

COMMENTARY: The eligibility requirements create a screening mechanism that will prevent diversion if the defendant or the victim does not consent or if the defendant's criminal record makes it likely that he would use diversion to avoid incarceration and would not participate seriously in the program. The eligibility criteria in subsection (B) are mandatory; a defendant who fails to satisfy any of the listed requirements may not be admitted to the program. The criteria in subsections (D) and (E), however, are intended to guide the prosecutor's discretion in determining who should be admitted to the diversion program.

6.03. ***Notice Requirements.***

(A) If the district attorney concludes that the defendant is eligible for diversion, he or she shall notify the defendant's attorney (or the defendant) and the victim. Notice shall be given orally and in writing and shall include:

(1) a description of the purposes and procedures of the diversion program;

(2) a general explanation of the roles and activities of the court, the prosecuting attorney, and the counseling program in the diversion process and an explanation of the scope of the prosecutor's discretion in determining which defendants are eligible for diversion;

(3) notice that the court, at a hearing, may decide not to divert the defendant;

(4) a clear statement of the conditions of diversion; and

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[215] *Cf. id.* §§ 1000.6, 1000.8(a) (West Supp. 1983) (providing for the court to determine the eligibility of the defendant for diversion based on similar factors).

[216] *See id.* § 1000.6(c) (West Supp. 1983).

(5) notice of the penalty for failing to meet the conditions of diversion.[217]

(B) If the prosecuting attorney decides that the defendant is ineligible for diversion, the district attorney shall file a written statement with the court of the grounds upon which the determination is based and shall make copies of this statement available to the defendant, the victim, and the defendant's attorney.[218]

COMMENTARY: No comment.

6.04. *Consent.* A defendant found eligible for diversion shall have an opportunity to consult with an attorney before entering into a diversion agreement. If the defendant agrees to participate in diversion, the defendant shall sign a written agreement under which he or she shall consent to the following terms:

(A) that he or she will abide by the conditions of diversion, including the restrictions imposed by the protection order, for a specified period;

(B) that he or she waives the right to a speedy trial; and

(C) that the agreement will toll any applicable civil or criminal statutes of limitation during the period of diversion.[219] The agreement shall also be signed by the victim and by the district attorney or by his or her designee.

COMMENTARY: The notice and consent requirements would prevent diversion in any case in which the defendant was not fully aware of the conditions of diversion. Absent such elaborate notice, the defendant might view the conditions imposed as punishment without conviction, especially since a post-conviction sentence might be similar to the terms of diversion.[220]

6.05. *Admissions Procedure.*

(A) Defendants shall be screened for diversion and eligible defendants shall be admitted to the program whenever possible within forty-eight hours after criminal charges are filed, or after the prosecutor identifies an abuse case.

(B) When a defendant is found eligible for and has consented to participation in diversion, the district attorney shall move for a continuance of the charges pending the defendant's completion of the diversion program. The district attorney shall request approval of a

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[217] *See id.* § 1000.7(a) (West Supp. 1983).
[218] *See id.* § 1000.6(b) (West Supp. 1983).
[219] *See* WIS. STAT. ANN. § 971.37(1m) (West Supp. 1982).
[220] *See* L. LERMAN, *supra* note 4, at 47–50.

consent agreement listing the terms of the diversion pursuant to section 6.06, and shall file a petition for a protection order on behalf of the victim. Whenever possible, such motion for continuance shall be made at a bond hearing or at arraignment, but may be made at any stage of the prosecution prior to sentencing.

(C) In ruling on the motion, the court shall determine whether the defendant knowingly has consented to participate and may review the factors used in determining eligibility.

(D) If the motion for continuance is granted, the court shall issue an order for diversion of the defendant which incorporates the terms of the consent agreement.

(E) If the court orders that the defendant be diverted and finds that the defendant is able to pay all or part of the costs of counseling, the court may order the defendant to pay this cost. If the defendant is indigent, the court may order the county to pay for counseling or may refer the defendant to a program that provides counseling services without charge.

(F) If the court decides that the defendant should not be diverted, the proceedings shall continue as if no attempt to divert the defendant had been made.[221]

COMMENTARY: The procedures for admission are designed to ensure the defendant's diversion as soon as possible after charges are filed. The effectiveness of diversion may be related to the amount of time that elapses between the filing of charges and the defendant's entry into the diversion program.[222] The trauma that abusers often experience immediately after an incident of abuse makes immediate action critical. If days or weeks pass, the program may not be effective.[223]

6.06. ***Conditions of Diversion.***

(A) Prosecution of criminal charges against a defendant may be deferred for the purposes of diverting the defendant pursuant to this chapter for not less than six months (unless the defendant violates the terms of diversion) nor longer than two years.[224]

(B) The terms and conditions of diversion shall be designed on an individual basis to provide for the protection of the victim and other designated persons and to provide for the rehabilitation of the de-

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[221] *See* CAL. PENAL CODE § 1000.8(a) (West Supp. 1983).
[222] L. LERMAN, *supra* note 4, at 94–95.
[223] *See id.* at 110–11.
[224] *See* CAL. PENAL CODE § 1000.8(c) (West Supp. 1983).

fendant through treatment and prohibition of any conduct that could lead to violence.[225]

(C) Conditions of diversion shall include an order of counseling that is designed to stop the defendant's violent behavior and an order of protection for the victim that may include any of the relief available under section 4.05.

(D) In referring defendants to counseling, preference shall be given to programs or therapists who focus on terminating violent behavior through group counseling or who teach defendants skills for resolving conflict without using violence. The court shall not refer defendants to couples counseling or to family therapy with their victims.

COMMENTARY: The section on conditions of diversion contemplates that each participant in the program would make an individual contract with the staff of the program, specifying the terms of his participation. The defendant must agree to participate in an intensive program of counseling for at least six months. He must also agree to comply with the terms of a protection order and to refrain from violence during participation.

Some therapists consider six months of counseling to be the minimum amount of time necessary for counseling to have any lasting impact on an established pattern of violence.[226] Specialized programs are preferred to family therapy because these programs make use of new techniques for working with batterers and stopping violent behavior. The statute also encourages the use of group counseling for batterers. One therapist experienced in this area of mental health has determined that an abuser must address his problem in a group or individual setting before engaging in counseling with other members of his family.[227]

6.07. ***Discretion to Terminate.***

(A) The district attorney or the administrator of the counseling program shall contact the victim at least monthly during the period of diversion so that the victim has an opportunity to report any violations of the diversion agreement by the defendant.

(B) If the prosecuting attorney or the court receives information from a counselor, the victim, or another source that the defendant has

[225] ARIZ. REV. STAT. ANN. § 13-3601(G) (West Supp. 1983).

[226] L. LERMAN, *supra* note 4, at 103.

[227] *See generally* A. GANLEY, *supra* note 71, at 68–70. A list of counseling programs that conduct group therapy for men who batter is available from the Center for Women Policy Studies, 2000 P St., N.W., Suite 508, Washington, D.C. 20036.

violated a condition of diversion or is not benefiting from counseling, or if the defendant is convicted of any offense involving violence as prohibited by section 6.02, the district attorney may terminate diversion. Upon termination of diversion, the district attorney shall reinstitute criminal proceedings against the defendant; if the defendant is participating in post-conviction diversion, the court may proceed to sentence the defendant.[228]

(C) In cases in which diversion is terminated and prosecution resumed, charges may not be dismissed at the request of the victim absent unusual circumstances. Unusual circumstances might be found if failure to dismiss charges would increase the risk of harm to the victim and if law enforcement officials would be unable to protect the victim during prosecution.

COMMENTARY: The statute requires the prosecution of the defendant to be resumed if the defendant violates the terms of diversion and the district attorney decides to terminate the program. The statute also prohibits dismissal of charges at the victim's request in most cases. This prevents the defendant from avoiding the terms of diversion by persuading or coercing the victim to request dismissal of charges. The "unusual circumstances" exception is included because in some cases failure to dismiss charges may place the victim in great danger. If the law enforcement system is unable to protect the victim during prosecution, it must not compel her participation.

6.08. ***Successful Completion of the Diversion Program.***

(A) On fulfillment of the terms and conditions of diversion, the court shall discharge the defendant and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction of a crime.[229]

(B) Two years after the discharge and dismissal under this section the defendant's record of arrest or criminal charges may be expunged upon request, provided there has been no further arrest or conviction for any offense involving a violent act.[230]

(C) When a defendant's record is expunged, the police department shall retain a nonpublic record of charges discharged or dismissed under this section. This record shall be furnished to a court, police agency, an attorney for a victim of domestic abuse, or prosecutor's office upon request to show that a defendant in a civil or criminal action

[228] *See* CAL. PENAL CODE § 1000.9 (West Supp. 1983).

[229] *See* MICH. COMP. LAWS § 769.4a(3) (1979).

[230] *Cf.* CAL. PENAL CODE § 1000.10 (West Supp. 1983) (providing for the expungement of arrest record upon the successful completion of a diversion program).

involving domestic violence previously completed the diversion program.[231]

COMMENTARY: This section provides for the expungement of records because avoidance of a criminal record is frequently a strong incentive for active participation in a diversion program. The statute requires that a private record be kept that will be available to law enforcement officials and attorneys handling subsequent domestic violence by the same individual.

6.09. ***Data Collection on Diversion of Criminal Defendants in Abuse Cases.***

The prosecutor's office or the prosecutor's designee shall collect and retain the following data:

(A) the number of cases screened for diversion;

(B) the number of cases accepted into the diversion program;

(C) a breakdown of the criminal charges that had been filed against defendants accepted into the program;

(D) conditions imposed on diverted defendants;

(E) the number of successful completions;

(F) the number of unsuccessful terminations;

(G) the reasons for unsuccessful termination;

(H) the duration of defendants' participation in the diversion program; and

(I) the disposition of criminal charges and sentences imposed on defendants rejected and on defendants unsuccessfully terminated.

COMMENTARY: The data collection provision is necessary in order to monitor the operation of the diversion program. Some programs have been very successful and have used the data collected in seeking funding for continued operation.[232]

6.10. ***Evidence.***

(A) Consent to participate in diversion is not an admission of guilt and the consent may not be admitted in evidence in a trial except to rebut allegations that the statute of limitations has run or that the defendant's right to a speedy trial has been denied.[233]

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[231] *See* MICH. COMP. LAWS ANN. § 769.4a(4) (West 1982).

[232] *See, e.g.*, L. LERMAN, *supra* note 4, at 157–60 app. (reprinting data from the annual reports of the Miami Domestic Intervention Program).

[233] *See* WIS. STAT. ANN. § 971.37(4) (West Supp. 1982).

(B) Communications between defendants, diversion program staff, and therapists who provide counseling for defendants, as well as communications between victims and advocacy staff, therapists, or others who assist victims in obtaining protection, shall be confidential, except that the court or the prosecutor may review information concerning violation of the terms of diversion. Statements made during diversion and records kept by the program shall be inadmissible in any court proceeding.

COMMENTARY: Because participation in diversion is not an admission of guilt, information obtained about the defendant's conduct during diversion should not be available in any prosecution. If the defendant is expected to be honest about his own violence, he must trust the confidentiality of a relationship with a therapist or other staff member with whom he has contact during diversion. The statute protects the confidential records created during diversion by prohibiting their use in court proceedings.

STATUTE

A LEGISLATIVE PROPOSAL FOR RESOLVING EXECUTIVE PRIVILEGE DISPUTES PRECIPITATED BY CONGRESSIONAL SUBPOENAS

JAMES HAMILTON*
JOHN C. GRABOW**

Disputes between the President and Congress regarding the executive branch's obligation to respond to Congressional demands for information have appeared with disquieting frequency in recent years. These disputes involve what has been called the "clash of absolutes," generating controversy and making political compromise difficult. Congress is forced to rely on its criminal contempt powers as the primary means to obtain compliance with subpoenas it has issued to employees and officials of the executive branch. These powers, however, are ill-suited to ensure adherence to such subpoenas.

In this Article, Mr. Hamilton and Mr. Grabow identify the shortfalls of the powers currently available to Congress to enforce its subpoenas and propose a bill that would provide a civil remedy for the enforcement of Congressional subpoenas issued to executive branch officials. The authors trace the history of similar proposals made in the past and examine alternatives to the proposed bill. Mr. Hamilton and Mr. Grabow conclude by arguing that there are no constitutional or other barriers to a civil action brought under the proposed bill and that it is now time for the bill's enactment.

From the administration of George Washington[1] to that of Ronald Reagan,[2] conflicts have arisen between the President and Congress over the executive branch's obligation to respond to congressional demands for information. To justify witholding information, the executive branch often has couched its claims of executive privilege in the broadest of terms. Thus, lawyers for President Nixon argued in 1973 that "[s]uch a privilege, inherent in the Constitutional grant of executive power, is a

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* Member, Ginsburg, Feldman and Bress, Washington, D.C. A.B., Davison College, 1960; LL.B., Yale University, 1963; LL.M., University of London, 1966.

** Associate, Ginsburg, Feldman and Bress, Washington, D.C. B.A., University of Michigan, 1978; J.D., University of Michigan, 1981.

[1] In 1796 George Washington refused to deliver certain documents concerning the negotiation of the Jay Treaty to the House of Representatives. Washington did, however, supply the information to the Senate, observing that the Senate, not the House, has a constitutional role in the negotiation of treaties. *See* Messages and Papers of the Presidents 194–96 (J. Richardson ed. 1896). *See also* Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103, 107–09 (1949).

[2] *See infra* notes 6–11 and accompanying text.

matter for Presidential judgment alone."[3] The Supreme Court unanimously rejected the claim that the President had an absolute, unreviewable executive privilege in *United States v. Nixon*.[4] Nonetheless, conflicts between the two branches of government have not abated, but continue to be acrimonious.[5]

In October 1981, President Reagan, asserting executive privilege, directed former Secretary of the Interior James G. Watt to withhold thirty-one documents subpoenaed by the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce.[6] The President asserted that disclosure would interfere with his confidential relationship with his cabinet and violate the doctrine of separation of powers.[7] The Secretary ultimately released the documents, but only after the subcommittee and the full committee had cited Watt for contempt of Congress.[8]

In November 1981, the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation issued a subpoena to the Administrator of the Environmental Protection Agency (EPA), Anne Gorsuch Burford, for documentation concerning EPA's enforcement of the "Superfund" statute.[9] Burford appeared before the subcommittee on December 2, 1982, but, under orders from President Reagan, refused to answer certain questions. She advised the subcommittee that the President was claiming executive privilege as to certain "sensitive documents found in open law enforcement files."[10] After the full committee reported a contempt resolution to the House of Representatives, that body, on December 16,

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[3] Brief of Richard M. Nixon in Opposition to Plaintiffs' Motion for Summary Judgment at 16, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973) [hereinafter cited as Nixon Brief].

[4] 418 U.S. 683 (1974).

[5] That the Supreme Court's decision in *Nixon* did not end disputes between the Congress and the executive branch is not surprising, because the case involved a subpoena issued in connection with a criminal trial, not a congressional subpoena. The Court in *Nixon* dealt only with executive confidentiality vis-a-vis the requirements of criminal justice. *Id.* at 711–12. The Court specifically noted that it was "not here concerned with the balance between . . . the confidentiality interest and congressional demands for information . . . ." *Id.* at 712 n.19. The dispute between the Watergate Committee and President Nixon was adjudicated by the lower courts in Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), *aff'g* 370 F. Supp. 521 (D.D.C. 1974), which is discussed *infra* at note 94.

[6] *See* H.R. REP. NO. 898, 97th Cong., 2d Sess. 6 (1982).

[7] *Id.* at 10.

[8] *Id.* at 8.

[9] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9657 (Supp. V 1981).

[10] 128 CONG. REC. H10,033, H10,037 (daily ed. Dec. 16, 1982).

1982, cited Burford for contempt of Congress and sent the matter to the Justice Department for criminal prosecution.[11] This was an historic first, for never before had a house of Congress held the head of an executive agency or department in contempt.

Following media reports about conflicts of interests, political manipulation of EPA programs and funds, and the purported shredding and destruction of agency documents, Burford resigned on March 9, 1983. That same day the White House agreed to provide the House Energy and Commerce Committee access to the disputed documents if the Committee would protect the confidentiality of certain documents identified by the EPA as "enforcement sensitive."[12]

The Watt and Burford controversies dramatically highlight the problem on which this Article will focus—the pitfalls of using Congress's criminal contempt powers as the primary means to obtain compliance with congressional subpoenas issued to employees and officials of the executive branch.[13] As an alternative procedure, we propose a new statute that gives the United States District Court for the District of Columbia original jurisdiction to hear, on an expedited basis, a suit brought by either house of Congress, or by an authorized committee or subcommittee, to enforce subpoenas issued to executive branch officials.

I. Congress's Current Contempt Powers

The Supreme Court has affirmed that Congress's power to conduct investigations is "inherent in the legislative process."[14] The scope of this power of inquiry is "as penetrating and far-

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[11] *Id.* at H10,033–61.

[12] *See* Washington Post, Mar. 10, 1983, at 1, col. 1.

[13] This Article will not review the variegated history of executive privilege claims. Nor will it discuss the Supreme Court's conclusion in United States v. Nixon that there is an executive privilege that, although not absolute, is grounded in the Constitution. Both subjects already have received widespread attention. On executive privilege generally, see, e.g., R. Berger, Executive Privilege: A Constitutional Myth (1974); J. Hamilton, The Power To Probe: A Study of Congressional Investigations (1976); Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1 & 2), 12 U.C.L.A. L. Rev. 1044 (1965); Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383 (1974); Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 Ohio St. L.J. 1 (1974). On the *Nixon* case, see the comments by Professors Berger, Gunther, Henkin, Karst & Horowitz, Kurland, Mishkin, Ratner, and Van Alstyne in *Symposium on* United States v. Nixon, 22 U.C.L.A. L. Rev. 1 (1974).

[14] Watkins v. United States, 354 U.S. 178, 187 (1957).

reaching as the potential power to enact and appropriate under the Constitution."[15] In the words of Chief Justice Warren:

> That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[16]

Among the tools of inquiry available to Congress, none is more important than the power to subpoena witnesses and materials. The Constitution, however, does not expressly grant Congress this power. But the Supreme Court has found the subpoena power to be an "indispensable ingredient"[17] of the legislative powers granted to Congress by the Constitution.[18] The rationale for this implied subpoena power is that:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[19]

The traditional "means of compulsion" used by Congress to ensure compliance with its subpoenas is punishment for contempt.[20] Although the Constitution does not expressly grant Congress the power to punish recalcitrant witnesses for contempt,[21] that power also has been deemed an inherent attribute

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[15] Barenblatt v. United States, 360 U.S. 109, 111 (1959).

[16] Watkins v. United States, 354 U.S. at 187.

[17] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975). *See also* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—it is an essential and appropriate auxiliary to the legislative function.").

[18] *See* U.S. CONST., art. 1, §§ 1, 8.

[19] McGrain v. Daugherty, 273 U.S. at 175.

[20] For a more detailed discussion of Congress's contempt powers, see generally C. BECK, CONTEMPT OF CONGRESS (1959); E. EBERLING, CONGRESSIONAL INVESTIGATIONS (1928); R. GOLDFARB, THE CONTEMPT POWER (1963); J. HAMILTON, *supra* note 13; T. TAYLOR, GRAND INQUEST (1955); Landis, *Constitutional Limitations in the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691 (1926).

[21] The sole exception is the power of each House of Congress to remedy contempts committed by its own members. *See* U.S. CONST., art. 1, § 5, cl. 2.

of Congress's legislative authority.[22] Congress first exercised this power in 1795[23] and the first contempt citation arising from a refusal to produce evidence occurred in 1812.[24] These early examples involved Congress's "self-help" contempt power, which allows either house of Congress to send its Sergeant-at-Arms to arrest an offender for trial before that house. The offender also faces possible imprisonment, historically in the District of Columbia jail or the guard house in the Capital basement. Prior to the adoption of the Constitution, the colonial assemblies and the Continental Congress exercised such powers, as did England's House of Lords and House of Commons.[25] A prisoner can challenge the legality of the confinement by a writ of habeas corpus.[26]

Under this self-help enforcement procedure, imprisonment is limited to the duration of the pending session of Congress.[27] Feeling that harsher penalties were necessary to obtain the cooperation of recalcitrant witnesses,[28] Congress supplemented its inherent contempt powers in 1857 by enacting a statute providing that a witness who fails to appear before a congressional committee, or who appears but fails to give testimony or to produce requested evidence, is guilty of a misdemeanor punishable by a fine of not less than $100 and not more than $1000 and imprisonment of not less than one month and not more than twelve months.[29] That statute (Section 192) remains essentially unchanged in the current Federal Code.[30]

Although Congress continued to exercise its self-help powers after enacting the 1857 criminal statute, reliance on the statutory procedure soon predominated as increased legislative responsibilities made full-scale congressional trials impractical. Although Congress still retains its self-help powers,[31] it last resorted to this procedure in 1945.[32]

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[22] *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 233 (1821).
[23] *See* Jurney v. MacCracken, 294 U.S. 125, 148 (1935).
[24] J. HAMILTON, *supra* note 13, at 87.
[25] Jurney v. MacCracken, 294 U.S. at 148–49.
[26] Kilbourn v. Thompson, 103 U.S. 168, 177 (1881).
[27] Jurney v. MacCraken, 294 U.S. at 151.
[28] *See* CONG. GLOBE, 34th Cong., 3d Sess. 405 (The 1857 Act was passed "to inflict a greater punishment than the Committee believes the House possesses the power to inflict.").
[29] Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.
[30] *See* 2 U.S.C. § 192 (1982)
[31] *See In re* Chapman, 166 U.S. 661, 671–72 (1897).
[32] *See* C. BECK, *supra* note 20, at 7.

Congress recently provided for civil enforcement in some instances of Senate, but not House, subpoenas. The 1978 Ethics in Government Act[33] gives the United States District Court for the District of Columbia jurisdiction over any civil action brought by the Senate, or by an authorized committee or subcommittee, to enforce, obtain a declaratory judgment concerning, or prevent a threatened noncompliance with, certain Senate subpoenas.[34] The Ethics in Government Act, however, specifically excludes from its coverage actions to enforce subpoenas directed at officials of the federal government.[35]

Congress also has a variety of other means that can be marshaled to compel the executive branch to produce requested materials. An administration's bill may be shelved in committee until relevant information is provided. Similarly, Congress may exercise its power over the purse to reduce or deny appropriations sought by an administration until the information is forthcoming. Such tactics, however, may prove ineffective in many situations. The recent controversies where Congress sought information from Watt and Burford about the alleged failure of the administration to execute existing legislation highlight the need for concern.

Congress, of course, retains the power to impeach an executive official—including the President—for failure to provide subpoenaed information.[36] In all but the most extraordinary situations, however, that power is not a credible threat and it does not provide a practical solution for resolving most interbranch

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[33] 2 U.S.C. § 288(d) (1982); 28 U.S.C. § 1364 (Supp. V 1981).

[34] 28 U.S.C. § 1364 (Supp. V 1981).

[35] *Id.* § 1364(a). ("This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity."). *See also* S. REP. No. 170, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD NEWS 4216, 4307–08 [hereinafter cited as Senate Ethics Act Report]. Congress evidently excluded actions to enforce subpoenas directed at executive officials from the Ethics in Government Act because of the strong objections raised by the Justice Department to a similar provision in an earlier proposal, the Watergate Reorganization and Reform Act of 1975, S. 495, 94th Cong., 1st Sess. § 101, 121 CONG. REC. 1828–32 (1975). *See also* 123 CONG. REC. 2961 (1977) (remarks of Sen. James Abourezk). Senator Ervin's proposal for a civil mechanism to enforce subpoenas against executive officials is discussed *infra* in greater detail at note 96 and accompanying text.

[36] Article II, § 4 of the Constitution provides that "[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST., art. II, § 4. On impeachment generally, see R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); C. BLACK, IMPEACHMENT: A HANDBOOK (1974).

disputes.[37] The House has voted only three articles of impeachment against executive branch officials[38] and the Senate has convicted only four individuals of impeachable offenses.[39]

Congress thus is forced to rely upon Section 192 criminal contempt proceedings as the primary means to obtain compliance with subpoenas it has issued to executive branch officials. For various reasons, however, this statutory method is ill-suited to ensure adherence to such subpoenas.

Section 192 is a criminal provision under which a witness faces a jail term for noncompliance.[40] The sanction is directed not at enforcing compliance, but at punishing a contumacious witness for past defiance and deterring future contempts.[41] Once court proceedings begin,[42] the defendant cannot purge himself of contempt merely by producing withheld documents or testimony.[43] The witness's inability to expunge a contempt citation severely limits the usefulness of Section 192 as a means to secure compliance with a congressional subpoena, since the witness has little incentive to comply once a court proceeding begins.[44]

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[37] *See In re* Subpoena to Nixon, 360 F. Supp. 1, 5 n.9 (D.D.C. 1973) ("impeachment may be the final remedy, but it is not so designed that it can function as a deterrent in any but the most excessive cases").

[38] Two were voted against presidents and one against a cabinet official (Secretary of War William Belknap in 1876). *See* Fenton, *The Scope of the Impeachment Power*, 65 N.W. L.REV. 719, 748–58 (1970).

[39] All four were federal judges. *Id.*

[40] The section provides for a fine of not less than $100 and imprisonment for not less than one month. 2 U.S.C. § 192 (1982). *See also* United States v. Tobin, 195 F. Supp. 588, 617 (D.D.C. 1961), *rev'd*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962). *But see infra* note 43.

[41] *See, e.g.*, Cheff v. Schnackenberg, 384 U.S. 373, 377 (1966); Shillitani v. United States, 384 U.S. 364, 368–71 (1966); McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

[42] The House of Representatives could drop its contempt citation against EPA Administrator Burford because the United States Attorney for the District of Columbia, Stanley S. Harris, had refused to present the House's contempt citation to the grand jury. *See infra* notes 55–58 and accompanying text. Contempt proceedings thus never had been formally instituted against Burford in court. The House took action to drop the contempt citation by a voice vote on August 3, 1983, after receiving access to the documents previously withheld. *See* Washington Post, Aug. 4, 1983, at 4, col. 4.

[43] *See, e.g.*, United States v. Brewster, 154 F. Supp. 126, 136–37 (D.D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958); United States v. Greyhound Corp., 363 F. Supp. 525, 533–34 (N.D. Ill. 1973). A few courts have attempted to temper the severity of this result by suspending sentence upon compliance with the subpoena by the defendant. *See, e.g.*, United States v. Tobin, 195 F. Supp. at 617. Although imprisonment and other punishment is avoided, the witness nevertheless remains guilty of a criminal act.

[44] This was critical to Congress's decision to provide for civil enforcement of certain Senate subpoenas in the Ethics in Government Act, 2 U.S.C. § 1346 (1982). *See* Senate Ethics Act Report, *supra* note 35, at 4257 ("Indeed, the major problem in instituting a

In addition, the Supreme Court has held that in a contempt prosecution "the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases."[45] Accordingly, the burden rests on the prosecution to establish that the defendant's refusal to comply with the subpoena was willful,[46] and that the withheld documents are pertinent to the subject matter of the investigation.[47] All elements of the offense must be proven beyond a reasonable doubt,[48] and the defendant is entitled to a jury trial.[49] Moreover, as with any criminal procedure, Congress may not appeal an acquittal. These basic protections make convictions difficult, as was demonstrated by the recent acquittal of EPA official Rita M. Lavelle in what many thought was an "easy" case for the government.[50] Thus, Section 192 is of limited use to Congress as a means of ensuring compliance with its subpoenas.

More fundamentally, however, Section 192 is an unsuitable mechanism for obtaining compliance with subpoenas issued to executive officials because the power to control prosecutions

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criminal contempt of Congress proceeding is that, once the initial refusal has occurred and a criminal contempt proceeding has begun, the recalcitrant witness has no incentive to comply with the subpoena.").

[45] Watkins v. United States, 354 U.S. 178, 208 (1957). *Accord* Russell v. United States, 369 U.S. 749, 755 (1962).

[46] Flaxer v. United States, 358 U.S. 147, 151 (1958). The requirement of willfulness is satisfied if "the refusal was deliberate and intentional and was not a mere inadvertence or an accident." Fields v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

[47] Watkins v. United States, 354 U.S. at 208. A committee also has the duty, upon specific objection by the witness, to provide an explanation on the record of the subject matter of the investigation and the relationship of the subject matter to the requested information. *Id.* at 214–15. In addition, an indictment charging the defendant with violation of Section 192 must include a statement of the subject matter of the investigation. Russell v. United States, 369 U.S. at 771–72.

[48] *See, e.g.*, Flaxer v. United States, 358 U.S. at 151; Quinn v. United States, 349 U.S. 155, 165 (1955).

[49] *See, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974); United States v. Brewster, 154 F. Supp. at 136.

[50] The Lavelle case arose from her refusal to testify before the Subcommittee on Investigations and Oversight of the House Energy and Commerce Committee. *See* New York Times, July 23, 1983, at 1, col. 1. Lavelle, who had left EPA when subpoenaed by the Subcommittee, did not refuse to testify on executive privilege grounds.

The difficulty of resolving executive privilege claims in the context of a criminal contempt proceeding was expressed by the United States Court of Appeals for the District of Columbia Circuit as follows: "A contempt of Congress prosecution is not the most practical method of inducing courts to answer broad questions broadly. Especially is this so when the answers sought necessarily demand far reaching constitutional adjudications." Tobin v. United States, 306 F.2d at 274. The district court in *Tobin* expressed a similar sentiment: "[W]here the contest is between different governmental units, . . . to raise these issues in the context of a contempt case is to force the courts to decide many questions that are not really relevant to the underlying problem of accommodating the interests of two sovereigns." 195 F. Supp. at 617.

lies not with Congress, but with the executive branch itself. The procedure for initiating criminal contempt proceedings for violation of Section 192 is set forth in 2 U.S.C. § 194 (Section 194). Section 194 provides that the President of the Senate or the Speaker of the House will certify a contempt resolution reported by the respective House to the United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action."[51]

The conflict of interest inherent in assigning prosecutorial control to the U.S. Attorney, an executive branch official, where the action is against another executive official was illustrated trenchantly by the House's inability to secure the prosecution of EPA Administrator Burford. On December 16, 1982, the House, by a vote of 259 to 105, cited Burford for contempt of Congress.[52] Pursuant to Section 194, the Speaker of the House certified the contempt resolution to the United States Attorney for the District of Columbia, Stanley S. Harris, for presentment to the grand jury.[53] The U.S. Attorney not only refused to present the contempt citation to the grand jury, but joined the Justice Department and Burford in an unprecedented legal action against the House and a number of its officials.[54] The ex-

[51] Section 194 provides in full:

> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any questions pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

2 U.S.C. § 194 (1982).

[52] H.R. Res. 632, 97th Cong., 2d Sess., 128 CONG. REC. H10,061 (daily ed. Dec. 16, 1982).

[53] *See* 128 CONG. REC. H10,268 (daily ed. Dec. 17, 1982).

[54] The named defendants were the House of Representatives, the Committee on Public Works and Transportation, Rep. James J. Howard (D-N.J.), Chairman of the Committee on Public Works and Transportation, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; Rep. Elliott J. Levitas (D-Ga.), Chairman of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; Rep. Thomas P. O'Neill (D-Mass.), Speaker of the House of Representatives; Edmund L. Henshaw, Jr., Clerk of the House of Representatives; Jack Russ, Sergeant-at-Arms of the House of Representatives; and James T. Molloy, Doorkeeper of the House of Representatives. In its motion to dismiss, the House sardonically noted that "[t]he complaint does not name the Chaplain or the

ecutive officials sought a declaratory judgment that Burford had acted lawfully in refusing to turn over certain allegedly "enforcement sensitive" documents to the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation. The District Court dismissed this suit on February 3, 1983.[55]

Harris's refusal to present the contempt citation to the grand jury appears to contravene Section 194, which provides that it shall be the "duty" of the U.S. Attorney to bring the matter before the grand jury.[56] At least one court has so ruled. For example, in *Ex parte Frankfield*,[57] the United States District Court for the District of Columbia declared that Congress "left no discretion" to the U.S. Attorney and that he "is required, under the language of the statute, to submit the facts to the grand jury."[58]

Postmaster, the two remaining elected constitutional House officers." Brief of the House of Representatives at 7 n.2, United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) [hereinafter cited as House Burford Brief].

[55] 556 F. Supp. at 150. Judge Smith dismissed the action, stating his belief that, given the existence of Sections 192 and 194, the "preferred" method to resolve the executive privilege claim was a criminal contempt proceeding. Recognizing the "difficulties apparent" in prosecuting an executive official for contempt, Judge Smith encouraged "the two branches to settle their differences without further judicial involvement." *Id.* at 153.

[56] 2 U.S.C. § 194 (1982). U.S. Attorney Harris, in later testimony before the House Committee on Public Works and Transportation, argued "that the use of the word 'shall' in a statute like 2 U.S.C. § 194 is directory rather than mandatory. Courts quite wisely have held that a legislature's use of the word 'shall' does not deprive a prosecutor of his normal prosecutorial discretion." Statement of Stanley S. Harris, United States Attorney for the District of Columbia, Before the Committee on Public Works and Transportation of the House of Representatives at 5, June 16, 1983 (on file with the HARVARD J. ON LEGIS.) [hereinafter cited as Harris Testimony]. Harris cited no authority for these statements.

[57] 32 F. Supp. 915 (D.D.C. 1940).

[58] *Id.* at 916. *Accord* United States v. Brewster, 154 F. Supp. 126, 136 (D.D.C 1957) ("United States Attorney [has] . . . duty . . . to bring the matter before the grand jury for its action . . . ."); R. GOLDFARB, *supra* note 20, at 42; J. HAMILTON, *supra* note 13, at 94; Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 G.W. L. REV. 399, 401 (1954); Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 257.

In its suit against the House, the Justice Department justified the U.S. Attorney's decision not to report the contempt citation to the grand jury by citing the court's statement in Anasara v. Eastland, 442 F.2d 751, 754 n.6 (D.C. Cir. 1971), that "perhaps . . . the executive branch . . . may decide not to present the matter to the grand jury (as occurred in the case of the officials of the New York Port Authority)." It is unclear what case the D.C. Circuit was referring to in this rather cryptic statement, for it cited no case involving the New York Port Authority. The D.C. Circuit did decide a case involving contempt by a Port Authority official, United States v. Tobin, 195 F. Supp. 588 (D.D.C. 1961), but the U.S. Attorney there did not refuse to present the matter to the grand jury. Rather, "[t]he charge was brought through an information, [the Port

Adherence by the U.S. Attorney to this requirement would not, however, seriously limit Justice Department control[59] over a Section 192 proceeding. The U.S. Attorney has considerable influence on the grand jury and could attempt to convince it that no indictment should issue because a valid executive privilege defense exists.[60] Although a grand jury has the power to present an indictment despite the U.S. Attorney's opposition,[61] the indictment will not be valid, and no criminal prosecution may proceed, unless it is signed by the U.S. Attorney[62] who has absolute discretion in deciding whether to affix his signature.[63]

Even if the U.S. Attorney signs the indictment, both he and the Attorney General have the power later to enter a nolle

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Authority official] having waived his right to Grand Jury presentment and prosecution by indictment . . . ." *Id.* at 592 n.2.

[59] Although Section 194 refers to the U.S. Attorney, U.S Attorneys are officers of the Justice Department, and therefore subordinate to the Attorney General. The conflict this may impose on the Attorney General is plain, since the President likely will have received the Attorney General's advice before asserting executive privilege. In fact, in recent years such involvement by the Attorney General has become a formal requirement. A directive, issued by President Nixon in 1969, and still in effect, provides that the invocation of executive privilege is subject to the following procedural steps:

1. If the head of an Executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information from a Congressional agency addressed to his department or agency raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.
2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that Executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring Congressional agency.
3. If the department head and the Attorney General agree that the circumstances justify the invocation of Executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

R. Nixon, Memorandum for the Heads of Executive Departments and Agencies: Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 24, 1969).

[60] In House testimony, U.S. Attorney Harris stated that "[t]he fact is that a prosecutor has an obligation to present exculpatory evidence as well as inculpatory evidence to a grand jury . . . . [T]he grand jury would be entitled to know that [Burford] was following the orders of the President of the United States in conducting herself as she did." Harris Testimony, *supra* note 56.

[61] *See, e,g.*, United States v. Smyth, 104 F. Supp. 283, 294 (N.D. Cal. 1952) ("Unquestionably, the grand jury are under no necessity to follow the orders of the prosecutor. They can present an indictment whether he will or not."); *In re* Miller, 17 F. Cas. 295 (C.C.D. Ind. 1878) (No. 92,552) (instructing the grand jury that it has the power to return an indictment against the accused despite instructions from the President to the U.S. Attorney not to proceed with the investigation).

[62] *See* FED. R. CRIM. P. 7(c).

[63] *See, e.g.*, United States v. Cox, 342 F.2d 167, 171–72 (5th Cir. 1965) *cert. denied*, 381 U.S. 935 (1967).

prosequi dismissing it.[64] The U.S. Attorney also can decline to bring the case to trial within the time limits of the Speedy Trial Act,[65] thus mandating dismissal.[66] In addition the prosecutor might refuse to resist a motion to dismiss based on executive privilege grounds. Finally, if the prosecution proceeds and culminates in conviction, the President can always pardon the convicted official. Indeed, President Franklin D. Roosevelt pardoned an individual convicted of contempt of Congress.[67]

Finally, the use of the criminal contempt sanction in executive privilege disputes may be unfair to an executive official following the President's orders. A witness "acts at his own peril"[68] because a mistaken view of the law is no defense.[69] The fact that a witness was acting under the orders of a superior authority does not appear to constitute a valid defense.[70] This unfairness

[64] At common law, a prosecutor had absolute discretion to enter a nolle prosequi. *See* Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868). Presently, under Rule 48 of the Federal Rules of Criminal Procedure, court approval is required to terminate prosecution once trial has begun. FED. R. CRIM. P. 48(a) This requirement was added to protect the defendant from prosecutorial harassment, e.g., charging, dismissing, and recharging the defendant. *See* Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977). Leave of the court is denied only where the U.S. Attorney's motion is "tainted with impropriety" and not "motivated by considerations . . . 'clearly within the public interest.'" *Id.* at 34. Examples of such improprieties include a motion motivated by a bribe, antipathy to the victim of the crime, or the like. *See* United States v. Hamm, 659 F.2d 624, 630 (5th Cir. 1981). However, even if the court denies the U.S. Attorney's nolle prosequi motion, the court is powerless to compel the prosecutor to pursue the case vigorously. The U.S. Attorney, for instance, can indicate to the grand jury the considerations that counsel no indictment or acquittal. *See* 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 812 (1982).

[65] 18 U.S.C. § 3161 (Supp. V 1981).

[66] *See* United States v. N.V. Nederlandsche Combinatie Voir Chemische Industrie, 453 F. Supp. 462, 463 (S.D.N.Y. 1978).

[67] Dr. Francis E. Townsend in 1938. *See* 83 U.S.C. 8425 (1938). *See also* Townsend v. United States, 95 F.2d 352 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938).

[68] Chapman v. United States, 5 App. D.C. 122, 136 (1898), *aff'd*, 166 U.S. 661 (1899). *See also* Sinclair v. United States, 279 U.S. 749, 767 (1929).

[69] *See, e.g.*, Watkins v. United States, 354 U.S. 178, 208 (1957) ("An erroneous determination on his part, even if made in the utmost good faith, does not exculpate him.").

[70] No case directly has held that the defense of superior orders justifies a government official's noncompliance with a congressional subpoena. United States v. Tobin, 195 F. Supp. 588 (D.D.C. 1961), rejected such a defense raised by the Executive Director of the Port of New York Authority, who disregarded a House subpoena upon orders from the Governors of New York and New Jersey. *Id.* at 613–16. Although holding that the defense provides no legal justification for failure to comply, the court left open the possibility that an order from a superior, if unsolicited by the disobedient official, might demonstrate a lack of the willfulness required by Section 192 for conviction. *See supra* note 46 and accompanying text.

In *Tobin*, the court of appeals reversed the lower court on the ground that the subpoenaed documents were not relevant under the House's authorizing resolution to the committee. Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962). *See also* Sawyer v. Dollar, 190 F.2d 623 (D.C. Cir. 1951), *rejected as moot*, 344 U.S. 806 (1952) (defense of superior orders no justification for failure to comply with civil contempt order of

may, however, work against *Congress*, as the courts may be disinclined to permit or uphold a prosecution when they believe a defendant is being treated unjustly.

II. The Proposed Bill—A Civil Alternative

As an alternative to bringing a criminal contempt action under Sections 192 and 194, the proposed bill (Section 1364a)[71] would provide a civil remedy for the enforcement of congressional subpoenas issued to executive officials. The procedure suggested is similar to that presently available under the Ethics in Government Act to enforce Senate subpoenas[72] directed at persons other than federal employees.[73]

Subsection (a) of the proposed Section 1364a would give the United States District Court for the District of Columbia jurisdiction over civil actions brought by either house of Congress, or an "authorized" committee or subcommittee, to enforce or secure a declaratory judgment as to the validity of a subpoena directed at an executive branch official acting in his or her official capacity.[74] The requirement that a committee or a subcommittee be "authorized" ensures that a house of Congress concurs in all civil actions brought under this section, even if the action is brought in the name of the committee or subcommittee issuing the subpoena. The serious nature of interbranch executive privilege disputes justifies this requirement.[75] A similar requirement is imposed by the Ethics in Government Act,[76]

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court). *But cf.* United States v. Ragen, 340 U.S. 462 (1951) (upholding refusal to comply with court's criminal contempt order because of order of U.S. Attorney General under the Federal Housekeeping statute, 5 U.S.C. § 22 (1982)).

[71] This proposed addition to 28 U.S.C. is set out in full in the Appendix to this Article.

[72] Congress has enacted analogous enforcement procedures authorizing numerous independent and executive agencies to seek the aid of federal courts to obtain compliance with agency subpoenas. *See, e.g.*, 15 U.S.C. § 49 (1982) (Federal Trade Commission); 15 U.S.C. § 687a(e) (1982) (Small Business Administration); 19 U.S.C. § 1333(b) (1976) (International Trade Commission); and 42 U.S.C. § 405(e) (1976) (Social Security Administration).

[73] *See supra* notes 33–35 and accompanying text. The Senate Report accompanying the Ethics in Government Act states, however, that "a future statute might specifically give the courts jurisdiction to hear a civil legal action brought by Congress to enforce a subpoena against an executive branch official." Senate Ethics Act Report, *supra* note 35, at 4305.

[74] Conduct by an executive official not acting in an official capacity presumably would not be based on executive privilege and thus would not present the kind of interbranch conflicts that Section 1364a covers. The Ethics in Government Act, 28 U.S.C. § 1364 (Supp. V 1981), covers executive officials acting in private capacities.

[75] *Accord* Cox, *supra* note 13, at 1434.

[76] *See* 28 U.S.C. § 1364 (Supp. V 1981).

and the procedure is consistent with Section 194, which requires that a criminal contempt resolution be voted by a full house of Congress. To ensure that actions brought by Senate committees or subcommittees are specifically authorized by the Senate, subsection (e) of Section 1364a provides that the Standing Order of the Senate "authorizing suits by Senate Committees"[77] does not permit suit under the section.

Two remedies provided in the Ethics in Government Act—a civil contempt proceeding and an action to prevent a threatened refusal to comply with a subpoena—have not been included in our proposal because Section 1364a would deal exclusively with executive branch officials. A contempt action normally should not be required to force subpoena compliance by executive branch employees; a declaratory judgment or injunction should suffice.[78] There also appears to be no significant need to create an action to prevent a refusal to comply by a federal official since an existing criminal statute already prevents obstructions of congressional investigations.[79]

Subsection (a) also would require that the District Court "shall hear" an action brought by a congressional body under this section. In the past, some courts have been reluctant to enter into interbranch disputes.[80] The requirement that the courts "shall hear" actions brought under Section 1364a instructs the District Court to resolve these disputes on the merits and not dismiss them on discretionary grounds.[81]

Subsection (b) would expedite consideration of actions brought under this section. Without prompt adjudication, civil subpoena enforcement would be of minimal value to a body in

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[77] In 1928, the Senate passed a resolution authorizing its committees to "bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate or other law." S. Res. 262, 70th Cong., 1st Sess., 69 CONG. REC. 10,596 (1928). The Senate passed this resolution in response to the Supreme Court's holding in Reed v. Board of County Comm'rs, 277 U.S. 376, 388 (1928), that a Senate committee was without power to bring a civil suit to enforce its subpoena because the Senate had not authorized it to do so. Resolution 262 is now part of the Standing Orders of the Senate. *See* S. JOUR. No. 572, 70-1, May 28, 1928. The House of Representatives has not granted its committees a comparable general authorization to sue.

[78] Noncompliance with a court order under Section 1364a could, however, subject the noncomplying official to the *court's* inherent contempt powers.

[79] *See* 18 U.S.C. § 1505 (1982).

[80] *See, e.g.*, United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977); 551 F.2d 384 (D.C. Cir. 1976); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

[81] Congress has inserted similar requirements in other statutes. *See, e.g.*, Federal Employees' Compensation Act, 5 U.S.C. § 8125 (1982); Sugar Act of 1948, 7 U.S.C. § 1115(e) (omitted 1974); 28 U.S.C. § 2361 (1976) (federal interpleader provision).

immediate need of materials or testimony. Congress has placed such a provision in numerous statutes,[82] including the Ethics in Government Act.[83]

Subsection (c) provides that an action or remedy brought or imposed under this section will not terminate upon sine die adjournment at the end of a Congress if the committee or subcommittee issuing the subpoena certifies to the court that its interest in the subpoenaed information or testimony continues. This subsection forecloses potential problems that might arise because the House of Representatives is not a continuing body.[84]

Subsection (d) ensures that the civil remedies contained in this section are available without precluding other remedies available to Congress to enforce its subpoenas—in particular, its self-help and statutory contempt powers. While enactment of this proposal could not eliminate Congress's traditional remedies, the civil remedy could be employed to resolve these interbranch disputes in the great majority of cases.

Subsection (f) provides that Congress may be represented in an action under this section by counsel of its choice—e.g., the Senate Legal Counsel, the Counsel to the Clerk of the House of Representatives, committee counsel, or appointed counsel. Subsection (g) would permit an action under the section to be brought by any authorized standing, select, joint, or special committee or subcommittee. Subsection (h) would establish that Section 1364a applies to all officers or employees of the federal government—including the President and Vice President.

III. Previous Proposals

Various proposals for federal court jurisdiction over civil actions brought by Congress to enforce subpoenas issued to executive officials have been made in the past.[85] While none became law, they have received serious support and consideration.

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[82] *See, e.g.*, Federal Election Compaign Act, 2 U.S.C. § 437d(b) (1982); Federal Employees' Compensation Act, 5 U.S.C. § 8125 (1982); Sugar Act of 1948, 7 U.S.C. § 1115(e) (omitted 1974); Agricultural Adjustment Act of 1938, 7 U.S.C. § 1366 (1982).

[83] 28 U.S.C. § 1364(c) (Supp. V 1981).

[84] *See* Rules of the House of Representatives, H.R. Doc. No. 416, 93d Cong., 2d Sess., Rules XI, 2(m)(1)(A), Rule XXVI and ¶¶ 386, 388, 710, 901. The Senate, on the other hand, is a continuing body. *See* Riddick's Senate Procedure, S. Doc. No. 21, 93d Cong., 1st Sess., Rules XXV(4), XXII(2).

[85] Several commentators also have proposed a civil mechanism to enforce congressional subpoenas. *See, e.g.*, J. Hamilton, *supra* note 13, at 199; R. Berger, *supra* note 13, at 1334; Dorsen & Shattuck, *supra* note 13, at 33–40; Cox, *supra* note 13, at 1434; Sky, *supra* note 58.

Representative Kenneth B. Keating (R-N.Y.) introduced the first such proposal in 1953.[86] His bill provided for either House, and any committee or subcommittee, upon a majority vote of its members, to "invoke the aid of the United States district courts in requiring the attendance and testimony of witnesses and the production of evidence."[87] Although directed generally at compliance with congressional subpoenas and not specifically targetted to reach members of the executive branch, Keating's proposed bill did not exclude executive officials from its scope. The bill passed the House,[88] but the Senate took no action. Keating reintroduced the bill in the Eighty-fourth, Eighty-sixth, and Eighty-seventh Congresses, but in no case was any action taken.[89]

More recent proposals arose out of the Watergate controversy. In its final report, the Senate Watergate Committee recommended that "Congress enact legislation giving the United States District Court for the District of Columbia jurisdiction to enforce congressional subpoenas issued to members of the executive branch, including the President."[90] Confronted by President Nixon's refusal to comply with its subpoena duces tecum for White House tape recordings of five conversations between President Nixon and his associates, including former counsel John W. Dean, III, the Watergate Committee sued in the District Court for the District of Columbia seeking a declaration that President Nixon's claim of executive privilege was unlawful. Chief Judge John J. Sirica dismissed that action, ruling that no existing statutes gave the federal courts jurisdiction to hear it.[91]

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[86] H.R. 4975, 83d Cong., 1st Sess. (1953).

[87] *Id.*

[88] *See* 100 CONG. REC. 13,338–40 (1954).

[89] *See* H.R. 780, 84th Cong., 1st Sess., 101 CONG. REC. 47, 2934 (1955); S. 1515, 86th Cong., 1st Sess., 105 CONG. REC. 5024–25 (1959); S. 2074, 87th Cong., 1st Sess., 107 CONG. REC. 10,221–22 (1961). Keating's proposed bill, essentially the same in the House and Senate versions, provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) either House, any committee or subcommittee of either House, any joint committee of the two Houses of Congress may, by an affirmative vote of a majority of its actual membership, invoke the aid of the United States district courts in requiring the attendance and testimony of witnesses and the production of evidence, in furtherance of any inquiry such House, committee, subcommittee, or joint committee is authorized to undertake.

Id.

[90] The Final Report of the Senate Select Committee on Presidential Campaign Activities, S. REP. No. 981, 93d Cong., 2d Sess. 1084 (1974).

[91] *See* Senate Select Comm. v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). The Watergate Committee primarily had relied on two statutory bases for jurisdiction, 28 U.S.C. § 1345

In response, Senator Sam J. Ervin, Jr. (D-N.C.) introduced a bill similar to what we propose.[92] Some senators, however, objected because they felt that the bill was too broad.[93] To ensure prompt passage, Ervin offered a compromise that Congress enacted. The substitute statute gave the District of Columbia District Court jurisdiction over suits brought by the Senate Watergate committee to enforce subpoenas issued to executive branch officials.[94]

(1976) ("Except as otherwise provided by an Act of Congress, the District Court shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States."), and 28 U.S.C. § 1331(a) (1976 & Supp. V 1981), the federal question jurisdictional provision, which at the time provided that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . arises under the Constitution, laws or treaties of the United States." Judge Sirica found both provisions inapplicable.

[92] S. 2641, 93d Cong., 1st Sess., 119 CONG. REC. 35,718 (1973).

[93] *See* J. HAMILTON, *supra* note 13, at 206.

[94] Act of Dec. 18, 1973, Pub. L. No. 93-190, 87 Stat. 736 (1973). The debate and a record of the passage of this statute appear at 119 CONG. REC. 36,472–77, 39,220–23 (1973).

The District Court for the District of Columbia, in an opinion by Judge Gesell, found the case justiciable and ruled that the court had authority to hear the suit under the jurisdictional statute enacted by Congress. *See* Senate Select Comm. v. Nixon, 370 F. Supp. 521 (D.D.C. 1974). However, Judge Gesell, in an opinion affirmed on other grounds by the United States Court of Appeals for the District of Columbia Circuit, *see* Senate Select Comm. v. Nixon, 498 F.2d 775 (D.C. Cir. 1974), dismissed the suit on the merits. That holding is discussed and criticized in J. HAMILTON, *supra* note 13, at 182–89.

The proper standard for judicial resolution of such interbranch disputes is beyond the scope of this Article. The subject has received considerable attention, however, and suggested standards can be categorized into three general groups. The first approach is illustrated by the decision in Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). There the court, adopting the standards it had earlier found applicable in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), held that presidential conversations are "presumptively privileged," 498 F.2d at 730, and that the privilege can be overcome "only by a strong showing of need by another institution of government—a showing that the responsibilities of the institution cannot responsibly be fulfilled without access to records of the President's deliberations." *Id.*

A second approach, proposed by former Watergate Special Prosecutor Archibald Cox, is that "the Legislative right should prevail in every case in which either the Senate or House of Representatives votes to override the Executive's objections, provided that the information is relevant to a matter which is under inquiry and within the jurisdiction of the body issuing the subpoena, including its constitutional jurisdiction." Cox, *supra* note 13, at 1434. Under this standard, "the President should have no constitutional right to withhold [information] and the judiciary should not go beyond the voted demand except to decide questions of relevance and jurisdiction." *Id.*

A third approach that has been suggested is "[a] simple balancing of the needs of Congress and the executive—unaffected by the application of any presumption." J. HAMILTON, *supra* note 13, at 192. This approach has also been advocated by the current Solicitor General of the United States, Rex Lee. Lee describes this "nonweighted balancing" as "a genuine balancing approach without any predetermined preference for either side, with the victor to be determined on the basis of a simple preponderance of relevant considerations." Lee, *supra* note 58, at 293.

The appropriate standard arguably might differ depending on the grounds for the assertion of executive privilege, i.e., preserving the confidentiality of presidential con-

That same year Senator Edward M. Kennedy (D-Mass.) introduced a bill that would have given the same District Court jurisdiction "with respect to any claim of executive privilege asserted before either . . . House or any . . . joint committee or committee."[95] The Senate passed that legislation, but the House took no action.

The Ninety-third and Ninety-fourth Congresses considered the Watergate Reorganization and Reform Act, which incorporated many of the Watergate Committee's recommendations.[96] The Senate Government Operations Committee, however, decided to deal with the subpoena power issue separately from the overall Watergate Reform Act. Consequently Senator Edmund S. Muskie (D-Me.) introduced an alternative bill[97] similar to Kennedy's proposal,[98] but no action was taken on it.

IV. ALTERNATIVE PROPOSALS

Congress is now considering two bills designed to avoid the difficulties experienced in attempting to secure the criminal contempt prosecution of EPA Administrator Burford. One bill—introduced by Representative James J. Howard (D-N.J.), Chairman of the House Public Works and Transportation Committee that reported the Burford contempt resolution to the House—

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versations (as in the Nixon cases) as opposed to protecting investigative files (as in the Watt and Burford controversies). *See generally* J. HAMILTON, *supra* note 13, at 189–96.

[95] That bill provided:

> The District Court for the District of Columbia shall have original, exclusive jurisdiction of any civil action brought by either House of Congress, a joint committee of Congress, or any committee of either House of Congress with respect to any claim of executive privilege asserted before either such House or any such joint committee or committee.

S. 2073, 93d Cong., 1st Sess., (1973). *See also* 119 CONG. REC. 21,435, 21,442–43 (1973).

[96] This bill was introduced by Senators Ervin (D-N.C.) and Ribicoff (D-Conn.), respectively. *See* S. 4227, 93d Cong., 2d Sess., 120 CONG. REC. 39,007 (1974); S. 495, 94th Cong., 1st Sess., 121 CONG. REC. 1821, 1826–32 (1975). The bill provided that:

> The District Court for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, over any civil action brought by either House of Congress, any committee of such House, or any joint committee of Congress, to enforce or secure a declaration concerning the validity of any subpoena or order issued by such House or committee, or by any subcommittee of such committee, to any officer, including the President and Vice President, or any employee of the executive branch of the United States Government to secure the production of information, documents, or other materials.

121 CONG. REC. 1831 (1975).

[97] S. 2170, 94th Cong., 1st Sess., 121 CONG. REC. 24,597 (1975).

[98] *See supra* note 95.

would amend Section 194 to specify that presentation of a certified contempt resolution by the U. S. Attorney to the grand jury "is not discretionary", and that the U.S. Attorney must bring the matter before the grand jury within sixty days.[99]

Although this bill might prevent a refusal to present a contempt citation to the grand jury (as happened in the Burford case), it would have little effect on Congress's ability to obtain compliance with its subpoenas. For the reasons discussed in Section I above, the U.S. Attorney still would retain control over all prosecutions for criminal contempt. Moreover, that official could attempt to convince the grand jury that no indictment should issue because of executive privilege. Further, if an indictment was returned, the U.S. Attorney could refuse to sign it, or could sign it and later enter a nolle prosequi, or could frustrate prosecution in other ways.[100]

A second pending House bill, introduced by Representative Barney Frank (D-Mass.), would eliminate the U.S. Attorney's control over criminal contempt actions sought by Congress against executive officials.[101] His bill would amend the Ethics in Government Act to require the Attorney General to apply to the appropriate court for the appointment of a special prosecutor within five days after Congress has certified a criminal contempt action against certain high-level executive officials.[102] This proposal, although more sweeping than the bill introduced by Representative Howard, would not transform criminal contempt proceedings into a suitable means to obtain compliance with congressional subpoenas. The criminal sanction would remain a measure primarily directed not at enforcing compliance, but at punishing an insubordinate witness for past defiance.[103]

Another alternative would be case-by-case enactment of jurisdictional statutes similar to that enacted to allow the Senate Watergate Committee to proceed with its action against President Nixon.[104] The executive branch has favored this approach in the past. Testifying before the Senate Government Operations

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[99] H.R. 3456, 98th Cong., 1st Sess., 129 CONG. REC. 4788 (1983).

[100] *See supra* notes 59–66 and accompanying text.

[101] H.R. 2684, 98th Cong., 1st Sess., 129 CONG. REC. H2313 (daily ed. Apr. 21, 1983).

[102] The proposed bill would only apply to contempt actions initiated against executive officials compensated at or above a rate equivalent to level 5 of the Legislative Schedule under section 5316 of Title V, i.e., officials at roughly the Assistant Secretary level or above. 5 U.S.C. § 5316 (1982).

[103] *See supra* notes 69–70 and accompanying text.

[104] *See supra* note 94 and accompanying text.

Committee on the 1975 Watergate Reform Act, Assistant Attorney General Michael M. Uhlmann argued that, because "a generic and permanent statute" might provide a disincentive for compromise between Congress and the President, the executive branch favored a "very tightly and specifically drawn statute to accommodate that particular situation."[105]

While political resolution of executive privilege disputes is preferrable to judicial intervention,[106] we doubt that enactment of Section 1364a would reduce Congress's motivation to reach a compromise before seeking judicial redress. The legislative and the executive branches both should desire to accommodate their competing interests rather than yield power to a judge who may be unfamiliar with or unsympathetic to either of the opposing concerns. Congress should have a particular interest in compromise because the courts may resolve such disputes after in camera inspection of the disputed materials. In this circumstance, congressional litigants—who would not have seen the materials and would have only limited knowledge of their contents—would be less able than the executive branch to influence the court's determination.

While negotiated resolution between the executive and legislative branches in subpoena disputes may be desirable, compromise can be difficult because these disputes often involve what one court has called the "clash of absolutes."[107] Such disputes, as occurred during Watergate and the recent Watt and Burford controversies, generate considerable controversy. In such a highly-charged climate, Congress will have difficulty enacting a special jurisdictional statute that could survive presidential veto. To rely on such problematical ad hoc remedies would be perilous and unwise.

A fourth choice for Congress is to attempt to bring a civil enforcement action without the aid of a special jurisdictional provision. Jurisdiction for such a suit likely exists now under the general federal question jurisdictional provision.[108] In *Senate Select Committee v. Nixon*, the court dismissed the Senate Wa-

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[105] *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 22–23 (1976) (statement of Michael M. Uhlmann, Ass't Att'y Gen., Office of Legislative Affairs, Justice Dep't); *accord* Lee, *supra* note 58, at 265.

[106] *See generally* Lee, *supra* note 58, at 264; Levi, *Some Aspects of the Separation of Powers*, 76 COLUM. L. REV. 371, 389–90 (1976); Freund, *On Presidential Privilege*, 88 HARV. L. REV. 13, 39 (1974); Comment, United States v. AT&T: *Judicially Supervised Negotiation and Political Questions*, 77 COLUM. L. REV. 466, 483–84 (1977).

[107] United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976).

[108] 28 U.S.C. § 1331 (1976).

tergate Committee's action against President Nixon for lack of subject matter jurisdiction.[109] In so doing, it rejected federal question jurisdiction because the then-applicable $10,000 amount-in-controversy requirement was not met. Congress, however, eliminated the amount-in-controversy requirement for federal question litigation in 1980,[110] thereby removing that barrier to jurisdiction.[111]

There are, however, two fundamental problems with bringing an action using federal question jurisdiction to enforce a congressional subpoena that point to a need for the enactment of a special jurisdictional provision such as this bill. First, the civil docket backlog in the federal courts is often substantial. Subsection (b) would require the district court to expedite consideration of actions brought under Section 1364a.[112] Without such a requirement, the effectiveness of a civil enforcement remedy would be substantially diminished.

Second, enacting a separate jurisdictional provision would counteract judicial reluctance to decide interbranch disputes. The proposed Section 1364a provides the courts with a clear mandate to exercise jurisdiction and to resolve these disputes. Although Section 1364a could have no effect on any constitutional barriers to congressional enforcement actions, courts could not avoid them by relying on prudential considerations.[113]

V. The Justiciability of Actions Under the Proposed Section 1364a

In the past, the executive branch and various commentators have questioned the validity of civil actions to enforce congressional subpoenas directed at executive officials. They have

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[109] 366 F. Supp. 51, 59–61 (D.D.C. 1973).

[110] 28 U.S.C. § 1331 (1976), *as amended* Dec. 1, 1980, Pub. L. No. 96-486, § 52(a), 94 Stat. 2369.

[111] Moreover, even before the amount-in-controversy requirement was eliminated, the court in 1976 in United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976), held that such a subpoena dispute presented claims arising under the Constitution and that subject matter jurisdiction was present under § 1331. The court in *AT&T* found the then applicable amount-in-controversy requirement satisfied, stating that "[w]here fundamental constitutional rights are involved, this court has been willing to find satisfaction of the jurisdictional amount requirement for federal question jurisdiction." *Id.* at 389. The Watergate Committee had urged this position on Judge Sirica, but to no avail. *See* Senate Select Comm. v. Nixon, 366 F. Supp. at 58.

[112] *See supra* notes 82–83 and accompanying text.

[113] In recent years such considerations have played an important role in precluding jurisdiction. *See, e.g.*, United States v. AT&T, 551 F.2d 384, 394–95 (D.C. Cir. 1976); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

raised four kinds of objections: (1) that such an action does not present a "Case or Controversy" cognizable by the federal courts under Article III of the Constitution; (2) that Congress has no standing to bring such an action; (3) that such an action presents a nonjusticiable political question; and (4) that such an action by Congress usurps the executive's law enforcement responsibilities. Judicial decisions during and subsequent to the Watergate era, however, reject these arguments and indicate quite clearly that there are no constitutional or other barriers to an action brought under the proposed Section 1364a.[114]

A. *Article III Case or Controversy*

The threshold requirement for bringing a federal action, the existence of an Article III "Case or Controversy,"[115] imposes no obstacle to such a Section 1364a action. At one time, a suit between Congress and the executive branch might have been deemed non-justiciable; no real case or controversy would have been found present, because the same party—the United States—was both plaintiff and defendant.[116] More recent decisions, however, recognize that "justiciability does not depend on such a surface inquiry,"[117] and courts now commonly entertain such interbranch disputes.[118]

B. *Standing to Sue*

While the Case or Controversy requirement is grounded in the Constitution, standing is a judicially created concept that focuses on a litigant's capacity to sue, limiting the exercise of

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[114] Although not the subject of this Article, it should be noted that any suit brought *against* Congress to challenge a congressional subpoena faces considerable obstacles, in particular the Speech or Debate Clause of Article I, Section 6. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). On the Speech or Debate Clause generally, see Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973).

[115] *See* U.S. CONST., art. III, § 2, cl. 1.

[116] *See, e.g.*, The Gray Jacket, 72 U.S. (5 Wall.) 342, 371 (1886).

[117] United States v. Nixon, 418 U.S. 683, 693 (1974).

[118] *See, e.g., id.* at 697; United States v. ICC, 337 U.S. 426, 430 (1949) ("Courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented"); ICC v. New Jersey, 322 U.S. 503, 523–24 (1944); Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). *See generally*, R. BERGER, *supra* note 13, at 313–20.

jurisdiction.[119] Recent decisions leave little doubt that a house of Congress or authorized committee or subcommittee has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues,"[120] and that as a result standing to bring a Section 1364a action to enforce a subpoena would exist.[121] Moreover, any uncertainty as to standing would be dispelled by Congress's enactment of the section, which itself confers standing.[122]

C. *Political Question Doctrine*

The Supreme Court's decisions in the 1960's in such cases as *Baker v. Carr*[123] and *Powell v. McCormack*,[124] and decisions of the courts of appeals in the 1970's, demonstrate that interbranch executive privilege-congressional subpoena disputes do not present a nonjusticiable "political question."[125] In *Baker v. Carr*, the Court emphasized that because a case is viewed as a "political case" or involves a "political controversy" does not itself indicate that it presents "political questions" beyond the jurisdiction of the federal courts.[126] The Court in *Baker* delineated six factors to determine the existence of a political question,[127]

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[119] *See generally* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961).

[120] The Supreme Court has stated that this is the "gist of the question of standing." Baker v. Carr, 369 U.S. 186, 204 (1962).

[121] *See, e.g.*, United States v. AT&T, 551 F.2d 384, 391 (1976) ("It is clear that the House as a whole has standing to assert its investigatory powers, and can designate a member to act on its behalf.").

[122] Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) ("[T]he question whether the litigant is a 'proper party to request adjudication of a particular issue' . . . is within the power of Congress to determine.").

[123] 369 U.S. 186 (1962).

[124] 395 U.S. 486 (1969).

[125] A finding that the dispute presents a political question would foreclose judicial resolution of the dispute, notwithstanding Congress's enactment of Section 1364a, since Congress is precluded from conferring jurisdiction on federal courts to resolve political questions. *See* Sierra Club v. Morton, 405 U.S. at 737 n.3.

[126] 369 U.S. 186, 217 (1962).

[127] The Court stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

but gave preponderant weight to the "commitment" factor—that is, to the question whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[128] The Court in *Powell v. McCormack* discussed this factor in detail and confirmed that the commitment factor is paramount, stating that the other elements set forth in *Baker* "depend in great measure on a textual commitment resolution of the question."[129]

The few courts that have dealt with an assertion of executive privilege against a congressional subpoena uniformly have found that such disputes are not political questions under the standards set forth in *Baker* and its progeny. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[130] the D.C. Circuit Court of Appeals, relying on its earlier decision in *Nixon v. Sirica*,[131] declined to rule that the dispute between the Senate Watergate Committee and Nixon was a nonjusticiable political question. The court rejected the claim that the President has an absolute, unreviewable executive privilege,[132] a position later upheld by the Supreme Court in *United States v. Nixon*.[133]

The same result was reached in *United States v. AT&T*,[134] where the court stated that:

> The simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution . . . . Indeed, disputes between two branches of the government are inherently different from those to which the political question abstention doctrine has traditionally been applied . . . . Normally, when the court abstains on political question grounds it acquiesces in a "commitment of the issue" to one of the political branches

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potentiality of embarrassment from mutlifarious pronouncements by various departments on one question.

Id.

[128] *Id.*

[129] 395 U.S. 486, 521 n.43 (1969). Many commentators understandably conclude that, after *Powell*, the six categories of political questions set forth in *Baker* in effect have been reduced to one. *See, e.g., Comments on Powell v. McCormick*, 17 U.C.L.A. L. REV. 1, 102 (1969); Sandalow, *id.* at 173.

[130] 498 F.2d 725 (D.C. Cir. 1974).

[131] 487 F.2d 700 (D.C. Cir. 1973). *Nixon v. Sirica* concerned a grand jury subpoena issued to Nixon by Special Prosecutor Archibald Cox.

[132] 498 F.2d at 725.

[133] 418 U.S. 683, 706–07 (1974).

[134] 567 F.2d 121 (D.C. Cir. 1977). AT&T was only nominally a party. The Justice Department brought the action to enjoin AT&T on national security grounds from complying with a congressional subpoena. The court allowed the Chairman of the House subcommittee that issued the subpoena to intervene and recognized that AT&T was a mere stakeholder.

> for resolution of the merits . . . . That branch is recognized as having the constitutional authority to make a decision that settles the dispute. *Where the dispute consists of a clash of authority between two branches, however, judicial abstention does not lead to orderly resolution of the dispute.* No one branch is identified as having final authority in the area of concern.[135]

Finding that there were manageable standards for resolution of the controversy, the court concluded: "In our view, neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title."[136]

In the recent EPA controversy the House of Representatives and the Justice Department recognized that such disputes do not present political questions. Although President Nixon during the Watergate controversy had argued strenuously that the controversy raised such an issue,[137] the Justice Department in the Burford litigation flatly stated that "the political question doctrine does not require the Court to abstain from adjudicating the issues raised by this action."[138]

D. *Improper Exercise of the Executive's Law Enforcement Powers*

A final objection previously raised to Congress's ability to bring a civil action to enforce its subpoenas is that such an action would usurp the executive's constitutionally granted law enforcement responsibilities. This was the Justice Department's primary objection in 1976 to an earlier version of the Ethics in Government Act that included executive officers in its coverage.[139]

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[135] *Id.* at 126 (emphasis added).

[136] *Id.* Even before *Baker* and *Powell*, the Supreme Court had resolved disputes concerning the allocation of power between the branches. *See, e.g.*, Youngstown Sheet & Tool Co. v. Sawyer, 343 U.S. 579 (1952); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926).

[137] Nixon Brief, *supra* note 3, at 10–21.

[138] Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss at 37, United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) [hereinafter cited as Burford Brief].

[139] One of the Act's co-sponsors, Senator James Abourezk (D-S.D.), noted in the floor debate that "[d]uring the subcommittee hearings, the Department [of Justice] argued vigorously that bringing such suits would be unconstitutional in light of *Buckley v. Valeo*, 424 U.S. 1, 138 (1976)." 123 CONG. REC. 2970 (1977).

Article II of the Constitution provides that the President "shall take Care that the Laws be faithfully executed."[140] In *Buckley v. Valeo*,[141] the Supreme Court stated that "a lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfuly executed' Art. II § 3."[142] However, the enforcement power struck down in *Buckley* was that of the Federal Election Commission—four of whose six members were to be appointed by Congress without Presidential involvement—to institute a civil action for injunctive and other relief to enforce the Federal Election Campaign Act.[143] The Court in *Buckley* specifically held "that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the Courts of the United States for vindicating *public rights*, violate Art. II, § 2, cl. 2, of the Constitution."[144] A civil enforcement action under the proposed Section 1364a would not be a suit vindicating "public rights" within *Buckley*'s meaning. Rather, such a suit would serve to protect Congress's own legislative and oversight authority and thus would not constitute an infringement on the executive's Article II law enforcement powers.[145]

VI. Conclusion

Section 1364a should be enacted now. For the first time, the executive branch has recognized and vigorously expounded on the need for a civil mechanism to resolve congressional subpoena-executive privilege disputes. This policy shift is dramatic. Lawyers for President Nixon in 1975 declared that judicial resolution of the Senate Watergate Committee's civil action against

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[140] U.S. Const. art. II, § 3.
[141] 424 U.S. 1 (1976).
[142] *Id.* at 138.
[143] 2 U.S.C. §§ 431–456 (1982); 18 U.S.C. §§ 592–607 (1976 & Supp. V 1981).
[144] 424 U.S. at 140 (emphasis added).
[145] Then Assistant Attorney General, now Solicitor General, Rex E. Lee, reached the same conclusion in testimony before the Senate Subcommittee on Separation of Powers of the Committee on the Judiciary. Lee testified that "Congressional enforcement of its own subpoenas . . . is such a part of the legislative function, particularly after *Eastland*, that there would not be serious constitutional problems." *Representation of Congress and Congressional Interests in Court, 1975: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. of the Judiciary*, 94th Cong., 2d Sess., 4, 61–62 (1975) (statement of Rex E. Lee, Ass't Att'y Gen., Civil Division, Justice Dep't); *see also* Lee, *supra* note 58, at 261.

Nixon "flies in the face of the role of the courts in our Constitutional system of government"[146] because the "invocation of executive privilege . . . is a matter of Presidential judgment alone."[147] But in the EPA controversy, the Justice Department, attempting to obtain a declaratory judgment that Burford's assertion of executive privilege was valid,[148] declared that "[o]nly judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of governmental operations."[149] The Department concluded that "[t]he purely legal issue giving rise to this controversy should be resolved now in a civil lawsuit, as in [*United States v.*] *Nixon*, in order to resolve and thereby render unnecessary further protraction of this constitutional confrontation."[150]

Justice Jackson once stated that "[s]ome arbiter is almost indispensable when power . . . is . . . balanced between different branches, as the legislative and the executive . . . . Each unit cannot be left to judge the limits of its own power."[151] While both Congress and the executive branch should attempt to resolve these interbranch disputes through political compromise, rather than relying on judicial decision, political compromise will not always be obtainable, particularly if Congress has no credible, effective means to obtain compliance with its subpoenas. The proposed civil remedy would not remove Congress's traditional remedies, including its self-help and statutory contempt powers, but in the great majority of cases would provide the appropriate mechanism for resolving these interbranch controversies that are appearing with disquieting frequency.

APPENDIX

Title 28 of the United States Code is amended by adding the following new section:

1364a.—Civil Enforcement of Congressional Subpoenas to Officers and Employees of the Federal Government

(a) The United States District Court for the District of Columbia, without regard to the amount in controversy, shall have original juris-

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[146] *See* Nixon Brief, *supra* note 3, at 10.
[147] *Id.* at 16.
[148] *See supra* notes 54–55 and accompanying text.
[149] Burford Brief, *supra* note 138, at 1–2.
[150] *Id.* at 2.
[151] R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

diction over, and shall hear, any civil action brought by either House of Congress or any authorized committee or subcommittee of such House, or any joint committee of Congress, to enforce or secure a declaratory judgment concerning the validity of any subpoena or order issued by such House, or any such committee or subcommittee, to any officer or employee of the Federal Government, acting within his or her official capacity, to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony of any combination thereof. Either House of Congress, or any authorized committee or subcommittee, may prosecute a civil action under this section in its own name.

(b) The District Court shall assign any civil action brought pursuant to this section for hearing at the earliest practicable date and cause the action in every way to be expedited. Any appeal or petition for review from any order or judgment in such action shall be expedited in the same manner.

(c) An action or remedy brought or imposed pursuant to this section shall not abate upon adjournment sine die by either House at the end of a Congress if the House, committee, or subcommittee which issued the subpoena or order certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment.

(d) The civil actions authorized by this section are in addition to any other remedies available to enforce a subpoena or order of a House of Congress, committee, or subcommittee, including but not limited to the certification of a criminal contempt proceeding under Section 194 of Title 2.

(e) A civil action commenced or prosecuted under this section by a Senate committee or subcommittee may not be authorized pursuant to the Standing Order of the Senate "authorizing suits by Senate Committees" (S. Jour. 572, May 28, 1928).

(f) The House of Congress or authorized committee or subcommittee commencing or prosecuting a civil action under this section may be represented in such action by such attorneys as it may designate.

(g) For the purposes of this section, the term "committee" includes standing, select, or special committees of either House of Congress, or any joint committee of Congress, established by law or resolution, and the term "subcommittee" includes any subcommittee of such committees.

(h) For the purposes of this section, the term "officer or employer of the Federal Government" includes all officers or employees of the Federal Government, including the President and Vice President.

STATUTE

SPEEDING JUSTICE ALONG: MODEL RULES OF SUMMARY CIVIL PROCEDURE

FREDERIC HABER*

The ever-increasing number of civil cases filed each year and the long period of time between the filing of a case and its final resolution has disturbed judges, attorneys, and the public for many years. In this Note, Mr. Haber presents a system of model rules of summary civil procedure which would apply to cases with few and simple issues and small amounts of money at stake. These Model Rules are designed to encourage settlement by giving the client more control of the case than he currently has and by requiring early meetings between the parties, their attorneys, and the judge. In addition, these Model Rules are designed to shorten the period of time that elapses between the institution of suit and its resolution.

There has long been general agreement among participants and observers of the American civil justice system that one of the major problems with the system is the increasing number of cases on court dockets.[1] An obvious consequence is the huge backlog of civil cases afflicting nearly every court.[2] Two to four

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* Associate, Weil, Gotshal & Manges. A.B., Harvard University, 1979; A.M., Harvard College, 1979; J.D., Harvard Law School, 1983.

[1] *See generally Hearings on the State of the Judiciary and Access to Justice Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); DEPARTMENT OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 1–4 (1977); *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976) [hereinafter cited as *Pound Conference*]; Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 30–31 (H. Jones ed. 1965).

The federal district courts reported nearly 169,000 new civil filings in 1979–1980, up more than nine percent over 1978–1979. ADMIN. OFF. OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 1980, 2–3. California's lowest courts of general jurisdiction, the superior courts, reported nearly 533,000 new civil filings in 1980–1981, up three percent over the previous year. JUDICIAL COUNCIL OF CAL., ANNUAL REPORT 1982, 65. In 1975, the New York State Supreme Court (trial court) and the New York City Civil Court together reported 195,000 new civil filings. ADMIN. BD. OF THE JUDICIAL CONF. OF THE STATE OF N.Y., ANNUAL REPORT 1976, 66–67, 82. Based on the 1980 federal census, STATISTICAL ABSTRACT OF THE UNITED STATES 1982–83, 6 table 1, California's figures suggest that there were over 5,000,000 civil cases filed in 1980–1981 in state trial courts of general jurisdiction. Civil filings in California courts of limited jurisdiction alone numbered over one million in 1980–1981. JUDICIAL COUNCIL OF CAL., *supra*, at 97.

[2] In 1979–1980, 8,300 more cases were filed than were terminated in federal district courts, and there were more than 186,000 cases pending, twice as many as in 1969–1970. ADMIN. OFF. OF THE U.S. COURTS, *supra* note 1, at 3. The state court statistics are less clear because they tend only to count those cases actually awaiting trial; many

years commonly pass in some state courts between the time issue is joined in a personal injury case and the time of trial.[3] Years more may pass before a plaintiff receives his damages or a defendant receives his vindication with the time consumed in trial, post-trial motions, and appeal. The inevitable results are delay and high cost, which undermine public opinion of the courts,[4] impose an unnecessary burden on the administration of justice,[5] and raise reasonable questions as to whether the results achieved can fairly be considered "just" and whether access to formal justice is not in effect denied to parties unable to prosecute claims or defenses because of limited time and money.[6]

Yet, state and federal rules of civil procedure commonly describe the purpose of the civil system as being one of "just,

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more cases have been filed but are still before the time of filing of an at-issue memorandum, which often may not come until discovery is completed. In California at the end of fiscal 1980–1981, the superior courts reported more than 122,000 cases awaiting trial (and presumably having completed discovery). JUDICIAL COUNCIL OF CAL., *supra* note 1, at 175.

[3] A nationwide average for delay in personal injury cases of 21.7 months was reported in 1972. In jurisdictions with a population over 750,000, the average was 28.4 months. Even greater delays were found in Boston and Cambridge, Mass. (approximately 40 months); in Manhattan (approximately 50.2 months); and in Chicago (approximately 58 months). INSTITUTE OF JUDICIAL ADMIN., CALENDAR STATUS STUDY — 1972, vi–viii.

[4] One recent survey concluded that only 23% of the public had great faith in state and local courts and only 29% had great faith in the federal courts. More than one-third had little or no faith in state and local courts. These courts ranked 11th out of the 15 institutions included in the poll — below the medical profession, American business, public schools, and the federal executive and legislative branches. "The survey also found that the more knowledgeable and experienced a person, the more likely that he would have an unfavorable opinion of courts." Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 304 (1979) (citing Yankelovich, Skelly & White, Inc., *The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders, in* STATE COURTS: BLUEPRINT FOR THE FUTURE 5 - 69 (T.J. Fetter ed. 1978)); T. CHURCH, A. CARLSON, J. LEE & T. TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 1 (1978) (same) [hereinafter cited as T. CHURCH].

[5] *In 1979–1980, federal district courts had 361 cases pending per judge with nearly 12% of them more than three years old. A. O. U.S. C, supra* note 1, at 58, 83. California metropolitan-area superior courts in 1980–81 had 211 cases pending per judge, down from a high of 257 in 1978–1979. JUDICIAL COUNCIL OF CAL., *supra* note 1, at 88.

[6] *See* 446 U.S. 997, 1000 (Powell, J., dissenting from adoption of amendments to federal discovery rules because they did not go far enough to eliminate abuses); D. BOK, THE PRESIDENT'S REPORT TO HARVARD BOARD OF OVERSEERS, 1981–1982 7 (1983) ("[T]he costs and delays of our system force countless victims to accept inadequate settlements or to give up any attempt to vindicate their legal rights."); Kastenmeier & Remington, *supra* note 4, at 302–03. Representative Kastenmeier was the chairman of the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary. In testimony before the subcommittee, a major Los Angeles law firm noted that it told clients that "it cannot provide quality legal representation in suits involving under $100,000." *Id.* at 303; *see also infra* note 8 and accompanying text.

speedy and inexpensive determination of every action."[7] As one rules revision committee has artfully expressed it:

> The scales of Justice pivot around the Rules of Court. To allow the scales to tip quickly and fairly, the Rules of Court must provide procedures by which disputes can be adjudicated with as little delay and expense as fairness will allow. Rules which are ineffective, time consuming, costly or not understood contribute to Injustice at the expense of the public.[8]

The careful and detailed adjudication that the long period between filing and final judgment sometimes represents may well yield the most "just" determination that participants in a democracy, employing an adversary system of justice, can produce. The process is "just" in the sense of most closely achieving the goals of determining facts, vindicating rights, and placing losses on the party who should bear them. But, given the time-value of money,[9] the extraordinary transaction costs that lawyers and a legal system produce,[10] and the rarely-compensated "damages" of frustration with lengthy processes and fear of huge potential liabilities,[11] the American civil justice system may well

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[7] FED. R. CIV. P. 1. Many states have largely adopted the Federal Rules, including Rule 1. *E.g.*, 1 ALA. PRAC., ALA. R. CIV. P. 1; ARIZ. R. CT., ARIZ. R. CIV. P. 1; MICH. STAT. ANN., GEN. CT. R. 13 (Callaghan 1976); N.D. CENT. CODE, N.D. R. CIV. P. 1 (1974); 9B UTAH CODE ANN., R. 1(a) (1977); VT. R. CIV. P. 1, VT. STAT. ANN. (1971); WIS. STAT. ANN. § 801.01(2) (West 1977). Other states, not relying directly on the Federal Rules, have expressed similar intent. *E.g.*, CAL. CIV. PROC. CODE § 1823 (West Supp. 1983) (authorizing Pilot Project on Economical Litigation); N.Y. CIV. PRAC. LAW § 104 (based on N.Y.'s 1848 Field Code but virtually identical to FED. R. CIV. P. 1); OHIO R. CT. 1(B) ("These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.").

[8] BARRISTER'S SOCIETY OF NEW BRUNSWICK, CIVIL PROCEDURE RULES REVISION COMMITTEE FINAL REPORT 3 (1981). In authorizing its Pilot Project on Economical Litigation, the California Legislature noted that the high cost of litigation "makes it more difficult to enforce smaller claims even though the claim is valid or makes it economically disadvantageous to defend against an invalid claim." CAL. CIV. PROC. CODE § 1823 (West Supp. 1983).

[9] The "time-value of money" is the concept that money today is worth more than money in the future. Money received at some time in the future is worth less than if it is received now because of the effect of inflation, because of the interest or other return that is lost by not being able to invest that money today, and because of the risk, however small, that that money will not be received.

[10] *See, e.g., Hearings on the Dispute Resolution Act (S. 957) Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 71–72 (1978) (statement of Mark Green, President of Congress Watch, noting 1976 survey saying that 62% of public believes most "lawyers charge more than they are worth" and noting that the average practicing lawyer in mid-1970's made more than $40,000 a year). The mean income for families after five years of high inflation was still less than $24,000 in 1980. STATISTICAL ABSTRACT OF THE UNITED STATES 1982–83, 435 (Table No. 718).

[11] One example of how potential liabilities can result in damage — and not only to

be indicted for its failure to achieve "just . . . determinations" through the "speedy [and] inexpensive" resolution of disputes. It is only through such resolution that the system can retain public respect and allow the business of the world to be resumed with the least amount of resources possible expended on litigation.

Courts and others concerned with the process of judicial administration have been grappling with the problem of backlog and delay in the civil system since before the founding of the United States.[12] In 1215, the English barons had sought the promise from King John that "to no one will we . . . delay right or justice."[13] David Dudley Field, reknowned for his efforts at codification and clarification of state laws, wrote as long ago as 1839, in reference to the judicial system of New York: "Speedy justice is a thing unknown; and any justice, without delays most ruinous, is most rare."[14] Though the problem has been decried, commissions appointed,[15] and reforms adopted,[16] the complaints of yesterday can be applied to the courts of today as aptly as they were to the courts of their time.[17]

Today, the literature, both within and without the legal community, tends to focus its criticisms about delay and cost on a

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defendants — is Manville Corp.'s 1982 filing for protection under the bankruptcy laws despite high operating profits and retained earnings. Manville filed for bankruptcy, alleging that potential injury claims by persons exposed to asbestos mined and manufactured by the company totalled more than $2 billion, much more than the company could ever afford. By filing in bankruptcy, Manville protects itself not only against potential claimants, but also against 16,500 current plaintiffs, whose cases are stayed indefinitely. *See* Wall St. J., Aug. 27, 1982, at 1, col. 1.

[12] *See generally* M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 32–58 (1976).

[13] MAGNA CARTA ch. 40 (1215).

[14] Letter from D.D. Field to Gulian C. Verplanck (1840), *quoted in* A. VANDERBILT, THE CHALLENGE OF LAW REFORM 81 (1955) (discussing reform of the New York State judicial system). Vanderbilt goes on to make a comparative note: the New York City Supreme Court in 1846 had a docket that would take 2 1/2 years to clear, if *no* new cases were filed, *id.* at 82, and jury cases in New York City in 1954 would take three to four years from the time issue was joined until trial, *id.* at 81.

[15] At the federal level, the Judicial Conference of the United States, the Federal Judicial Center, and the Department of Justice (through, for example, its Committee on Revision of the Federal Judicial System) research reforms constantly. At the interstate level, the National Center for State Courts, the Council of State Governments, and many committees and sections of the American Bar Association do the same. Each state also appoints committees on a regular basis (A. VANDERBILT, *supra* note 15, at 82, notes that New York had 25 successive commissions and committees during the years 1845–1955), and many states now have permanent judicial councils. Many more public and private bodies and bar associations are also constantly working in this field.

[16] Nearly all the states regularly amend their rules of civil procedure. The Federal Rules, too, have been amended periodically since their implementation in 1938, usually with the purpose of streamlining and simplifying the conduct of litigation.

[17] *See supra* notes 12–14.

few particular areas: the ever-increasing litigiousness of the American population,[18] the abuse of the civil discovery rules,[19] and the tendency of both lawyers and clients to rely on the endless opportunities for procedural wrangling to achieve small victories that may avoid the necessity of reaching a final confrontation and decision.[20] It is not evident what the legal system can do about litigiousness. Some believe that by appointing strict federal judges and by eliminating the availability of free legal service to the indigent civil plaintiff the tide can perhaps be stemmed.[21] This is unlikely, however, to make much of a dent in the problem when the vast majority of civil cases are filed in state court.[22] With regard to discovery, the literature is plentiful in cataloguing the ills of the system and in proposing remedies. For the most part, courts and legislatures have been reasonably diligent in implementing reforms.[23] Nonetheless, the backlog grows, and the time from filing to trial lengthens.

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[18] *See generally, e.g.*, J. AUERBACH, JUSTICE WITHOUT LAW (1983); Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); *Pound Conference*, *supra* note 1. *See also supra* notes 1–2 and accompanying text.

[19] *See* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.02[3] (2d ed. 1983); Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288–92 (1978); *Pound Conference*, *supra* note 1, at 107, 202–04; *How to Break Logjam in Courts: Exclusive Interview with Chief Justice Burger*, U.S. NEWS & WORLD REP., Dec. 19, 1977, at 21.

[20] *See generally, e.g.*, J. MOORE, *supra* note 19, ¶ 26.02[3]; J. AUERBACH, *supra* note 18; D. BOK, *supra* note 6, at 4–11, Barton, *supra* note 18; *Pound Conference*, *supra* note 1, at 107, 202–06.

[21] *See generally* Ehrlich, *Save the Legal Services Corporation*, 67 A.B.A. J. 434 (1981).

[22] *See supra* note 1.

[23] *See* D. SEGAL, SURVEY OF LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS (1978). For more recent commentaries, see the *Symposium on Judicial Administration*, 1981 B.Y.U. L. REV. 443, and, in particular, Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, *id.* at 579, and Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, *id.* at 597. These two pairs of authors were at the time employed respectively by the Office for Improvements in the Administration of Justice of the U.S. Department of Justice and at the Special Committee for the Study of Discovery Abuse of the ABA's Section of Litigation.

The Supreme Court recently has amended several of the federal discovery rules, including FED. R. CIV. P. 26, 28, 30, 32–34, 37, and 45, 446 U.S. 997 (1980), over the dissent of three members of the Court that the changes did not go far enough to alleviate problems in the discovery system. *Id.* at 997–98. The proposed drafts of those rule changes by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States may be found at 77 F.R.D. 613 (1978) and 80 F.R.D. 323 (1979). *See also Notes of the Advisory Committee on Rules to Rule 26(f)*, 28 U.S.C.A. (West Supp. 1983); P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (Fed. Jud. Ctr. 1978); Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873 (suggestions on how to strengthen rule 26(f) even further).

As to procedural overuse, it is not clear what can be done in the case of major business litigation, where clients are well aware of the costs of delay and presumably make cost-benefit judgments regarding the value of extending their cases ad infinitum. For certain cases (often those with smaller monetary claims), however, some courts have implemented proposals to mitigate the crisis of backlogged dockets, pursuant either to statute or to local rule. These proposals generally involve either diversion from court process altogether (save for the formal entering of judgment to make a resolution binding)[24] or imposition of special rules to avoid delay in the prosecution of a civil case from filing to trial.[25]

The purpose of this Note is to propose a model set of rules for the summary conduct of a civil case—probably for simpler cases in terms of issues in dispute and smaller cases in terms of money at stake—in the trial court of general jurisdiction in either a state or the federal system.[26] After a brief discussion in Part I of the major diversion alternatives, Part II discusses the nondiversion alternatives that many courts are attempting to implement, the streamlining of regular civil procedures, and the encouragement of prompt, and hence inexpensive, resolution of disputes within the civil justice system itself. The proposed rules seek to collect and rationalize a variety of the reforms that courts have implemented,[27] to produce a summary civil procedure that will encourage and even require the "speedy and inexpensive" resolution of disputes more effectively than do the current rules. In this way, the demands and expectations of the public for resolution of the more routine cases of civil justice can better be fulfilled.

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[24] *See infra* Part I.

[25] *See infra* Part II.

[26] As we shall see, however, the Model Rules will likely be applied to a limited area of the court's jurisdiction and hence could probably be applied with ease in trial courts of limited jurisdiction. California's Pilot Project on Economical Litigation is applied in the municipal courts (jurisdiction limited to $15,000) as well as in the general jurisdiction superior court. CAL. CIV. PROC. CODE §§ 90–100, 1823.1 (West Supp. 1983). But because the Model Rules are intended primarily for cases likely to require formal procedures, their use in courts of limited jurisdiction might be of small help in addressing the general problems of delay in pretrial litigation procedures.

[27] For a good survey of what courts are doing, based on extensive interviews and questionnaires, see P. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY (Rand 1981).

I. PUSHING CASES OUT OF COURT BEFORE THEY BEGIN: DIVERSION ALTERNATIVES

Chief among the diversion alternatives is judicial arbitration.[28] Although arbitration's roots reach far back in history,[29] judicial arbitration began in Philadelphia only thirty years ago. The express purpose of this arbitration was to transfer cases from the regular civil docket to an alternative forum, where an impartial but nonjudicial officer could make an initial attempt at achieving a resolution.[30] Each case filed involving a sum of money below a set ceiling is required to be sent to an arbitrator for hearing before the court will allow trial.[31] Although the ar-

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[28] Of the eight states that have authorized judicial arbitration, only California refers to it solely by that title, CAL. CIV. PROC. CODE §§ 1141.10–.32 (West 1982 & Supp. 1983). Ohio's Hamilton (Cincinnati) and Stark (Canton) Counties (RULES GOVERNING THE COURTS OF OHIO, Local Rules 24 and 16 respectively) and Pennsylvania, 42 PA. CONS. STAT. ANN. § 7361 (Purdon 1982), refer to it as compulsory arbitration. Ohio's Cuyahoga County (Cleveland) (RULES GOVERNING THE COURTS OF OHIO, Local Rule 29) and Washington State, WASH. REV. CODE ANN. §§ 7.06.010–.910 (Supp. 1982), refer to it as mandatory arbitration. The other states simply refer to it as arbitration. ALASKA STAT. §§ 09.43.190–.220 (1973); ARIZ. REV. STAT. ANN. § 12-133 (1982); NEV. REV. STAT. §§ 38.215–.245 (1979) (motor vehicle damage actions only); 22 N.Y. ADMIN. CODE tit. 22, §§ 28.1–.14. The federal courts that have experimented with similar programs seem to use the term "court-annexed" arbitration. *See* Kastenmeier & Remington, *supra* note 4, at 322. Judicial arbitration, as here discussed, is separate from the authorization that most states have given to private parties to agree to arbitrate any claims between them, thus overruling the common-law aversion to such diversion from the courts. *See, e.g.*, UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1979 & Supp. 1983) (adopted by 25 states).

[29] *See* A. GOLDMAN, PROCESSES FOR CONFLICT RESOLUTION: SELF-HELP, VOTING, NEGOTIATION AND ARBITRATION 153–54 (1972).

[30] For a brief history and assessment of the utility of the Pennsylvania program, as it expanded from Philadelphia, see JUDICIAL COUNCIL OF CAL., A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS 27–36 (1973). An early study had concluded that the Pennsylvania program would not relieve delay and congestion problems in the trial courts of general jurisdiction (though it might help in lower courts). Rosenberg & Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448, 471 (1961). Later studies, however, have concluded that the benefits of arbitration in Pennsylvania have been substantial. E. JOHNSON, V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES 41–43 (1977) [hereinafter cited as E. JOHNSON]; JUDICIAL COUNCIL OF CAL., *supra*, at 34–36; *see also* D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR (Rand 1981) (early assessment: minimally helpful in reducing problems of expense and delay but attractive for other reasons).

[31] ALASKA STAT. § 09.43.190 (1973) ($3,000); ARIZ. REV. STAT. ANN. § 12–133(A) (1982) ($5,000); CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1983) ($15,000; $25,000 in certain large courts); NEV. REV. STAT. § 38.215 (1979) ($3,000); N.Y. ADMIN. CODE tit. 22, § 28.2 ($6,000); RULES GOVERNING THE COURTS OF OHIO, Cuyahoga County Local Rule 29, Hamilton County Local Rule 24, Stark County Local Rule 29, Stark County Local Rule 16 ($10,000-$15,000); 42 PA. CONS. STAT. ANN. § 7361(b) (Purdon 1982) ($10,000; $20,000 in certain large courts); WASH. REV. CODE ANN. § 7.06.020 (Supp. 1982) ($10,000).

bitrator's decision is not binding on the parties,[32] various circumstances, both informal (clients' likely lack of desire to "try" a case twice) and formal (various costs—though none very high—incident to a party's seeking trial de novo before the court), tend to encourage the parties to accept the arbitrator's decision.[33] Different courts have different requirements for the arbitration procedure, and the formality of the arbitration proceedings (e.g., taking of evidence and filing of briefs and motions) varies tremendously with the jurisdiction.[34] Today, at least eight states have judicial arbitration programs,[35] and there is extensive literature canvassing the success of the various programs.[36]

Other diversion alternatives have been developed, usually with the intent of removing a type of litigation, rather than a class of cases determined by the amount at stake, from the courts. These include screening panels, mediation, and simplified procedures for uncontested matters that must be ruled on by a court. Screening panels—a modified form of arbitration—have been used particularly in cases of medical malpractice and are designed to have panels of "experts" (doctors and lawyers) pass on likely liability before a court need burden its docket.[37] States have had widely varying degrees of success with their panels, apparently depending on the exact procedures adopted. Some states' highest courts, however, have found the panel system to burden impermissibly the constitutional rights of free access to a court and to a jury.[38] Mediation has been used by

[32] Federal and state guarantees of due process and right to a jury trial generally require that there be available a trial de novo in court. Because of the availability of trial de novo, the Pennsylvania compulsory arbitration statute, the nation's first, was upheld as constitutional in In re Smith, 381 Pa. 223, 112 A.2d 625, *appeal dismissed*, 350 U.S. 858 (1955). Other states have followed suit when judicial arbitration has been adopted either generally or for specific types of cases. *E.g.*, Attorney General v. Johnson, 282 Md. 168, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978) (medical malpractice). *But see infra* note 38 and accompanying text.

[33] *See* P. EBENER, *supra* note 27, at 55–56.

[34] *See generally* E. JOHNSON, *supra* note 30, at 41–50; P. EBENER, *supra* note 27, at 48–56; JUDICIAL COUNCIL OF CAL., *supra* note 30, at 27–50.

[35] *See supra* note 28; *see also Report of the ABA's Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 178–79 (1976) (recommending compulsory arbitration for the federal courts).

[36] *See, e.g.*, E. JOHNSON, *supra* note 30, at 39–50. See also the selected collections of materials on arbitration in F. SANDER & F. SNYDER, ALTERNATIVE METHODS OF DISPUTE SETTLEMENT: A SELECTED BIBLIOGRAPHY 23–26 (1979), and in *Selected Materials on Dispute Resolution: Mediation-Arbitration*, 37 REC. A.B. CITY N.Y. 166 (1982) [hereinafter cited as *Selected Materials*].

[37] For an explanation and assessment of various states' programs, see Note, *Medical Malpractice Arbitration: A Comparative Analysis*, 62 VA. L. REV. 1285 (1976).

[38] *See, e.g.*, Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736

some jurisdictions in ways similar to arbitration, particularly in cases involving parties who are exceptionally unaccustomed to formal adjudication (such as in small claims courts and in landlord-tenant disputes).[39] In addition, for some matters that require the imprimatur of a court but not its attention, particularly in the areas of uncontested divorce and probate, courts have set up special procedures by which parties first reach a proposed resolution outside the court and then submit that resolution to the court for approval.[40]

II. Pushing Cases Out of Court by Speeding Them to Trial or Settlement: Streamlining Pretrial Procedure

Experience has demonstrated that there is a certain number of cases that must be resolved through regular civil procedure in a court of law. No amount of diversion alternatives will be able to reduce that number. Given the great variety of these cases, however, there is no need for all of them to be left to the complex civil procedure rules that were generally designed to handle both complicated litigation and the more routine cases that dominate every court's docket.[41] This Note proposes a model system of civil procedure rules that—primarily by stream-

(1976); State *ex rel.* Cardinal Glennon Mem. Hosp. v. Gaertner, 583 S.W.2d 107 (Mo. 1979).

[39] Mediation tends to be used in courts of limited jurisdiction. *See, e.g.*, McGinness & Cinquegrana, *Legal Issues Arising in Mediation: The Boston Municipal Court Mediation Program*, 67 Mass. L. Rev. 123 (1982). In the Boston Housing Court, the judges routinely refer cases to mediators known as Housing Specialists (appointed under Mass. Gen. Laws Ann. ch. 185C, § 16 (Supp. 1982)). Mediation will also often take place even *before* a dispute evolves into a case and comes to the courthouse. *See* E. Johnson, *supra* note 30, at 57–76. For selected bibliographies on mediation, see F. Sander & F. Snyder, *supra* note 36, at 21–23, and *Selected Materials*, *supra* note 36.

[40] For example, the Uniform Probate Code, adopted in 14 states, provides for informal probate and succession without judicial administration in art. III, pt. 3, and for independent administration in art. III, pts. 7, 9 & 10. Unif. Probate Code, 8 U.L.A. 287 (1972 & Supp. 1983). The Uniform Marriage and Divorce Act § 305, adopted in 8 states, provides for no-fault divorce. Unif. Marriage and Divorce Act, 9A U.L.A. 91 (1979 & Supp. 1983). For a brief overview of these types of out-of-court settlements, see E. Johnson, *supra* note 30, at 25–38.

[41] *See* 4 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 1013–28 (1969). That the Federal Rules, and by implication, at least those state rules modeled after them, are insufficient in and of themselves to handle the most complex cases is borne out by the publication of the Manual for Complex Litigation (5th ed. 1981), published under the auspices of the Federal Judicial Center. The Manual suggests local rules and procedures for handling complex and multidistrict litigations; these rules add to and modify the Federal Rules in order to make them useful. The Model Rules proposed in this Note may be viewed as an attempt to offer a means to modify the regular rules of civil procedure so as to make them more useful at the opposite end of the complexity spectrum.

lining pretrial procedures—is designed to handle routine cases in a speedier and more efficient manner, without violating procedural or substantive fairness.[42]

A. *Shifting Control Away from Counsel*

As will be evident in the Model Rules themselves and will be discussed in detail below, a fundamental goal of the proposed streamlined procedure is to shift the control of litigation away from counsel to a great extent. Instead of the common system of attorneys setting the pace and deadlines of cases (through negotiation, though often merely for their own convenience),[43] the Model Rules will vest more control in the court.[44] The Model Rules also will encourage the client to assume a more visible and active role in the litigation by requiring the attorney to keep him more closely informed of the progress of his case, by encouraging his direct involvement in pretrial conferences and hearings, and by requiring the written consent of the client on requests for significant continuances. In this way, the client will be likely to gain some power vis-a-vis the attorney in making long-range decisions.[45] The purpose of the Model Rules in this area is to encourage more respect by the attorney for both the client's assumed desire to resolve the case,[46] and for the court's

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[42] In a survey, "pretrial delay was a major problem in court operation cited by those members of the general public most knowledgeable about the judicial system." T. CHURCH, *supra* note 4, at 1.

[43] To some extent, "lawyers (in non-contingency fee cases) can maximize profits by 'keeping busy' and avoiding the costs of 'dead time.' What is important to the self-interest of lawyers is a controlled pace of activity and a relatively predictable flow of new business." Grossman, Kritzer, Busmiller & McDougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86, 88 (1981) [hereinafter cited as Grossman].

[44] This is by no means a novel suggestion. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); King, *Management of Civil Case Flow from Filing to Disposition*, in *Proceedings of Seminar for Newly-Appointed United States District Judges*, 75 F.R.D. 89, 155–56 (1977); Rosenberg, *supra* note 1; Will, Mehige & Rubin, *The Role of the Judge in the Settlement Process*, in *id.* at 203.

[45] "Clients who participate actively in the conduct of their claim get significantly better results than clients who passively delegate decision responsibility to their lawyer." D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 3 (1974) (conclusion of empirical study of personal injury claims).

[46] In a survey, nearly 60% of the general public and of community leaders felt that the efficiency of the courts was a "serious" or "very serious" problem. More than 64% of the general public and more than 72% of community leaders felt that it would be useful to have "tax dollars spent on . . . trying to make the courts handle their cases faster." Grossman, *supra* note 43, at 89–90 (citing LAW ENFORCEMENT ASSISTANCE ADMIN., THE PUBLIC IMAGE OF COURTS: GENERAL PUBLIC DATA AND SPECIAL PUBLIC DATA (1977)).

mandated goal of administering "speedy and inexpensive" justice to all litigants.

Along these lines, a fundamental assumption of the Model Rules is that encouraging settlement or, if necessary, trial of disputes at the earliest practicable moment, will help greatly to reduce courts' backlog.[47] The Model Rules also assume that efficiency will best be served if the legal rules (particularly of substance and evidence) are left relatively untouched in favor of modification of more administrative rules. In this way, neither lawyers nor judges will be faced with the prospect of new law to apply. Instead, the same law will simply be applied sooner.

Both scholars[48] and practitioners[49] seem to agree that closer court management of litigation tends to speed resolution. Although it is outside the scope of this Note, the criminal justice system provides a useful model for this proposition. Bound by the statutory requirement of speedy trials, criminal courts tend to monitor progress of cases more closely, often by computer, to set firm trial dates soon after filing of the indictment, and to proceed to trial as soon as possible.[50] In the criminal system, the court (often in conjunction with a public prosecutor who also has duties under speedy trial laws) controls the litigation. The result frequently is shorter pretrial delay and less docket backlog. [51]

In particular, the early setting of firm trial dates, while strictly limiting continuances, should go far to bring prompt resolution, either in negotiated settlements or after plenary trial. The Model Rules adopt the long-standing belief of the judiciary that "nothing settles cases like setting them for trial."[52] Model Rule 11

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[47] Although figures on settlement are not directly available, it can be estimated that, for example, while 734,967 new civil cases were filed in California superior courts in 1980–1981, *supra* note 1, and 122,000 cases were ready for trial, *supra* note 2, 190,000 other cases were disposed of before trial, JUDICIAL COUNCIL OF CAL., note 1, at 148–65, presumably mostly by settlement. In the federal district courts in 1979–1980, only 6.5% of all civil cases were reaching trial. ADMIN. OFF. OF THE U.S. COURTS, *supra* note 2, at 80.

[48] *See, e.g.*, T. CHURCH, *supra* note 4, at 66; S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS, (1977).

[49] *See* T. CHURCH, *supra* note 4, at 39–42; Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465 (1976); Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400, 402–06 (1977) (insisting, *inter alia*, that extensive court involvement in pretrial procedure is no threat to fairness); *see also supra* note 44.

[50] T. CHURCH, *supra* note 4, at 42–46.

[51] *Id.*

[52] JUDICIAL CONFERENCE OF THE UNITED STATES, HANDBOOK FOR EFFECTIVE PRETRIAL PROCEDURE 271 (1964), *quoted in* P. EBENER, *supra* note 27, at 75. Interviewed lawyers seem to agree. *See* T. CHURCH, *supra* note 4, at 68–69.

requires the setting of a firm trial date at the first meeting of the parties with the judge and makes it difficult to change the date thereafter. Necessarily, a court's continuance policy must be very strict to preclude counsel's opportunity for undue delay.[53] Reducing or eliminating this common source of attorney control of litigation is thus explicit in the Model Rules, and it is here that the idea of encouraging client governance appears: nontrivial delays require client as well as court approval.[54]

Alternative methods exist and have been proposed that serve the notion of increasing court control over the conduct of civil litigation. For the most part, these methods are applied within the courthouse rather than between court and counsel. Some are easily imposed, such as requiring that a single person, either judge or clerk, approve all continuances; his duty is to be uniformly strict among all parties and lawyers and to set clear standards for the granting of continuances.[55] Other methods would require changing how the jurisdiction handles its scheduling function. Significantly, courts using a judge-by-judge calendar system tend to process cases faster than courts using master or whole-court calendars.[56] When a judge knows which cases are "his," he seems to feel more responsibility for processing them quickly.[57] Any of these methods for rearranging resources within the courthouse may well help streamline the civil process. The Model Rules, however, may be implemented independently and probably would increase the benefits derived from any of them.

B. *The Model Rules' Strict Time Parameters*

These are Model Rules of "Summary" Civil Procedure. *Black's Law Dictionary* defines "summary proceeding" as any "proceeding by which a controversy is settled [or] case disposed of . . . in a prompt and simple manner, . . . out of the regular course . . . . In procedure, proceedings are said to be summary when they are short and simple in comparison with regular

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[53] *See* T. CHURCH, *supra* note 4, at 66–70.

[54] *See* Model Rule 11(c).

[55] At least three states and 14 metropolitan courts have central scheduling offices for all pretrial procedure and at least one court uses that office to control continuances. P. EBENER, *supra* note 27, at 23–24, 108–09.

[56] *See* T. CHURCH, *supra* note 4, at 36–39, 72–75.

[57] *See id.*

proceedings."[58] Commentaries supplement each of the Model Rules, explaining the significance of the Rule and how it furthers the system's goal to eliminate pretrial delay and thereby to reduce cost. The Commentaries also elaborate how each Rule interacts with the others. Briefly, Model Rule 12 sets a six-month deadline on the parties before a relatively near trial date is set at a pretrial conference. Under Model Rule 10, if the pretrial conference comes earlier, so will the trial date. And Model Rule 11 makes the trial date fairly rigid,[59] continuances being difficult to procure. Model Rule 6 cuts off general discovery two weeks before the initial trial date, no matter what continuances are obtained. Finally, Model Rule 8 requires predisclosure of all witnesses and evidence to be offered at trial if an adverse party, as would be expected, so requests.

The Model Rules are intended to offer a solution for the perceived problem of pretrial delay that effectively denies access to the civil justice system to those parties unwilling to suffer the expenditure of time and money.[60] In a society that has become accustomed to the routine referral of disputes to courts,[61] such an effective denial is unjust indeed. Inevitably, during the time of transition to a system like that of the Model Rules, courts and counsel can be expected to creak and groan, adjusting themselves to the accelerated schedule that the Model Rules require.[62] When fully implemented, however, a system like that of the Model Rules should be able to process cases quickly, with no change in the applicable substantive law. The pressure created by rapid deadlines also will be a strong stimulus to settlement. Under a system such as the Model Rules, parties may again view the courts as a viable alternative for those disputes involving smaller money claims or simpler legal issues.

Possibly the strongest commitment to reduced cost and delay or to rapid settlement that adoption of the Model Rules indicates on the part of a jurisdiction may be found in Model Rule 13. This Quick Ruling provision permits any party to initiate an

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[58] BLACK'S LAW DICTIONARY 1084 (5th ed. 1979).

[59] *See supra* note 52 and accompanying text ("'nothing settles cases like setting them for trial'").

[60] *See supra* note 6 and accompanying text.

[61] *See supra* notes 1, 18–22 and accompanying text.

[62] And maybe not adjusting themselves without misgivings. *See generally* T. CHURCH, *supra* note 4, at 55–58 ("As one attorney put it, 'Crash programs seem to come and go every seven or eight years — like the locusts.'"); Grossman, *supra* note 43, at 90–94 (discussing perspectives of lawyers and judges).

early pretrial procedure, somewhat similar to arbitration or mediation within the court, that can end a case or greatly narrow the disputed facts and issues within weeks after suit is filed. The parties can then leave court with a judgment or with the foundation of a settlement, without the lengthy proceedings of discovery, pretrial procedure, trial preparation, and trial, and thus provide a great saving of time and money to both the parties and the court.

C. *Two Potential Problems in Applying the Rules*

At least two problems, however, are beyond the scope of what the Model Rules can hope to resolve: what to do about the limitations imposed on speedier resolution of cases by the "local legal culture,"[63] and how to determine what classes of cases should be governed by the Model Rules. The literature describing the extent of pretrial delay frequently canvasses both the procedural proposals available and the structural changes necessary to eliminate backlog and then offers the "black box" of "local legal culture" to account for why similar courts in different jurisdictions can have vastly different backlogs.[64] The Model Rules, by shifting control away from the lawyers and toward the courts, and by accelerating procedures and—presumably, in time—clients' expectations, may have some influence on changing the dominant legal culture. Unfortunately, however, if judges feel a responsibility not to "upset the applecart" among their friends and former associates in the bar by pushing them along in the pretrial process and toward faster resolution of cases, then no amount of rule modification will help.

A jurisdiction adopting these Model Rules must necessarily make a choice as to what cases will be governed by them. The two main alternatives are (1) to set a ceiling amount of recovery and to reach all cases below that amount (the value of a given case to be determined by the initial pleading),[65] or (2) to assign

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[63] The term was apparently first used in T. CHURCH, *supra* note 4, at 54. "Local legal culture" is defined as the web of "established expectations, practices, and informal rules of behavior of judges and attorneys." *Id.*

[64] *See, e.g., id.* at 54–58; *see also* P. EBENER, *supra* note 27, at 10; H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT (1959).

[65] The value of counterclaims should not make a difference although the Model Rules allow for withdrawal to the regular rules of civil procedure at the court's discretion. Model Rule 4(c). Should the plaintiff substantially overstate the value of the case, the

all cases of a certain legal description (*e.g.*, personal injury, two-party contract) to be governed by the Model Rules (probably still below a money ceiling).[66] General examples of classification similar to each of the above alternatives are readily available in jurisdictions requiring, respectively, (1) judicial arbitration[67] or (2) a separate housing court[68] or medical malpractice screening.[69] The only two states that have adopted any integrated procedure akin to the Model Rules have each chosen one of the two alternatives: (1) California's Pilot Project on Economical Litigation ($25,000 ceiling in superior court)[70] and (2) New York's Simplified Procedure for Court Determination of Disputes (primarily, though not exclusively, designed for commercial contract disputes).[71]

Both alternatives have advantages and disadvantages that should be weighed before a court adopts rules such as those proposed here. The primary advantage to a money-ceiling sys-

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defendant may so state in his answer and place the case under the Model Rules. At that point, the Model Rules will apply unless the judge orders otherwise after a pretrial conference.

[66] A possible third alternative is to allow the parties the choice of when to be governed by the Model Rules. This is akin to the common use of arbitration by businesses to avoid recourse to the courts altogether. To some extent, New York's statutory Simplified Procedure for Court Determination of Disputes, N.Y. CIV. PRAC. LAW §§ 3031–3037, discussed in the text below and designed primarily for business litigation, exemplifies this third alternative. This New York procedure has, however, encountered a good deal of resistance from the legal community and from the business community it represents; it has made few inroads on the dominance of arbitration as the method by which businesses resolve their differences outside of formal court proceedings. *See* D. SIEGEL, PRACTICE COMMENTARY §§ C3031:1, :4, in *id.* at 594–95, 598–600. We thus assume that it is unlikely, if the parties can agree at all on a speedy resolution of a routine business dispute, that they would choose the Model Rules over the more common route of arbitration. But, as discussed in the Commentary to Model Rule 13, *infra*, the Model Rules may enable parties not in a regular business relationship to gain some of the advantages that businesses get from contractual arbitration clauses, in the Quick Ruling procedure.

[67] *See supra* notes 28–36 and accompanying text.

[68] For example, Massachusetts has created housing courts for its two biggest communities, Boston and Hampden County (Springfield), with concurrent jurisdiction with the regular trial courts over any case relating to housing problems. MASS. GEN. LAWS ANN. ch. 185C (West Supp. 1982). The problem is in defining such topical jurisdiction, at common law and in equity, over "all housing problems, including all contract and tort actions which affect the health, safety and welfare of the occupants or owners thereof." *Id.* § 3. An artful attorney should be able to stretch that definition to an extraordinary coverage of issues.

[69] *See supra* notes 37–38 and accompanying text.

[70] CAL. CIV. PROC. CODE §§ 1823–1833.2 (West Supp. 1983). The project is being conducted in the Fresno and Los Angeles (Torrance branch) superior courts. CAL. R. CT. 1811(a). As of July 1, 1983, the project also applies in *all* municipal courts, where jurisdiction is limited to $15,000. CAL. CIV. PROC. CODE §§ 90–100 (West Supp. 1983). For a general discussion of the project, see Note, *California's Pilot Project in Economical Litigation*, 53 S. CAL. L. REV. 1497 (1980).

[71] N.Y. CIV. PRAC. LAW §§ 3031–37; *see also supra* note 66.

tem is the familiarity with this method of determining jurisdiction. Indeed, many states determine the cases destined for their courts of limited jurisdiction[72] or for judicial arbitration[73] in this way. The common disadvantage, that parties might assert weak or unfounded claims or counterclaims to defeat limited jurisdiction, has already been faced by these courts, and they have presumably already developed methods for handling the problem.

The principal advantage to issue-type jurisdiction lies in the courts' ability to develop a uniform common law between large and small cases, thus avoiding the gamesmanship of alleging large damages to defeat a money threshold. Unfortunately, a similar gamesmanship may develop: parties may add different claims or counterclaims, thereby complicating a case so that a court will remove it from a streamlined system like that of the Model Rules. Balancing these considerations, the Model Rules adopt the alternative of a money ceiling, expecting that courts will apply their experience in determining when in fact a case does not reach the jurisdictional maximum. Should a jurisdiction prefer the second alternative of type classification, the Model Rules may be easily modified.

III. SUMMARY

The system of Model Rules of Summary Civil Procedure that follows consists of fourteen rules designed to alter the pretrial procedures which help to produce delay and high cost in civil justice for suits involving smaller amounts of money or simpler legal issues. As noted in Model Rule 3, the system is designed to be used as a supplement to and not as a substitute for the regular rules of civil procedure. It is offered in the hope that, by collecting and offering as an integrated package a variety of rules adopted by various jurisdictions, other courts and lawyers may be stimulated to attempt to streamline pretrial procedures in their own jurisdictions and thereby to offer persons with these simpler claims effective access to civil justice.

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[72] *See, e.g.*, CAL. CIV. PROC. CODE § 86 (West Supp. 1983) (municipal courts, $15,000); MASS. GEN. LAWS ANN. ch. 218, § 21 (district courts in small claims, $1200); N.Y. CONST. art. 6, § 11 (a) (county courts, $6,000); *id.* § 15(b) (New York City Civil Court, $10,000).

[73] *See supra* note 31.

MODEL RULES OF SUMMARY CIVIL PROCEDURE

Rule 1. AUTHORITY; CITATION.

(a) These Rules of Summary Civil Procedure are adopted pursuant to the authority granted to the Supreme Court [or other court with rule-making power] by [insert constitutional provision] to adopt rules for civil practice and procedure.

(b) These rules may be cited as the [State] Rules of Summary Civil Procedure.

COMMENTARY: This Rule is merely a formality. Most states provide that the state supreme court may adopt whatever rules are necessary for administration of the court system.[74] The significant element of the authorization is contained in Model Rule 2, concerning the objective of these Rules and the construction to be given them.

Rule 2. OBJECTIVE; CONSTRUCTION OF RULES.

(a) The objective of these Rules is to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law. The [name of trial court] shall seek to achieve this objective in a speedy and economical fashion by applying the system of accelerated procedures embodied in these Rules to the cases subject to them.

(b) In order best to achieve the objective of these Rules, they shall be given a liberal construction.

(c) As used in these Rules, unless otherwise expressly provided:

(1) any act to be performed by the court or judge may be performed by a duly-appointed master or magistrate except where prohibited by law;

(2) "shall" is mandatory, and "may" is permissive;

(3) the past, present and future tenses each includes the others;

(4) the masculine, feminine and neuter genders each includes the others; and

(5) the singular and plural numbers each includes the other.

COMMENTARY: The purpose of the Rules is not to change substantive law but merely to have that law applied sooner. The formality of subsection (a) is derived from the Texas Rules of

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[74] *See, e.g.*, ALASKA CONST. art. IV, § 15; CAL. CONST. art. VI, § 6; FLA. CONST. art. 5, § 2(a); LA. CONST. art. 5, § 5(A); MO. CONST. art. 5, § 5; VT. CONST. ch. II, § 37.

Court[75] and is meant to assure both the parties and the court that these Rules are not designed to provide or encourage low-quality justice. Subsection (b) emulates the rules of many states,[76] encouraging judges to look to the spirit behind the Rules as well as to their letter. Both (a) and (b) are included in the Rules themselves in order to enshrine the purpose behind them in the text and not merely in the commentary. Parties, particularly those outside the legal profession, can thus be put on notice that the jurisdiction is specifically guided by the desirable purposes of speed and economy.

Subsection (c)(1) is intended to compensate for the increased workload that the court will have as a result of taking greater control of the course of litigation.[77] Motion practice, the Quick Ruling procedure under Model Rule 13, and the pretrial conferences under Model Rule 10 might all be conducted by court personnel other than the trial judge, wherever the law allows.[78] The fear of extensive appeals from a nonjudge's rulings[79] may hinder such a rule, but only experience (both the courts' and the attorneys', particularly if the judges on appeal begin routinely to uphold the nonjudge's rulings) will determine whether such a fear is well-founded.

Rule 3. APPLICABILITY OF GENERAL RULES.

Except where changed by these Rules, all provisions of law and all rules applicable to civil actions generally shall apply to actions subject to these Rules of Summary Civil Procedure.

COMMENTARY: These Rules are intended only to change certain procedures which tend to slow down simpler cases.[80] No substantive or evidentiary law is meant to be altered, and many procedures that do not generally slow the progress of cases, such as requirements of service and forms of papers, are meant to be retained.[81]

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[75] TEX. R. CIV. P. 1.

[76] *See, e.g.*, N.M. R. P. MUN. CTS. 1, N.M. R.P. METRO. CTS. 1, N.M. R. CIV. P. (Magis. Cts.) 1; TEX. R. CIV. P. 3 . This is also the reasonable inference from FED. R. CIV. P. 1 and the state rules that duplicate it, *see supra* note 7.

[77] *See supra* notes 43–49 and accompanying text.

[78] FED. R. CIV. P. 53 (adopted in many states) already grants masters, defined broadly therein, extensive judicial power but makes reference to masters "the exception and not the rule." The constitutionality of making Model Rule 2(c)(1) the rule and not the exception, at least in cases under the Model Rules, is beyond the scope of this paper, but New Hampshire and other states appear to have approved the concept. *See* N.H. CT. R. ANN., SUPER. CT. R. 81–85; P. EBENER, *supra* note 27, at 34.

[79] *See* P. EBENER, *supra* note 27, at 34–35.

[80] *See supra* text accompanying note 47.

[81] The source of this Rule is CAL. R. CT. 1703, 1803.

It is important that it not appear, by the application of these Rules, that the law discriminates between large and small claims. Accelerating pretrial procedure, as the Model Rules do, should not affect the parties' legal rights. For example, the right to discovery is not significantly reduced and, if necessary, may be the basis for a motion to withdraw a case from the application of these Rules.[82] Acceleration should do no more than vindicate parties' legal rights much sooner and more inexpensively than would otherwise be the case.[83] In those circumstances where acceleration would not serve the cause of justice, the Model Rules shall not apply.[84]

Rule 4. APPLICABILITY OF THESE RULES; WITHDRAWAL FOR CAUSE.

(a) Except as otherwise provided in this Rule, these Rules shall apply to every civil action filed in the [name of trial court] in which the amount in controversy does not exceed [amount]. These Rules also shall apply to any civil action transferred to the [name of trial court] by reason of improper venue or lack of jurisdiction in the court in which the complaint was filed, if the action would have been subject to these Rules if originally filed in the [name of trial court].

(b) These Rules do not apply to [list exceptions].

(c) An action may be withdrawn from the application of these Rules only by order of the court for good cause, either upon motion by any party on not less than five days written notice or upon the court's own motion. The motion shall be heard and determined not less than sixty days before the initial trial date. No limited or partial withdrawal shall be permitted. Motions to withdraw are disfavored.

COMMENTARY: This Rule is drawn from the California Pilot Project for Economical Litigation, apparently the only attempt to fashion rules similar to those proposed here. Generally, all money-damage cases below the jurisdictional ceiling are intended to be reached. The exceptions to be permitted in subsection (b) are special proceedings such as probate, civil commitment, and extraordinary writs.[85]

No specific money ceiling is designated in the Rule because jurisdictions may have different requirements for determining at what point application of these Rules will become efficient. In discussing judicial arbitration, it was noted that jurisdictions tend to have fairly low ceilings in determining which cases to

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[82] *See* Model Rule 4(c) and accompanying Commentary.
[83] *See supra* notes 4–6 and accompanying text.
[84] *See* Model Rule 4(c).
[85] CAL. CIV. PROC. CODE §§ 1823–1833.2 (West Supp. 1983); CAL. R. CT. 1711, 1811.

refer to arbitrators before trial.[86] Where, as here, there is no question about denying access to the court in applying the alternative procedures of the Model Rules,[87] a higher ceiling would probably be advisable in order better to achieve the goal of reducing delay and backlog. A higher ceiling would also minimize the likelihood of a party's adding weak or unfounded claims to overcome application of these Rules[88] and would encourage a broader range of settlement offers.[89]

The motion to withdraw is disfavored but necessary in order to allow parties to attempt to convince the court to exclude cases that are too complex or that may require discovery beyond the limits permitted by these Rules.[90] The express statement of disfavor is again intended to put all parties and the court on notice that the intention of the jurisdiction is to make these Rules almost always applicable.[91]

Rule 5. PLEADINGS.

(a) The only pleadings permitted shall be complaints, cross-complaints, answers to complaints or cross-complaints, and replies to counterclaims.

(b) A complaint initiating an action shall include as its first allegation a jurisdictional statement setting forth the amount in controversy.

(c) Any answer to a complaint or a cross-complaint may respond to the jurisdictional statement in the complaint by alleging that the amount in controversy, if any, but not including counterclaims or cross-

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[86] *See supra* note 31.

[87] *See supra* notes 37–38 and accompanying text.

[88] *See supra* part II.C.

[89] Neither party — particularly not the plaintiff — should properly feel inhibited by a ceiling on jurisdiction. If these Rules achieve their purpose and speed resolution of cases, a plaintiff might be inclined to undervalue his claim in order to get quick results under the Model Rules rather than state its true value and be consigned to waiting longer to collect his damages. The lower the ceiling the greater the number of cases that will come close to reaching it. If a defendant expects to be held liable at a figure near but above the ceiling, he will inevitably seek to pressure a plaintiff to take a settlement below the ceiling or to suffer the delay of regular procedures for cases above it. With a higher ceiling, the parties will be able to negotiate settlements in more cases without the added issue of one side manipulating an element of jurisdiction that might affect when resolution will otherwise take place. *Cf.* E. JOHNSON, *supra* note 30, at 47 (discussing jurisdictional ceilings on judicial arbitration and the likelihood of appeal to the court for trial de novo). The California Pilot Project for Economical Litigation set a ceiling of $25,000 for the superior courts. CAL. CIV. PROC. CODE § 1823.3 (West Supp. 1983). A temporary rule of the New Hampshire Supreme Court, apparently since withdrawn, set the ceiling for judicial arbitration at $50,000. *See* P. EBENER, *supra* note 27, at 53.

[90] *See* Note, *supra* note 70, at 1508 nn.95–96 (discussing empirical findings and Advisory Committee Comments to the Pilot Project rules).

[91] *See supra* Commentary to Model Rule 2.

claims, does not exceed [amount]. If an answer makes such an allegation, these Rules shall be deemed to apply unless the court, after a pretrial conference, orders otherwise. Unless an answer makes such an allegation, application of these Rules shall be determined by the jurisdictional statement.

(d) A responsive pleading shall admit or deny each allegation in the adverse pleading other than the jurisdictional statement and shall set forth any new matter constituting a defense. A responsive pleading shall include compulsory counterclaims and may include permissive counterclaims.

(e) A responsive pleading must be filed and served within fourteeen days of service of the pleading to which it responds or within seven days of notice of determination by the court of a motion concerning pleadings, jurisdiction, or a Quick Ruling under Rule 13.

(f) No pleading need be verified.

COMMENTARY: The intention of the Model Rules is to simplify the pleading stage as much as possible. Except as changed by the Model Rules, the regular civil rules apply. Thus, rules such as those that require particularized pleading of fraud or hold that allegations deemed admitted if not denied remain in full force. Also, it is expected that, in those jurisdictions where notice pleading is the norm, compliance with the requirement of a "short and plain statement"[92] of all allegations will be strongly encouraged by the court. The normal liberal procedure for amending pleadings is retained as well.[93]

To stretch application of the Model Rules to as many cases as possible, this Rule provides that a plaintiff's allegation of the amount in controversy, if below the jurisdictional ceiling, will control. If it is above the ceiling, any defendant may allege that it is below and call the Model Rules into play unless the court orders otherwise after a pretrial conference.[94] This will encourage the parties either to submit a case near or below the ceiling to the accelerated procedures of the Model Rules when any one party so desires or be forced to argue the amount in controversy to the judge. At the very least, this will encourage parties to a

[92] *See, e.g.*, FED. R. CIV. P. 8(a) (adopted in many states).

[93] *See, e.g.*, FED. R. CIV. P. 15(a) (adopted in many states).

[94] Allowing either party to call these accelerated procedures into play in order to allow as generous an application of them as possible has been endorsed before by others, such as the Vice Chancellor of England. *See* RT. HON. SIR R. MEGARRY, A FREE FANTASIA OF A VISITING ENGLISHMAN ON THE THEME OF THE COST OF JUSTICE 152–53 (1980), *quoted in* BARRISTER'S SOCIETY OF NEW BRUNSWICK, *supra* note 8, at 25–26. *Cf.* CAL. R. CT. 1817 (jurisdictional statement controls regardless of defendant's answer).

suit which is not clearly outside the jurisdiction of the Model Rules (*i.e.*, where there is no doubt that a court will order the case out of the Model Rules) to have an early opportunity to talk face-to-face in front of the judge. A meeting between the parties this early in the litigation may facilitate settlement.

Rule 6. DISCOVERY.

(a) Except as otherwise provided in this Rule, discovery is permitted.

(b) Interrogatories are not permitted, except by leave of the court.

(c) Depositions may be taken only of:

(1) a party;

(2) any other person on stipulation of all the parties; and

(3) on notice to all parties and by order of the court, any other person whom the court finds will more probably than not be unavailable at trial.

(d) Discovery may be conducted any time after fourteen days before the initial trial date only by leave of the court.

COMMENTARY: Discovery is limited by the prohibition against interrogatories. The information ordinarily obtained through the use of interrogatories may be collected in depositions or by subpoenas for documents. In this way, the practice of preparing lengthy sets of interrogatories, followed by objections and motions to compel, followed by lengthy answers, will be omitted. The limitations on who may be deposed are intended simply to narrow the universe in which deponents are sought to those persons most directly related to the suit. In either case, a party may convince the court or the other side to overrule the limitations by granting leave to serve interrogatories or by stipulating to another deposition.

Under subsection (d), the cutoff date for discovery is automatically set at the time of the first pretrial conference when an initial trial date is required to be set. Because discovery ends on a date determined according to the initial trial date, even if trial is postponed, litigants will not be able to wait until the last minute to conduct discovery and then seek continuances.[95] The requirement of Model Rule 8 that all witnesses and evidence to be offered at trial be disclosed in the pretrial statement gives an even earlier spur to the parties to complete discovery promptly.

[95] *See, e.g.*, MICH. CT. R., GEN. CT. R. 503.1 (expressing this policy explicitly: "to encourage the diligent preparation and trial of cases").

Because of the great amount of literature and continuing research on the reform of discovery,[96] and because its contribution to delay and expense in cases such as those to be governed by the Model Rules is still unclear,[97] the Model Rules necessarily leave reforms to the general rules which cover all cases, including these, by virtue of Model Rule 3.

Rule 7. COSTS AND SANCTIONS.

In the event either that a party makes a motion for an order to compel discovery or that a court imposes costs or sanctions for any unjustified violation of any rules of the court, the court shall state on the record the apportionment of responsibility between the party in question and his counsel for the failure to comply and shall apportion any costs or penalties imposed accordingly. If the unjustified violation or failure to comply is attributable substantially to an attorney, the court shall order the attorney or his firm to pay the compensation and shall prohibit the attorney or his firm from directly or indirectly charging the cost of the payment to any client or clients.

COMMENTARY: The purpose of this Rule is self-evident.[98] Although authorization usually exists for the imposition of costs on attorneys in appropriate circumstances,[99] this Rule is meant both to encourage courts to penalize counsel when delay is clearly attributable to them and to put counsel on notice that the objective of these Rules, to reduce cost and delay, will be sought with resolute determination by the court. The Rule thus furthers the overall concept of drawing more control over the pace of litigation away from the attorney and lodging it in the court and the client.[100] The court is encouraged to sanction counsel when necessary and the client is assured that truly unnecessary costs incurred by his attorney will not simply show up in the bill.

A refusal to answer discovery will not always be agreed upon between client and counsel; therefore, the words "unjustified" and "substantially" are used to assure the attorney that he will not automatically suffer the imposition of costs in every instance. No numerical guide is given as to the meaning of "sub-

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[96] *See supra* note 23.

[97] For a brief summary of empirical data and its inconclusiveness, see Grossman, *supra* note 43, at 107–12.

[98] This rule is drawn for the most part from a suggested amendment to the Federal Rules' sanctions provisions laid out in Brazil, *supra* note 23, at 955.

[99] *See, e.g.*, FED. R. CIV. P. 37(a)(4) (adopted in many states); CAL. CIV. PROC. CODE § 2034(b)(2)(D) (West Supp. 1983).

[100] *See supra* notes 43–46 and accompanying text.

stantially," but it is not expected that it should be taken merely to mean "more than 50%." The court presumably will exercise its discretion in accord with both the objective of the Rules and the ordinary role and responsibilities of the attorney to "represent a client zealously."[101]

Rule 8. PRETRIAL STATEMENTS.

(a) At any time between thirty and sixty days prior to the initial date set for trial, any party may serve on any adverse party a request for a pretrial statement. The pretrial statement shall be served within fourteen days of the request.

(b) A party's pretrial statement shall contain:

(1) a list of facts and issues that the party believes not to be in dispute;

(2) a detailed list of facts and issues that the party contends are in dispute;

(3) the names and addresses of all witnesses to be called at trial by the party;

(4) a description of all physical evidence to be offered at trial by the party;

(5) a description and, if available to the party, copies of all documentary evidence and deposition testimony to be offered or read at trial by the party; and

(6) an estimate of the time the party will require to present its case at trial.

(c) A party may call no witness and may offer no evidence at trial not previously listed in the party's pretrial statement, except for witnesses and evidence introduced solely for impeachment purposes.

(d) Additional, amended, or late pretrial statements shall not be permitted, except by order of the court on written motion or by stipulation of all the parties.

COMMENTARY: In some ways, the pretrial statement[102] is the ultimate discovery device. At the least, it is the culmination of the discovery process,[103] where each party can no longer hide

[101] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979).

[102] *Cf.* CAL. R. CT. 1721, 1825; MICH. CT. R., GEN. CT. R. 301.10 (exchange of witness list).

[103] The pretrial statement should not be confused with a pretrial brief, which includes statements of facts and witness and evidence lists, often required in large cases. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 41, at § 3.30. Unlike a brief, legal argument is not required in the pretrial statement and hence might be more easily and less expensively prepared. This Rule does not, however, preclude a pretrial brief, if otherwise required or permitted by the regular civil rules.

information or feint as to goals. It is the time "to lay your cards on the table" by providing the other side with what is essentially a trial outline. Given that the purpose of discovery is to eliminate surprise,[104] this device should succeed in doing so. A trial will necessarily be only "a search for the truth" and not "a battle of wits."[105] Because of the general prohibition on admission of any testimony or evidence not previously revealed, no amount of sleight-of-hand will avail a party to retain secrets before trial.

Inevitably, the necessity of providing the pretrial statement, revealing the strength or weakness of a party's case, should be a spur to settlement. Although a party need not reveal the nature or scope of a witness's testimony or the import of nonhuman evidence, much will be revealed merely by description. And, of course, should the name of an unexpected witness appear in a pretrial statement, adverse parties will still have a brief period before the close of discovery to take a deposition. This logic being plain to all parties well ahead of time, a party with a case that he knows is weak will be encouraged to reach an early settlement or at least to reach stipulations narrowing the scope of trial.[106] The party with the weaker case will be encouraged to do this to avoid having the judge see the statements before trial and perhaps exert stern pressure on him to settle. After all, it should not be a purpose of the litigation process to allow a weak hand to force a stronger one to "give in" in settlement merely by bluffing about surprises at trial. The game here is civil justice and not poker.

At the same time, a more detailed statement agreed to by all parties[107] is not required. Although such a document might be a formidable weapon for a judge, enabling him to slice away large pieces of the case to be tried, it would only come after lengthy and costly negotiations over precise details of the stipulations. Since these Rules are intended to minimize the delay and cost of litigation for parties, such extensive stipulations may be counterproductive. With statements from both parties before him at a pretrial conference, the judge may more easily outline the "agreed" facts and issues in his pretrial order. Reaching a settlement agreement at such a pretrial conference might become

[104] *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2001, at 17 n.16 (1970 & Supp. 1982) (collecting cases).

[105] *Id.* at 14.

[106] Brazil, *supra* note 23, at 957–58 (proposing device of a formal "stipulation conference").

[107] *See, e.g.*, N.H. CT. R. ANN., SUPER. CT. R. 62.

more likely when the judge observes and states that the parties do not seem far apart on the basis of their pretrial statements.

Rule 9. WITNESSES AND EVIDENCE AT TRIAL.

(a) Any party who prepared a pretrial statement in response to a request under Rule 8 may call no witnesses and offer no evidence at trial against the party who served the request, except as disclosed in the pretrial statement or as provided in this Rule.

(b) Any adverse party, or any witness called or evidence offered solely for the purpose of impeachment, may be called or offered without having been disclosed in the pretrial statement.

(c) Any witness deposed or evidence discovered after the adverse party's pretrial statement was served may be called or offered at trial if the court, at the time of trial, finds that the failure previously to have deposed such witness or to have discovered such evidence was reasonable.

(d) If the court, in its discretion, permits a party to call a witness or to offer evidence not disclosed in its pretrial statement, the adverse party shall be entitled to a continuance to meet the new evidence and may do so by evidence not disclosed in its own pretrial statement.

COMMENTARY: This Rule is drawn from the California Pilot Project on Economical Litigation.[108] It is intended to complement Rule 8 on pretrial statements. It describes the effects of the disclosures and the failures to disclose in the pretrial statement. The exceptions allowed to the predisclosure rule — other than those for calling an adverse party or for introducing evidence for impeachment, both of which must always be expected despite nondisclosure — are within the court's discretion. However, no party will want to rely heavily on being able to convince a court to admit undisclosed evidence. Most likely, in all but the unusual case, the disclosure requirements of the pretrial statement will do the job of eliminating the surprise the American civil justice system seeks to avoid.[109]

Rule 10. PRETRIAL CONFERENCES.

(a) A pretrial conference, as authorized by [other rule, akin to Fed. R. Civ. P. 16], shall be requested by plaintiff and shall be convened at

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[108] *See* CAL. R. CT. 1725, 1829.

[109] *See* C. WRIGHT & A. MILLER, *supra* note 104, at 14–19 (liberal discovery is intended "to put an end to the 'sporting theory of justice,' by which the result depends on the fortuitous availability of evidence or the skill and strategy of counsel [citing cases]").

a date no later than seven days after the time for service of all pretrial statements shall have expired. The pretrial statements shall be used in aid of discussion of the considerations listed in [other rule].

(b) A pretrial conference may be convened by the court at the request of any party or at any time in the court's discretion.

(c) Counsel shall be encouraged to conduct discussions at any time outside the presence of the judge, in aid of conservation of judicial resources.

(d) Failure by either a party or his counsel to appear at a duly scheduled pretrial conference shall entitle any appearing party or counsel to move for entry of default upon which judgment may be granted upon notice and hearing.

(e) Counsel shall encourage the parties they represent to attend any pretrial conference. The court may direct that the parties to the action shall be present or immediately available at the time of any such pretrial conference.

(f) Upon agreement of all parties, a pretrial conference may be conducted by telephone.

COMMENTARY: Pretrial conferences are broadly defined by subsection (f) as occurring any time all the parties and the court confer, whether in person or by telephone. As such, the apparent predilection of the Model Rules for consuming the court's time in these conferences is misleading. In order to control the course of litigation more closely,[110] the court will have to monitor it occasionally; monitoring by conference, instead of consulting docket entries, should not be that onerous. The drain on the court's time is compensated for by more prompt settlement. If in fact the court does become overburdened by such conferences, nothing denies the court the discretion to order the parties and their counsel to meet, under subsection (c), and to report their results to the judge. Also, as discussed above,[111] the judge may delegate the responsibility to a magistrate in those jurisdictions that would allow him to do so.

As a leading jurist has pointed out in reference to the significance of the parties' attendance at very early sessions before the judge, as under subsection (e),

> [t]his would expose them not only to the presence of each other but also to the presence of the situation. Each would realise more fully that he is getting into something serious.

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[110] *See supra* notes 47–54 and accompanying text.

[111] *See* Commentary to Model Rule 2(c).

> He would see the fangs of the lawyer on the other side, and he would see and hear the judge and his questions, some of them ominous and dangerous. These pressures, at an early stage, before heavy costs have been incurred, might well induce a settlement that otherwise would prove impossible. The clients would also encounter the moral force of the judge. A judicial intimation that the claim seemed thoroughly unmeritorious or that the defence was shabby might well bring second thoughts to a litigant. In short, the amount of judicial time that would have to be spent on these . . . hearings (and it would be considerable) might well be more than balanced by the time that would be saved in cases that are settled instead of being fought.[112]

Thus, the importance of the pretrial conference, no matter how brief — assuming, of course, that the court deems one at all useful at the time — cannot be stressed enough. This is expressed by the sanctions of subsection (d) and by the power of the court to order the presence of the parties themselves under subsection (e).[113]

The one required pretrial conference of subsection (a) comes at the time when it should be most evident to the parties, to counsel, and to the court whether the case is actually "trial-worthy." Both sides have laid out their trial outlines in their pretrial statements, and the time for trial is drawing near. Settlement negotiations will presumably already be accelerating and a deft touch by the court should be able to give the negotiations the final push. During this conference, the court should be able, at the very least, to strip away the final uncontested issues on the basis of the pretrial statements and to gain stipulations as to admissibility, witnesses, and the order of trial. By doing so, the court may further clarify the possible grounds of settlement that counsel and their clients may pursue on their own. It is unlikely that this conference will acutally come as close to the trial date as the Rules allow[114] since both sides will have been motivated to request pretrial statements as early as permitted (each in order to be able to have "the last word" in his own

[112] R. MEGARRY, *supra* note 94, at 26 (referring to the very early hearing on a motion for a Quick Ruling, as in Model Rule 13).

[113] Subsections (d) and (e) are substantially drawn from MICH. CT. R., GEN. CT. R. 301.9 and 301.5.

[114] Assuming the initial trial date is still the date set, the request for pretrial statements could have come on the 30th day before, the statements 14 days later (both as in Model Rule 8(a)), and the conference seven days after that (subsection (a)). This leaves nine days before trial — not an intolerable amount — and, of course, the parties may still seek a continuance if they comply with Model Rule 11(c), a request the court is unlikely to deny if all parties desire it.

statement). Thus, ample time is likely to remain for the parties to reach a settlement, and the judicial time saved by avoiding trial should compensate for the time spent in the pretrial conference.

Rule 11. SETTING TRIAL DATE.

(a) As part of the order reciting the results of the first pretrial conference, the court shall set the initial trial date. If possible, the initial trial date shall be a day no later than sixty days after the date of the order.

(b) Each attorney of record, and, as to unrepresented parties, the clerk of the court, shall specifically inform his client or the unrepresented party of the initial trial date.

(c) No postponement of the trial date shall be allowed except on written motion, supported by affidavit, setting forth grounds recognized by statute or rule, or special circumstances of good cause arising after the setting of the initial trial date. Any such application for a postponement shall be signed by the party, as well as by an attorney of record, if the date to which trial will be postponed is more than thirty days (or, if the pretrial conference required by Rule 10(a) has already taken place, more than seven days) after the initial trial date.

COMMENTARY: This Rule embodies one of the principal goals of the entire proposed system: the shift of control over the pace of litigation to the court and to the client.[115] At some point within six months of the filing of the suit, either a party or the court will arrange a pretrial conference, possibly no more than a brief telephone call,[116] during which the initial trial date will be set.[117] Since the initial trial date, if possible, will be within sixty days, this also means that the time permitted for pretrial statement requests is immediately opened.[118] In this way, the first pretrial conference performs the function of the filing of an at-issue memorandum,[119] to alert the parties and the court that the road to trial has been laid out.

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[115] *See supra* notes 43–46 and accompanying text.

[116] *See* Model Rules 10(a), (b) (requests for pretrial conferences), and 12 (dismissal for inactivity for six months).

[117] *See supra* notes 52–54 and accompanying text ("'nothing settles cases like setting them for trial'").

[118] *See* Model Rule 8.

[119] An at-issue memorandum or a certificate of readiness is a filing with the court indicating that "issue has been joined," all parties served, discovery substantially completed, etc., and that a date for trial is being requested. *See, e.g.*, ARIZ. R. CT., UNIF. R. PRAC. SUPER. CT. ARIZ. 5(a); CAL. R. CT. 206 (superior court rule); 30 FLA. STAT. ANN., FLA. R. CIV. P. 1.440(b) (Supp. 1983); N.H. CT. R. ANN., SUPER. CT. R. 12 (represents as well "that settlement negotiations have been exhausted").

With pretrial statement requests in the offing, the parties will necessarily have finished substantially all of their discovery. Presumably, both sides will be able to assess strengths and weaknesses and will become disposed to settle.[120] This should be reinforced by the explicit notice to clients required by subsection (b) that a trial date has been set. Generally, this pretrial conference will be the first time that the court will have taken any notice of the case (other than possibly for a Quick Ruling under Rule 13) and, if the prod of a firm trial date does in fact promote settlement,[121] it may well be the last.

Subsection (c) is intended to be exceptionally strict, combining the widespread requirement of a motion with affidavit for any postponement of the initial trial date[122] with the uncommon requirement of client approval for any substantial postponement.[123] Continuances will be granted where good cause warrants, but this high barrier will preclude the routine reliance on postponements that some counsel exhibit by preparing for trial or negotiating a settlement only when the last moment has finally arrived.[124] Knowing that the court is under an obligation embodied in the Rules to move the case to trial on time, parties and counsel will, again, presumably either consider settlement sooner or quickly reach trial. In any case, the general objective of these Rules is accomplished: "speedy and inexpensive determination of every action."

Rule 12. DISMISSAL FOR INACTIVITY.

If plaintiff has failed, within six months after filing the action, either to move to compel discovery or to request a pretrial conference, the court may dismiss the action, either on motion of any other party or on the court's own motion.

COMMENTARY: This Rule is intended to serve as the linchpin of the Model Rules. Within six months, either discovery must have reached an impasse or the first pretrial conference — which will set the initial trial date[125] and thus trigger the filing of pretrial

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[120] *See* Commentary to Model Rule 8.

[121] *See supra* notes 52–53 and accompanying text.

[122] Phrasing of first sentence drawn from ARIZ. R. CT., UNIF. R. OF PRAC. OF SUPER. CT. 5(h). *See also, e.g.*, IOWA R. CT., IOWA R. CIV. P. 183(b); MICH. CT. R., GEN. CT. R. 503.1; MISS. CODE ANN. § 11-7-123 (1972); 9B UTAH CODE ANN., UTAH R. CIV. P. 40(b) (1977).

[123] *See* N.H. CT. R. ANN., SUPER. CT. R. 49 (*all* motions for continuances must be supported by affidavit and must be signed by client).

[124] *See* T. CHURCH, *supra* note 4, at 68–69; P. EBENER, *supra* note 27, at 40.

[125] Model Rule 11(a).

statements[126] and the end of discovery[127] — must have been requested. Since a discovery impasse might well lead to a need for a pretrial conference, the trigger might also be pulled at this earlier stage and thus force the parties and counsel to speed up the case or its settlement.

The result of a failure to prosecute is a dismissal serving as an adjudication on the merits.[128] Should the defendant fail to move for dismissal, the court may do so, presumably as part of a frequent practice of docket clearing. If nothing else, this should give the court a clearer idea of the true state of its docket.

By the nature of the cases that will come under the Model Rules, that is, those with simpler issues and less money at stake, a plaintiff — counsel notwithstanding — should have no interest in letting a case stall interminably. If, in fact, the usual case involves only a recalcitrant defendant — presumably often an individual debtor or tortfeasor or a small vendor unwilling to take back faulty goods — then this burden on the plaintiff to move the case along within a six-month period should not be onerous. The statute of limitations, remaining unchanged, will still allow a plaintiff time for his facts to ripen, should they need to, before he files suit rather than after he first comes to court. In this way, he can get in and out of court quickly, when he is ready.[129]

Rule 13. QUICK RULING.

(a) Within thirty days of the filing of an action, any party may serve on an adverse party a request for consent to a Quick Ruling. Accompanying the request shall be a statement of facts and issues which the party deems either not in dispute or ready for a Quick Ruling. The adverse party shall respond in writing within ten days, indicating whether he agrees to any or all of the undisputed facts and issues or whether any or all of the facts and issues in dispute are ready for a Quick Ruling. The parties are encouraged to hold discussions before the written response is served.

(b) If agreement is reached, the party that initiated the request shall move the court for a nonpublic Quick Ruling hearing.

(c) At least one day before the hearing, each party shall file and serve a written brief containing

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[126] Model Rule 8(a).
[127] Model Rule 6(d).
[128] *E.g.*, FED. R. CIV. P. 41(b); MO. R. CT. 67.02; TENN. R. CT., TENN. R. CIV. P. 41.02; WYO. CT. R. ANN., WYO. R. CIV. P. 41(b).
[129] *See supra* notes 4–11 and accompanying text.

(1) a chronological summary of relevant facts;

(2) a brief statement of the applicable law;

(3) the relief sought or the defense raised; and

(4) copies of documents relevant to the action.

(d) At the hearing, the judge may

(1) refuse to hear argument if he deems the action or the facts and issues submitted unsuitable for a Quick Ruling; or

(2) conduct the hearing in any manner he deems fair, including hearing argument, taking testimony, or conducting colloquy with any person in attendance; or

(3) adjourn the hearing.

(e) Subject to subsection (f) of this Rule, the judge shall render a Quick Ruling at the hearing, or within thirty days, on the action or on any of the facts and issues submitted, and, if appropriate, shall enter judgment. Any decision entered as an order shall be the law of the case. If the judge finds that the action or the facts and issues submitted are unsuitable for a Quick Ruling, he may treat the hearing as a pretrial conference and enter an order reciting the results of the conference, except that such a pretrial conference shall not be deemed the first pretrial conference for purposes of Rule 11(a).

(f) Any party to the action and to the Quick Ruling shall serve and file a Notice of Nonacceptance within five days or he shall be deemed to accept the Quick Ruling and to waive any appeal from it. The party filing such a Notice shall be assessed costs, including attorneys' fees, unless the judge orders otherwise.

(g) If a Notice of Nonacceptance is filed, the record of the Quick Ruling shall be closed to every person but the parties, unless the court directs otherwise. The record shall not become a part of the record of the action and may not be referred to, except on cross-examination at trial.

(h) A judge who conducts a hearing under this Rule shall not participate in any further proceedings related to the same action.

COMMENTARY: This Rule is drawn from a novel rule in the newly-revised Rules of Court of New Brunswick.[130] It "is designed to provide a non-compulsory and non-binding adjudication of a dispute by a judge early in the proceeding and at minimum cost."[131] It has been modified slightly in order to incorporate it into the Model Rules and so that it may be adapted

[130] N.B. R. CT. 77 (found in Reg. 82-73, filed Apr. 29, 1982, under authority of the Judicature Act, N.B. REV. STAT. ch. J-2 (1973), *approved by* Act of June 1, 1982, ch. 34, § 4).

[131] BARRISTER'S SOCIETY OF NEW BRUNSWICK, *supra* note 8, at 24.

easily to the use of a magistrate or other designated official, as allowed by Model Rule 2(c)(1).

In essence, the Quick Ruling concept is a form of arbitration or mediation within the court, electable by parties before much litigation expense is incurred. Indeed, a plaintiff may file a very brief complaint (always amendable later),[132] follow it the next day with the request under subsection (a), and possibly have the Quick Ruling hearing two weeks later. Alternatively, the defendant could make a Quick Ruling request before his answer is due and be done with the case before he begins to drain his assets.

This procedure might be useful where a single fact or question of law is all that divides the parties or keeps them from reaching a settlement. The Quick Ruling concept may also enable parties without a regular contractual relationship to opt for a form of arbitration, such as is commonly provided for in ongoing business relationships.[133] If, in fact, this is the use to which the Quick Ruling is put, nothing in these Rules forbids the appointment of regular arbitrators to perform the hearing duties of the judge under this Rule. The Quick Ruling differs from judicial arbitration[134] in that it is noncompulsory.

The hearing may be wide-ranging, encompassing inadmissible material as well as anything that might be used as evidence at trial, but will not prejudice inadmissibility at trial. For this reason, it is likely that the parties themselves will usurp at least some of counsels' functions: in effect, the judge may choose to preside over a bargaining session between the actual owners of the rights and property at issue. The imposition of costs on the party who chooses not to accept a Quick Ruling should ensure that all attend the hearing in good faith. Of course, if a decision is truly close, the judge can refuse to issue a Quick Ruling (leaving the parties to prepare for full trial) or he can choose not to impose costs on an objecting party (thus also leaving the parties where they were).

Even if the Quick Ruling does not reach all the issues in a case, it may perform the valuable functions of narrowing issues early in the case — perhaps more quickly than stipulations might — and of having the parties actually face each other and the

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[132] *See* FED. R. CIV. P. 15(a) ("leave [to amend] shall be freely given when justice so requires") (adopted in many states).

[133] *See supra* note 66 (discussion of use of arbitration by businesses).

[134] *See supra* notes 28–36 and accompanying text covering the arbitration process.

claims.[135] No matter what the result of the Quick Ruling, it may well lay the foundation for a prompt settlement.

Rule 14. LATE SETTLEMENT.

(a) The court shall impose costs and penalties on the parties and counsel, by any apportionment the court deems just, to the extent of double the expense to the court, if settlement of an action is reached

(1) on a day scheduled for trial of the action, or

(2) at any time after the beginning of a day during which the court sat, immediately previous to a day scheduled for trial of the action, or

(3) at any earlier time when not promptly reported to the court.

(b) The expense to the court shall be deemed to include, but shall not be limited to, all expenses of operating the courtroom, including salaries of all court employees and fees for jurors and witnesses, for at least one half-day of trial.

COMMENTARY: The purposes of this Rule are twofold. First, and more significant, is the saving of court resources on the occasion that a case is called on a day of trial — the first day or any other — and the parties rise to report a settlement, leaving a jury or a jury array and perhaps an entire court with no immediate business scheduled until the next trial.[136] Although motion practice and criminal business may be quickly scheduled to fill the void, such a manipulation and potential waste of judicial resources should not be a burden on the taxpayers.

Secondly, such a further stimulation to early settlement is within the overall objective of the Rules. The Rule may be rarely invoked, but the lack of discretion in the court, except as to apportionment, again reminds counsel and parties that a case may not be dragged on until the last possible moment before finally settling. Of course, the court, if it finds counsel substantially responsible, may impose the total financial burden on the attorneys.[137] The half-day minimum is intended to be just that: the court, if its schedule has been disrupted by the deletion of what was expected to be a much lengthier trial, may impose proportionately greater costs (plus the 100% penalty).

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[135] *See supra* quotation accompanying note 112.

[136] *See, e.g.*, D.C. CT. R. ANN., SUPER. CT. R. 16-I(i) (more limited penalty). *See also* P. EBENER, *supra* note 27, at 25 (noting other courts that have similar rules, although some may have been withdrawn).

[137] Model Rule 7. This should overcome a drawback of similar rules noted in P. EBENER, *supra* note 27, at 25.

COMMENT

LINKING EDUCATIONAL BENEFITS WITH DRAFT REGISTRATION: AN UNCONSTITUTIONAL BILL OF ATTAINDER?

RICHARD D. MARSICO, JR.*

In *Doe v. Selective Service System*,[1] a federal district court judge enjoined the Selective Service Board from enforcing the Solomon Amendment,[2] the law that prohibits students who have not certified that they have registered for the draft from receiving federal financial aid for higher education.[3] The plaintiffs contended that the Solomon Amendment constituted an unconstitutional bill of attainder[4] and violated the students' Fifth Amendment privilege against compulsory self-incrimination.[5] Government attorneys filed an appeal,[6] and, on further review, the Supreme Court stayed the preliminary injunction pending appeal to and final resolution of the case by the Court.[7]

This Comment evaluates the bill of attainder attack on the Solomon Amendment. It begins by considering the history of the law and then summarizes the district court's opinion in *Doe*. Next, it considers the modes of analysis that courts have em-

* B.A., Fordham University, 1982; member, Class of 1985, Harvard Law School.

[1] 557 F. Supp. 937 (D. Minn. 1983), *cert. granted*, 51 U.S.L.W. 3932 (June 28, 1983) (No. 83-276). The district court found that the plaintiffs had a probability of success on the merits. *Id.* at 950.

[2] Department of Defense Authorization Act of 1983 (formally entitled Enforcement of the Military Selective Service Act), Pub. L. No. 97-252, § 1113, 96 Stat. 718, 748 (1982) (to be codified at 50 U.S.C. app. 453) [hereinafter referred to as the Solomon Amendment or the Amendment].

[3] The Solomon Amendment amended the Military Selective Service Act of 1948, 50 U.S.C. app. §§ 451–473 (1976). The Act created the system by which men register and are drafted. Although the draft ended in 1973, registration requirements continued until March 29, 1975. Proclamation No. 4360, 40 Fed. Reg. 14,567 (1975). President Carter reinstated mandatory registration on July 2, 1980. Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980).

[4] A bill of attainder is a legislative adjudication of guilt that exacts punishment on a specific person or group without the protections of a judicial trial. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4, at 484 (1978). *See* U.S. CONST. art. I, § 9, cl. 2 (prohibiting Congress from passing a bill of attainder); U.S. CONST. art. I, § 10, cl. 3 (placing similar restrictions on the states). *See also infra* text accompanying notes 49–56.

[5] U.S. CONST. amend. V (no person "shall be compelled in any criminal case to be a witness against himself").

[6] At the time this Comment went to press, the Supreme Court had not yet scheduled arguments.

[7] 51 U.S.L.W. 3932 (June 28, 1983) (No. A-1033).

ployed in deciding if a particular piece of legislation is a bill of attainder. Finally, this doctrine is appplied to examine the validity of the Solomon Amendment.

I. History of the Solomon Amendment

Representative Gerald B.H. Solomon (R-N.Y.) introduced the Amendment on July 28, 1982, during the House debate on Defense Department spending for 1983.[8] Senators Mack Mattingly (R-Ga.) and S.I. Hayakawa (R-Cal.) had introduced similar legislation in the Senate on May 12, 1982.[9] In its final form, the Solomon Amendment states that any person who is required to register for the draft and does not "shall be ineligible for any form of assistance or benefit provided under Title IV of the Higher Education Act of 1965."[10]

The Department of Education (DOE) issued its final regulations implementing the Amendment on April 11, 1983.[11] Under these regulations a student seeking financial aid is required to submit a statement of compliance with the registration law to the Secretary of Education. Any student who does not file such a statement cannot qualify for financial aid under the Higher Education Act.[12] Using the Department's model statement of registration compliance or a similar form,[13] a student must certify either that he has complied with the Selective Service Act or is exempted from registration for one of the reasons stated therein.[14] Starting in the 1985–1986 school year, students eligible for the first time for Title IV aid will be required to prove that they have complied with the Selective Service Act by submitting the appropriate documents.[15] The regulations also require notice to be sent to students whose aid is about to be denied for failure to file the compliance statement. A student who receives such

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[8] 128 Cong. Rec. H4756 (daily ed. July 28, 1982).

[9] *Id.* at S4943 (daily ed. May 12, 1982).

[10] *Id.*; *see* 20 U.S.C. §§ 1070–1089 (1976).

[11] Dep't of Educ., Student Assistance General Provisions, 48 Fed. Reg. 15,578 (1983) (to be codified at 34 C.F.R. § 668.24).

[12] *Id.* The protected aid programs include Pell Grants, Supplemental Educational Opportunity Grants, College Work Study, National Direct Student Loans, Guaranteed Student Loans, PLUS loans, and Student Incentive Grant Programs. *Id.*

[13] *See* 48 Fed. Reg. 15,582 (1983) (to be codified at 34 C.F.R. § 668.25).

[14] Exempted classes include women, persons in the armed services on active duty, persons not yet eighteen years old, and residents of the Trust Territories of the Pacific Islands. *Id.* The form does not contain an exemption for conscientious objectors. *Id.*

[15] 48 Fed. Reg. 15,582 (1983) (to be codified at 34 C.F.R. § 668.26).

notice will be given thirty additional days to file. A student who is denied benefits can request a hearing.[16]

The Solomon Amendment and the DOE regulations sparked a national debate. Representative Solomon hailed the regulations, stating: "If young men want the privilege of getting low-cost, taxpayer funded college loans, then they damn well ought to live up to their duty to obey the law."[17] The legislation also met with strong opposition. Financial aid administrators at colleges around the country resented the law for the administrative burden and governmental intrusion it imposed on them, if not for political reasons.[18] The Brethren, Mennonite, and Quaker Churches established funds to support students whose federal loan applications were denied as a result of nonregistration.[19]

II. *Doe v. Selective Service*

Plaintiffs in *Doe* are college students who were required to register under Section 453 of the Selective Service Act and who were unable to file truthful compliance statements. They claimed that they would be unable to remain in college without federal education aid. Plaintiffs sought a preliminary injunction against enforcement of the Solomon Amendment, challenging that law as an unconstitutional bill of attainder and alleging violations of their Fifth Amendment privilege against self-incrimination.

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[16] *Id.* at 15,583 (to be codified at 34 C.F.R. § 668.27).

[17] 129 CONG. REC. E315 (daily ed. Feb. 3, 1983) (extension of remarks of Rep. Solomon). Similar legislation has already been sucessfully introduced. On October 13, 1982, President Reagan signed into law the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1399 (1982) (to be codified at 20 U.S.C. § 1504). Under its terms, the Secretary of Labor is required to ensure that all people participating in any of the programs funded by the Act have registered for the draft.

[18] N.Y. Times, July 19, 1983, at C1, col. 1. In August, 1983, the newsletter of the Committee Against Registration for the Draft, *Rough Draft*, compiled a list of responses by various northeast colleges to the Amendment. According to their researchers, Boston College, Boston University, Brandeis University, Emmanuel College, and Northeastern University all planned to send compliance forms to students. Dartmouth College, Harvard University, and the Massachusetts Institute of Technology planned to send out the compliance forms and also to help their students obtain market rate, nonfederally financed loans. Yale University and Brown University planned to help affected students find campus jobs and commercial loans. Williams College did not intend to send compliance forms to its students and was attempting to secure employment and alumni/parent sponsored loans for students. Wellesley College planned not to send compliance forms to its students and hoped to be exempted from the regulations. Middlebury College did not mail forms to its students and has attempted to replace work-study funds lost by students by giving them jobs on the college payroll. Rough Draft, Aug., 1983, at 3–4.

[19] N.Y. Times, July 26, 1983, at B16, col. 1.

A. *Irreparable Harm*

Rejecting the Selective Service's claim that plaintiffs were not threatened with harm because they had not yet aplied for or been denied federal aid, Judge Alsop asserted a presumption that the Secretary of Education would comply with the regulations and that plaintiffs' aid would be denied. The court held that the inevitable denial of aid to the plaintiffs demonstrated a threat of irreparable harm because the plaintiffs would be unable to remain in college.[20] Judge Alsop stressed the great value that the Supreme Court has attached to a college education.[21]

The court also held that the Solomon Amendment threatened plaintiffs with irreparable harm to their Fifth Amendment privilege against self-incrimination.[22] Those who invoke the Fifth Amendment instead of filing a compliance form would lose financial aid benefits and could be providing the government with incriminating evidence.

B. *Balancing Injuries*

The court next weighed the threat of harm to the plaintiffs against the harm an injunction would impose on the Selective Service System. Judge Alsop found that the potential harm to the plaintiffs if an injunction were not granted, namely the loss of the opportunity to go to college, far outweighed the potential disruption in the administration of the draft registration system that the issuance of the injunction might cause.[23]

C. *Probability of Success on the Merits*

1. *Bill of Attainder.* The Constitution prohibits Congress from passing a bill of attainder.[24] Judge Alsop defined a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual or group without the protections of a judicial trial."[25] He applied a three-part test to

[20] Doe v. Selective Service, 557 F. Supp. 937, 939–40.
[21] *Id.* at 939, citing Plyler v. Doe, 457 U.S. 202, *reh. denied*, 103 S. Ct. 14 (1982), in which the Court described education as providing opportunities for individuals and assuring a high quality of community life. *Id.* at 221.
[22] 557 F. Supp. at 940.
[23] *Id.* at 941
[24] *See supra* note 4.
[25] 557 F. Supp. at 941.

determine whether the Amendment was a bill of attainder. The court considered whether the Solomon Amendment is aimed at a specific person or group based on its past conduct, whether it is a leglslative determination of guilt, and whether it imposes a punishment.

a. *Application to a specific person or group.* Plaintiffs argued that the Amendment is aimed at a specific group of persons — young male students who require federal financial aid for education but who cannot file truthful statements of registration compliance.[26] In contrast, defendants claimed that the Amendment does not attach to a specific group because it does not punish persons for the past act of nonregistration. Rather, it attempts to regulate the present and future conduct of men who are required to register and desire federal education aid.[27] In rejecting defendants' argument, Judge Alsop relied on *Cummings v. Missouri*,[28] in which the Supreme Court rejected a similar argument applied to a statute requiring loyalty oaths as a condition of practicing certain professions.[29] Judge Alsop said that because males born after January 1, 1963, who failed to register within thirty days of their birthday cannot do so without being subject to prosecution for late registration, the statute does not encourage them to comply, but punishes them as members of a clearly ascertainable group whose members are identified by past conduct which they cannot eradicate.[30]

b. *Legislative determination of guilt.* Judge Alsop ruled that because the Solomon Amendment automatically denies federal aid to students who fail to file a compliance form, it "assumes that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements."[31] The students who fail to file a compliance form are denied financial aid whether the nonregistration is intentional or innocent.[32] The Amendment assumes that all students who fail to submit the required statement possess a guilty intent to avoid the registra-

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[26] *Id.* at 942.

[27] *Id.* A statute which applies to persons because of their past conduct is considered to be aimed at that specific group because those persons whose past behavior brings them under the statute cannot eradicate their past acts and escape the deprivations of the statute. *Id.*

[28] 71 U.S. (4 Wall.) 277 (1867).

[29] 557 F. Supp. at 942.

[30] *Id.*

[31] *Id.* at 943.

[32] Under the Selective Service Act, penal sanctions can be imposed only on persons who knowingly fail to obey their registration obligations. 50 U.S.C. app. § 453 (1981).

tion requirements, and is therefore a legislative adjudication of guilt.[33]

c. *Imposition of punishment.* The third element of the court's bill of attainder test was whether the statute imposed punishment. In determining this, the court followed *Nixon v. General Services Administration*,[34] in which the Supreme Court upheld against a bill of attainder challenge a statute which deprived former President Nixon of the right to dispose of his Presidential papers and tapes as he wished. The Court listed three areas that courts should examine in determining whether a statute which imposes a burden is actually imposing a punishment: whether the deprivation falls into an historical category of punishment, whether the burden was incidental to a valid governmental regulation, and whether the statute was passed with a punitive motive.[35]

Following *Nixon*, the district court first considered whether the denial of educational benefits falls into the category of historical punishments.[36] Defendant argued that this was not a punishment as that term has been interpreted by the courts. The defendants claimed that the Solomon Amendment was comparable to the statute in *Flemming v. Nestor*[37] that denied Social Security benefits to persons who had been deported because of past subversive activity. Judge Alsop disagreed,[38] stating that the sanctions provided by the Solomon Amendment fall into the class of punishment through which the legislature bars groups or individuals from employment or vocations. The Supreme Court has found these punishments to be unconstitutional.[39]

As required by the *Nixon* decision, the court next considered whether the statute and the deprivation it imposes furthers legitimate nonpunitive legislative purposes. Judge Alsop found that the statute failed this functional test. According to the court, the statute "imposes both a restraint and disability, assumes nonregistrants possess a guilty intent, promotes the aims of retribution and deterrence, applies to behavior that is already a crime and is excessively broad in relation to its alternative purposes."[40] In rejecting the Selective Service's argument that

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[33] 557 F. Supp. at 943.
[34] 433 U.S. 425 (1977).
[35] *Id.* at 473–78.
[36] 557 F. Supp. at 944.
[37] 363 U.S. 603 (1960).
[38] 557 F. Supp. at 943–44.
[39] *Id.* at 943.
[40] *Id.* at 944.

the legitimate nonpunitive purposes of the statute were to encourage registration, to promote a just allocation of financial aid, and to assist the Selective Service in enforcing draft registration laws,[41] the court noted that "every 'punishment' could be renamed an 'encouragement' thereby escaping the Constitution's prescription on bills of attainder."[42]

Finally, the court considered whether the legislative record evinces a congressional intent to punish recalcitrant students. The court reviewed the legislative history and found such an intent. While Judge Alsop agreed with the defendants that the *Congressional Record* included statements that the Solomon Amendment's purpose was to encourage compliance, he found that "thorough examination of those statements . . . clearly reveal [sic] a punitive intent."[43]

Thus, plaintiffs met all of the requisite tests to establish a bill of attainder. The court concluded that plaintiffs had shown a probability of success on the merits of their claim that the Solomon Amendment was an unconstitutional bill of attainder.

2. *The Fifth Amendment.* The court also found that plaintiffs had established a likelihood of success on their claim that the Solomon Amendment violated the Fifth Amendment privilege against compulsory self-incrimination.[44] It held that the information required is incriminating to nonregistrants and could also furnish a link in the chain of evidence used to prosecute them.[45] Moreover, the statute penalizes those students who exercise the privilege by denying them access to federal financial aid for college.[46]

D. *The Public Interest*

Judge Alsop concluded that because plaintiffs had demonstrated a likelihood of success on their claim that the Amendment is unconstitutional, the public interest favored an injunction. The court granted the plaintiffs a preliminary injunction and ended its decision with a disclaimer: this decision should not be "construed as condoning noncompliance with the valid draft registration laws of this nation . . . . The issue here before

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[41] *Id.*
[42] *Id.* at 944–45.
[43] *Id.* at 945.
[44] *Id.* at 947.
[45] *Id.*
[46] *Id.*

this court turns not on whether the registration law should be enforced, but in what manner."[47]

Justice Department officials appealed the injunction to Justice Blackmun, Circuit Justice for the Eighth Circuit. He stayed the injunction, and the rest of the Supreme Court affirmed his decision.[48]

III. An Analysis of the Bill of Attainder Claim

A. *Overview*

A bill of attainder is a legislative act which adjudicates guilt and imposes punishment on a person or an easily ascertainable group without the protections guaranteed in criminal trials.[49] Bills of attainder were valid exercises of legislative power in England and most of the colonies during the pre-Constitutional period,[50] but were banned by the United States Constitution.[51]

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[47] *Id.* at 950.

[48] 51 U.S.L.W. 3938. According to the *New York Times*, government lawyers convinced the Court that concern for national security and the wide deference given to Congress when it legislates for reasons of national security required a stay of the injunction. N.Y. Times, July 19, 1983, at C1, col. 1. To have accepted this argument, the Court must have begun with the presumption that the Solomon Amendment was an attempt to enforce the Selective Service Act. The Court's traditional deference to Congress when it legislates about issues of national security was reaffirmed in Rostker v. Goldberg, 453 U.S. 57 (1981). The Court in *Rostker* accepted a gender-based classification which excluded women from military registration requirements instead of subjecting the classification to stricter scrutiny. Justice Rehnquist wrote for the majority that "[t]he case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." 453 U.S. at 64–65 The Court also doubted its own competence to adjudicate questions of national security: "Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Id.* at 65. For other cases in which the Court has accepted other suspect classifications as legitimate incidents of regulating national security, see Korematsu v. U.S., 319 U.S. 432 (1942) (racially based discrimination); United States v. O'Brien, 391 U.S. 367 (1967) (speech); Parker v. Levy, 417 U.S. 733 (1973) (overbreadth doctrine).

[49] *See, e.g.*, Garner v. Board of Public Works, 341 U.S. 716 (1951); United States v. Lovett, 328 U.S. 303 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

[50] Bills of attainder most often appeared in England and the United States during periods of political unrest and distrust. Garner v. Board of Public Workers, 341 U.S. at 745. They played an integral role in British succession struggles and religious persecutions and were passed by colonial legislatures during the Revolutionary War. For examples of statutes which persecuted Loyalists, see Reppe, *The Spectre of Attainder in New York*, 23 St. John's L. Rev. 1 (1948). For examples of British bills of attainder, see U.S. v. Brown, 381 U.S. 437, 445–46, n.19 (1965); Communist Party v. Subsersive Activities Control Board, 367 U.S. 1, 149–54 (1960) (appendix to Black, J., concurring); Barenblatt v. U.S. , 360 U.S. 109, 160–62 (1959) (Black, J., dissenting); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 146–50 (1951) (Black, J., dissenting); Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 Hastings Const. L.Q. 767 (1978); and Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330 (1962).

[51] *See supra* note 4.

Despite the constitutional prohibition, Congress and the states passed laws which later were found to be bills of attainder during the post-Civil War period[52] and the Communist scare of the 1940's and 1950's.[53]

The Supreme Court, in analyzing challenged legislation, requires four elements to find that a statute is a bill of attainder: a legislative act, an imposition of punishment, application of the punishment to a specific person or group, and absence of judicial safeguards.[54] Any statute deemed by the Court to contain these four elements will be struck down.

The Court's most recent formulation of the bill of attainder test came in *Nixon v. Administrator of General Services*.[55] Speaking of the relationship between punishment and the specification of an individual, Justice Brennan stated that the bill of attainder prohibition is applicable only to cases in which the individual or group is punished by a statute. He specified that such a statutory punishment exists if: a) the statute inflicts a traditional form of punishment such as death or imprisonment; b) it imposes a deprivation of a government benefit without serving a legitimate governmental purpose; or c) Congress passed the statute with punitive motives.[56]

As reflected in *Nixon*, the Court's bill of attainder analysis focuses on whether the act in question inflicts punishment. The Court, however, approaches this question from two different perspectives. The Court first undertakes a quasi-equal protection analysis which examines whether the deprivation caused by the statute is actually an incident of rational regulation of a legitimate governmental concern. If it is, the deprivation is not

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[52] *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866).

[53] *See, e.g.*, United States v. Brown, 381 U.S. 437 (1965); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (opinion of Burton, J.); United States v. Lovett, 328 U.S. 303 (1946). Many statutes drafted during this period, however, survived challenges brought on bill of attainder grounds. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1960); Flemming v. Nestor, 363 U.S. 603 (1960); Garner v. Board of Public Works, 341 U.S. 716 (1951); American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).

[54] Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 HASTINGS CONST. L.Q. 767 (1978). The punishment can be the deprivation of any right or privilege and is not limited to traditional forms of punishment which accompanied attainders. *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 475 (1977); Cummings v. Missouri, 71 U.S. 277, 320 (1866). In addition, the legislation does not have to specify the person or group by name. If it applies to past acts committed by a certain group which Congress has deemed worthy of punishment, a court will find that the act applies to that group. *See, e.g.*, *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866).

[55] 433 U.S. 425 (1977).

[56] *Id.* at 470–78.

found to be a punishment.[57] The second approach assumes that the purpose of the Bill of Attainder Clause is to implement the notion of the separation of powers, specifically legislative and judicial powers. If the Court finds that, in enacting a statutory deprivation, the legislature was acting as a court — deeming certain persons guilty of punishable behavior and exacting a punishment — the statute will be found to be a bill of attainder.[58]

Both analyses involve the question of whether Congress, in enacting a deprivation, intended to punish a particular class. There is, however, a crucial difference in the analyses. The quasi-equal protection/regulatory analysis is sympathetic to the existence of a valid governmental regulatory motive. If there is such a valid motive and the statute regulates the activity in question by passing standards of behavior related to the activity, the statute is acceptable.

Even if a statute is regulatory on its face, however, it is is a bill of attainder if it imposes a deprivation on a group of people as a result of past conduct which they cannot undo by changing present behavior.[59] The second analysis is concerned with whether the legislature, in imposing a burden on a class of persons, has done so because it deems them guilty of certain behavior. It is this legislative adjudication of guilt which violates the Bill of Attainder Clause.[60] Unlike the first, this form of analysis is not concerned with a valid regulatory motive or with whether the deprivation is a legitimate regulatory burden as opposed to punishment.

B. *Regulatory Analysis*

The roots of the regulatory analysis applied in bill of attainder cases can be traced to *Cummings v. Missouri*.[61] In that case, the Supreme Court rejected Missouri's argument that a provision of the state's antebellum constitution requiring priests and

[57] *See, e.g.*, Garner v. Board of Public Works, 341 U.S. 716 (1951); American Communications Ass'n. v. Douds, 339 U.S. 382 (1949).

[58] *See, e.g.*, U.S. v. Brown, 381 U.S. 437 (1965).

[59] *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1960); Flemming v. Nestor, 363 U.S. 603 (1960); Garner v. Board of Public Works, 341 U.S. 716 (1951); American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).

[60] *See* United States v. Brown, 381 U.S. 437 (1965); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1866). *See also* Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 356 (1965).

[61] 71 U.S. (4 Wall.) 277 (1866).

clergymen to take a loyalty oath that they had been loyal to the South during the Civil War was a valid regulation of the clergy. The Court found that because there was no relation between previous disloyalty and the ability to be a priest, the statute was not a regulation of the clergy, but a punishment for past conduct.[62] The Court held that a statute which disqualifies persons from certain professions on the basis of past conduct will be upheld against a bill of attainder challenge only if there is some relation between the past conduct and the ability to practice the profession.[63]

Regulatory analysis has been refined to allow a statute which regulates a profession or activity by disqualifying persons from that activity based on their past conduct if those persons may renounce their past conduct by changing their present behavior. In *American Communications Association v. Douds*,[64] plaintiffs challenged as a bill of attainder a law that denied labor unions access to the National Labor Relations Board if officials of those unions failed to file affidavits affirming that they were not Communists. The Court held that this was a legitimate nonpunitive exercise of congressional power to regulate interstate commerce[65] because the law did not punish union leaders based on past membership in the Communist Party. The law allowed them to avoid sanctions by renouncing their membership and conforming their behavior to acceptable standards.[66] Thus, when a regulation is based not on past, ineradicable acts, but on "continuing contemporaneous"[67] behavior, it is not punitive, and not a bill of attainder. Legislation which imposes sanctions on individuals only if they fail to change their present behavior does not fall under the bill of attainder prohibition.

C. *Separation of Powers Analysis*

The Supreme Court most completely formulated the separation of powers analysis in bill of attainder cases in *United States*

[62] *Id.*

[63] Thus, in Hawker v. State of New York, 170 U.S. 189 (1897), the Court upheld a state statute which made it illegal for persons previously convicted of a felony to practice medicine, agreeing with the state's argument that protecting its citizens from physicians of bad moral character is a legitimate interest of the state. *Id.* at 196.

[64] 339 U.S. 382 (1950).

[65] 339 U.S. at 387–88. The Court also considered First Amendment issues.

[66] *Id.* at 413–14.

[67] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86–87 (1960) (registration requirement imposed on the Communist Party is not a bill of attainder).

v. Brown.[68] In *Brown*, the Court struck down Section 504 of the Labor Management Act which made it a crime for a person who at that time was or had been in the previous five years a member of the Communist Party to occupy executive positions in labor unions. Chief Justice Warren found that the potential for conforming behavior to acceptable standards was irrelevant.[69] The crucial factor for the Court was that the legislature usurped the judicial function by finding that all Communists were dangerous.[70] The Court held that Congress may set forth rules of general applicability, defining who is qualified to serve on a union exectuive board, but it "cannot specify the people upon whom the sanctions it prescribes are to be levied."[71] This task belongs to the courts.[72] Thus, the crucial element in this analysis is not whether a person is suffering a legislative sanction, but whether that sanction was imposed after a legislative finding of guilt.

D. *The Solomon Amendment: Regulatory and Separation of Powers Analysis*

1. *The regulatory analysis*. Using the regulatory analysis, the Court would view the Solomon Amendment as an attempt to enforce the draft registration law. If prohibiting persons who fail to file a compliance form is found to be a valid incident of this regulation, the Act will stand. If, however, the Court finds that Congress had a punitive motive in depriving non-registrants of their governmental benefits, it will strike down the statute.[73]

The Court might view the Solomon Amendment in its most favorable light, as granting federal financial aid only to those who affirm that they have registered by filing a compliance form. Under this formulation, the Amendment does not reach the past act of nonregistration and thus would not be considered punishment.[74]

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[68] 381 U.S. 437 (1965).
[69] 381 U.S. at 458–59.
[70] *Id.* at 450.
[71] *Id.* at 461.
[72] *Id.*
[73] While this mode of analysis is similar to the analysis used in the separation of powers mode, there is an important difference. Here, the Court considers whether the legislature either was inflicting a punishment or was creating a deprivation incidental to regulating. In the separation of powers mode, the Court only looks at whether the legislature was acting like a court. Congress can legislate punishments for certain types of conduct. Only the courts, however, may apply these punishments.
[74] *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1877).

The compliance form is not a means of ascertaining or punishing persons who failed to register. It merely encourages men to register by denying them federal aid if they do not. The Court might decide that persons who do not file the form are not deemed by Congress to be guilty of breaking the Selective Service law; these persons simply failed to file the form. They may have done so for a number of reasons — because, for example, they no longer need aid, or they plan to leave college.

The Court would look to the statute itself, and the Congressional debates about its passage, to determine if the legislature intended to enforce the Selective Service Act through the Amendment. In the Senate, one of the sponsors of the legislation, Senator Hayakawa, stated that "[t]his Amendment seeks not only to increase compliance with the registration requirement but also to insure the most fair and just usage of Federal education benefits . . . . The Selective Service System was established for a very important purpose. The success of this system is crucial to the security of this country."[75] Senator Roger W. Jepsen (R-Iowa) stated that "the chief purpose of the amendment is to encourage greater compliance with the registration requirement. Registration is the law of the land. And this amendment is not meant to punish as many nonregistrants as possible."[76]

If the Court identifies the Amendment as having such a regulatory purpose, it next would determine whether Congress implements this purpose in a way which imposes legitimate burdens on noncomplying individuals or illegitimate burdens meant to punish them. Under the Amendment, Congress dangles the benefit of educational loans before the students, but requires them to register if they want to receive the reward. The provision most likely will aid in the enforcement of registration. The analysis, however, does not end here. The Court must consider Justice Field's pronouncement in *Cummings* that "it by no means follows that under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act . . . ."[77]

With this in mind, the Court would have to evaluate the impact of the Amendment on the respective categories of men affected by the action. The issue is whether they are suffering a burden incidental to congressional regulation of the Selective

[75] 128 CONG. REC. S4943–44 (daily ed. May 12,1982) (statement of Sen. Hayakawa).
[76] *Id.* at S4945 (statement of Sen. Jepsen).
[77] 71 U.S. (4 Wall.) 277, 325 (1877).

Service Act, or whether they are being intentionally punished for their alleged past act of nonregistration.[78] The first category to be considered consists of those men who have not yet turned eighteen or who have turned eighteen less than thirty days previously and can still register in compliance with the Selective Service Act. These men can escape from the deprivations of the bill, and thus, like the parties in *Douds*,[79] *Garner*,[80] and *Communist Party*,[81] are not being punished for past conduct.

The Court, however, would face considerable criticism if it invoked the escapability proviso. Critics of the notion claim that inescapability and the inevitability of punishment are not essential elements of a bill of attainder. Punishment in a bill of attainder can be preventive and is not limited to retribution. In *Brown*, the Court held that inescapability is not a prerequisite of a bill of attainder.[82] Chief Justice Warren stated that punishment need not be merely retributive, as it would be if the person could not escape from the deprivation imposed by the statute. "Punishment serves several purposes: retributive, rehabilitative, deterrent — and preventive."[83] Warren explicitly noted that bills of attainder were often passed to inflict deprivation "upon that person or group in order to keep it from bringing about the feared event."[84] Under the Court's reasoning, punishment within the meaning of a bill of attainder does not necessarily have to apply to the ineradicable past conduct of a person or group. Congress can also be found to be punishing individuals when it restricts them from engaging in certain behavior by legislating specific disqualifications applicable to those presently engaging in that behavior.

The Court also must examine the effect of the legislation on the persons who can no longer register in compliance with the law. The conduct of these persons with regard to registration is ineradicable. They cannot escape the deprivations imposed by the Solomon Amendment unless they turn themselves in or perjure themselves by filing false forms. As the court in *Doe*

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[78] Justice Harlan, writing for the majority in Flemming v. Nestor, 363 U.S. 603, 614 (1960), characterized this distinction by stating that "[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly on the one affected."

[79] 339 U.S. 382 (1950).

[80] 341 U.S. 716 (1951).

[81] 367 U.S. 1 (1960).

[82] 381 U.S. 437, 458–59 (1965).

[83] *Id.* at 458.

[84] *Id.* at 459.

pointed out, men who fail to register within thirty days of their eighteenth birthday are subject to prosecution for late registration.[85] Thus, Congress has isolated past conduct, specified the group which has committed it, and punished the members of this group for their ineradicable past conduct. This legislation seems to fulfill all of the requirements of a bill of attainder.[86] The government could not claim that the statute is a means of enforcing the Selective Service Act as applied to this particular group. The law does not encourage these people to register; it is already too late for that. In this context, it merely attempts to impose civil sanctions on persons who do not file compliance forms. The legislation reaches the person, not the conduct,[87] and violates the prohibition against legislative punishment.

The Government may argue that because Congress has the right to set reasonable terms for the benefits that it bestows on the public, denying aid to those who refuse to comply with the registration law cannot be considered punishment.[88] Further, students do not have a right to education unless it is granted by statute. The Higher Education Act does not guarantee an education.[89] While the right of students in higher education to financial aid might not rise to the level of a property right for the purposes of due process protection,[90] its denial might be deemed a punishment for the purposes of bill of attainder analysis. In *Cummings*, the Court held that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."[91]

Thus, when Congress intends a deprivation,[92] and its intention deprives a person of some benefit, its action may be deemed a

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[85] 557 F. Supp. 937 (D. Minn. 1983). *See* 50 U.S.C. app. § 462 (1976).

[86] *See supra* text accompanying notes 26–46.

[87] *See* Flemming v. Nestor, 363 U.S. 603, 614 (1960).

[88] *See, e.g., id.*

[89] In Goss v. Lopez. 419 U.S. 565 (1975), the Court considered a challenge by grade school students to their suspension on the basis that it was ordered without any procedural protections. The Court ruled that students had no right to an education outside of that granted by state statute. Because the state did guarantee a public education, it was required to provide procedural protections before it deprived students of that right. In Arnett v. Kennedy, 416 U.S. 134 (1974), however, Justice Rehnquist stated in a plurality opinion that when the state chooses to create a benefit, it also may define the procedural protections which accompany the benefit where the two are inextricably intertwined.

[90] Despite this argument, Department of Education regulations provide for protection against loss of benefits. *See supra* text accompanying note 16.

[91] 71 U.S. (4 Wall.) 277, at 320 (1866).

[92] *See, e.g.*, Nixon v. General Services Admin., 433 U.S. 425 (1977); Flemming v. Nestor, 363 U.S. 603 (1960).

punishment. Denying a person education benefits clearly is a deprivation. In *Plyler v. Doe*,[93] Justice Brennan wrote for the majority that ". . . education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."[94] Thus, Congress's denial of financial aid for education seems to be the kind of deprivation that was deemed a punishment in *Cummings*. Under the analysis of the regulatory model, the Solomon Amendment is a bill of attainder.

2. *The separation of powers analysis — legislative adjudication.* If the Court uses a separation of powers analysis in evaluating the Solomon Amendment, as it did in *Brown*, its primary concern will be determining whether Congress has adjudged guilt and meted out punishment. If Congress has deemed persons who have failed to file a compliance form guilty of registration evasion, the statute is a bill of attainder.[95] Because the Court must decide whether Congress has acted as a court or as a legislative body, the notion of escapability and the distinction between past and future nonregistrants is irrelevant here. The sole question is whether Congress has adjudged people who fail to file the compliance form guilty of nonregistration.

An examination of the congressional debates makes it clear that supporters of the Amendment believed that persons who did not comply with the form were in fact guilty of nonregistration. Many senators who supported the Amendment stated that young men who did not register (that is, did not file a form certifying that they had registered) should not receive governmental benefits.[96] The House debates were similar. Representative Solomon's first words were: "Mr. Chairman, this amendment prohibits young men who are in violation of the Draft

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[93] 457 U.S. 202 (1982).

[94] 457 U.S. at 221.

[95] 71 U.S. (4 Wall.) 333 (1866).

[96] The debates in the Senate on the Solomon Amendment show that supporters of the Amendment believed that men who did not file the form would be guilty of nonregistration. Senator Mattingly, one of the Amendment's sponsors in the Senate, said, ". . . as long as we have the law, all men reaching the age of 18 should and must register for it. If a young man decides he will ignore this law, he should not be eligible for financial assistance from the Federal Government." 128 CONG. REC. S4947 (daily ed. May 12, 1982) (statement of Sen. Mattingly). Senator Hayakawa, another sponsor, stated, "the responsibilities of registering with the Selective Service System should be gladly accepted. If it [sic] is not, then America has every right to deny those who are unwilling to do so financial assistance to advance their education." *Id.* at S4944 (statement of Sen. Hayakawa). Senator Tower (R.-Tex.) expressed similar sentiments: "I do not know why anyone should be permitted to claim the benefits of that which are financed out of the pockets of the taxpayers of this country if they are not prepared simply to register for a draft . . . ." *Id.* at S4945 (statement of Sen. Tower).

Registration Act from receiving any financial assistance under title IV of the Higher Education Act."[97] The Solomon Amendment, however, is not a criminal statute that provides civil penalties for draft evaders once a court has pronounced them guilty. The Amendment instead uses the nonfiling of the registration compliance form to establish an irrebuttable presumption that a person is guilty of violating the registration provisions of the Selective Service Act. Representatives seemed to presume that anyone who failed to file the compliance form was guilty. For example, Representative Stratton (D-N.Y.) said that "[t]he Amendment . . . is designed to prevent anybody who is violating the registration law [from receiving educational aid]."[98]

It is evident that Congress intended that those men who do not file the compliance forms should be deemed not to have registered and therefore should not share in the benefits of federal financial aid. The separation of powers analysis prohibits the legislative behavior involved here: adjudication of guilt followed by punishment. Congress has determined who is guilty of registration evasion. It does not matter that nonregistration is punishable as a crime, and that Congress merely is adding to the penalties for nonregistrants. What does matter is the means through which Congress has chosen to enforce these penalties. Congress could legislate that nonregistrants cannot receive financial aid for education, but it must let the courts determine whether a person has registered.

Thus, it is apparent from the existence of the compliance form and the attitude of many of the supporters of the Amendment that the Solomon Amendment is an act of legislative adjudication. The creation of such Congressional presumptions of guilt clearly is prohibited by the Bill of Attainder Clause.

IV. Conclusion

Plaintiffs in *Doe* do not challenge Congress's power to add civil sanctions, in the form of denial of federal financial aid, to the criminal sanctions already imposed for failure to comply with draft registration laws. They challenge the means Congress has chosen to determine who will suffer deprivations: the requirement students who desire aid must file a compliance form

[97] 128 Cong. Rec. H4757 (daily ed., July 28, 1982) (statement of Rep. Solomon).
[98] *Id.* at H4759 (statement of Rep. Stratton).

and the denial of aid to students who do not file forms. The heart of plaintiffs' bill of attainder claim is that this process of law enforcement, by which Congress determines the guilt of and inflicts punishment on a specific group of persons without a trial, is constitutionally forbidden.

The Supreme Court's decision in *Doe* should send a signal to Congress about the limits of its power to legislate. If the Court accepts the Solomon Amendment as a regulation, it must construe the deprivation of aid as nonpunitive. This would require a narrow definition of punishment and a holding that the Amendment does not punish nonregistrants, but rewards registrants. The Court, however, would be ignoring those men who cannot register without facing prosecution. To this group, the statute presents the option of losing aid or registering late and facing prosecution.

If the Supreme Court accepts the Solomon Amemdment, it will indicate that it will allow Congress a broad range of powers to impose civil penalties on persons who fail to affirm their own law-abiding behavior. If the Court rejects the Amendment as a regulation, this power will be denied. Similarly, if the Court rejects the Amendment from a separation of powers perspective, it will signal Congress that it may punish persons for illegal conduct only by passing laws applicable to the population at large, leaving to the judiciary the task of applying them to specific individuals.

COMMENT

PARAQUAT: THE USE OF TOXIC SUBSTANCES AS DRUG ENFORCEMENT MECHANISMS

KENT R. RICHEY*

In August of 1983, the Drug Enforcement Administration (DEA), as part of its three-year-old domestic marijuana eradication program, began spraying the herbicide paraquat [1] on small plots of illicitly grown marijuana in the Chatahoochee National Forest, located in Georgia.[2] The DEA was able to spray only twelve of these plots before the district court issued a restraining order bringing the program to a halt.[3] The DEA is currently enjoined from using paraquat in its eradication program until it prepares an Environmental Impact Statement (EIS).[4] Once the DEA prepares an acceptable EIS, it will be able to begin a spraying program that would cover national forest lands located within as many as forty states.[5]

Previous litigation over the use of paraquat raised the issue of the chemical's harmful consequences to marijuana consumers. This, however, is not a major issue in the present controversy because the DEA's spraying guidelines require that federal guards be posted on the site until the sprayed plants are pulled up and destroyed,[6] thus preventing the harvest of the paraquat-contaminated marijuana. The efficiency of this method of marijuana destruction, though, is questionable at best. The plots which were sprayed in Georgia consisted of only ten to

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* B.A., M.A., Northwestern University, 1982; member, Class of 1986, Harvard Law School.

[1] *See infra* text accompanying notes 8–29.

[2] Riley, *Paraquat Spraying Program Faces a Tough Legal Battle*, Nat'l L.J., Aug. 29, 1983, at 9, col. 1; Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 7, 1983).

[3] Riley, *supra* note 2, at 9, col. 1; Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 7, 1983). Telephone interview with David Wolbert, Esq., Rubin, Winter, Goger & Kirwan, P.C. (Oct. 7, 1983).

[4] National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (codified at 42 U.S.C. 4332 (1976).

[5] Riley, *supra* note 2, at 9, col. 1.

[6] A. GLASS, GUIDELINES FOR THE ERADICATION OF CANNABIS WITH PARAQUAT 6 (1983).

fifteen plants.[7] A few men with hoes or scythes could most likely do the same job more cheaply and perhaps even more quickly than could the helicopter, certified applicator, two guards, and clean-up crew required by the DEA's guidelines. If either spraying or manual eradication is sufficient, the concurrent use of both methods is redudant.

As part of its EIS, the DEA will have to explain its reliance on the paraquat spraying program as the chief means of eliminating marijuana production. Because the DEA and other government officials have in the past expressed their conviction that a domestic spraying program would encourage foreign countires to use paraquat in their drug eradication efforts, this policy argument is likely to be advanced by the DEA in support of its program.[8] According to the DEA, marijuana source countries have been reluctant to use herbicidal methods of eradication because of their perception that the United States is unwilling to carry out such a program in its own country. If the United States can demonstrate a willingness to clamp down on its own marijuana producers, South and Central American governments will have less reason to balk at U.S. proposed measures against theirs.[9] This argument appears to have some merit, but it may not be sufficiently compelling to justify the use of paraquat in the face of more efficient and less environmentally dangerous alternatives such as manual eradication. This comment will analyze the prospects for judicial review under the National Environmental Policy Act (NEPA) of the DEA's decision to use paraquat. Section I is a brief overview of paraquat's history as both a herbicide and a means of destroying illicitly grown marijuana. Section II examines the NEPA requirement that the DEA compare and evaluate reasonable alternatives to its proposed paraquat spraying program, suggesting that the DEA will find it difficult to justify its choice on cost-efficiency grounds. Section III discusses the narrow "arbitrary and capricious" standard of review of the DEA's final decision under NEPA and evaluates the value of a policy justification based on foreign policy considerations.

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[7] Telephone interview with David Wolbert, Esq., Rubin, Winter, Goger and Kirwan, P.C. (Oct. 7, 1983).

[8] *International Narcotics Trafficking: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. at 158 (1981) (testimony of Howard L. Shapiro, Staff Counsel, Permanent Subcomm. on Investigation); Riley, *supra* note 2, at 34, col. 2.

[9] Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 7, 1983); F. Mullen, Jr., Programmatic Environmental Assessment and Finding of No Significant Impact 1 (July 19, 1983).

I. HISTORY OF PARAQUAT

According to the Department of Agriculture, paraquat is one of the most commonly used herbicides in the United States.[10] It was first used in 1959 as a growth regulator on certain crops to curb the growth of leaves and encourage fructification.[11] It is now used primarily in no-till farming to clear a field of weeds or of unharvested crops before the planting of new crops.[12]

Paraquat destroys any green leaf on contact by precluding photosynthesis.[13] When properly applied, paraquat is relatively safe for the environment. It is photodegradeable: after twenty-four hours of exposure to sunlight, as much as seventy-three percent of the active chemical is converted into other, nontoxic substances.[14] Paraquat is also pyrodegradeable: burning the contaminated plant destroys all but 0.1 percent of the active chemical.[15] Because paraquat is instantly deactivated when it comes in contact with the soil, there is no danger of it either leaching into nearby water sources or carrying over into the next planting.[16] The primary environmental danger is the risk of spray-drift onto open water, livestock, or nearby crops.[17]

The dangers to the paraquat applicator, on the other hand, are substantial. Paraquat is an extremely toxic substance. Several dozen people have been killed by accidentally ingesting large doses of paraquat.[18] The applicator is warned to "wear full face shield, rubber gloves and apron when handling" the concentrated herbicide.[19] He is instructed to wash his clothing after

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[10] Telephone interview with Dr. Walter A. Gentner, National Technical Advisor — Narcotics, Department of Agriculture (Oct. 21, 1983).

[11] *Id. See also* Riley, *supra* note 2, at 34, col. 2.

[12] Telephone Interview with Dr. Walter A. Gentner, National Technical Advisor — Narcotics, Department of Agriculture (Oct. 21, 1983); *See also* U.S. Dep't of State, Cannabis Eradication in Foreign Western Hemisphere Nations: Final Programmatic Environmental Impact Statement of the Effects in the United States, at B-4 (Nov. 1982) (supplemental pamphlet for paraquat application).

[13] A. GLASS, *supra* note 6, at 4; Lauter, *Overcoming an Image Problem: A Deadly Herbicide Faces Legal Dusting* NAT'L L.J., May 10, 1982, at 11, col. 1.

[14] Telephone interview with Dr. Walter A. Gentner, National Technical Advisor — Narcotics, Department of Agriculture (Oct. 21, 1983).

[15] *Id.*

[16] A. GLASS, *supra* note 6, at 2; Lauter, *supra* note 11, at 11.

[17] A. GLASS, *supra* note 6, at 4. U.S. Dep't of State, *supra* note 10, at B-8 (environmental safety cautions).

[18] *Is Paraquat-Sprayed Marihuana Harmful or Not?: Hearing Before the Select Comm. on Narcotics Abuse and Control*, 96th Cong., 1st Sess. 14–15 (1979) (statement of Dr. William Foege, Director, Center for Disease Control) [hereinafter cited as *Hearing*]; Ferebee v. Chevron Chemical Co., 552 F. Supp. 1293 (D.D.C. 1982) (farm worker killed by long-term exposure to paraquat spray).

[19] A. GLASS, *supra* note 6, at 4.

each use of the herbicide and to bathe before eating, smoking, or drinking. Excessive inhalation of the spray may cause permanent damage to the lungs in the form of pulmonary fibrosis.[20]

Because of these dangers, the Environmental Protection Agency (EPA) has set maximum contamination levels for paraquat spray residues on food crops.[21] It has not set a maximum level for residues on marijuana, and in fact has not specifically approved the use of paraquat on marijuana. Paraquat has, however, been approved for use against broadleaf plants, of which marijuana is one.[22]

Mexico began using paraquat in 1975 to eradicate otherwise inaccessible fields of marijuana from the air. The United States provided much of the technical assistance (maintaining the airplanes and training the pilots) and a portion of the funding (approximately $12 million each year).[23] The Mexican program received little public attention until 1977 when the Secretary of Health, Education and Welfare released an announcement to the effect that paraquat-contaminated marijuana was reaching the United States and might pose a substantial health risk to marijuana consumers.[24]

The question of United States participation in the Mexican program became moot in September of 1978 when Congress passed the Percy Amendment to the Foreign Assistance Act of 1961.[25] The amendment barred use of foreign aid funds for any marijuana eradication program involving the use of a herbicide "likely to cause serious harm to the health of persons who may use or consume the sprayed marihuana."[26] The Percy Amendment was repealed in 1981, opening the way once again for United States participation in a foreign paraquat spraying program.[27]

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[20] *Hearing, supra* note 18, at 14–15 (statement of Dr. William Foege, Director, Center for Disease Control).

[21] 40 C.F.R. § 180.205 (1982).

[22] Telephone interview with Dr. Walter A. Gentner, National Technical Advisor — Narcotics, Department of Agriculture (Oct. 21, 1983).

[23] Nat'l Org. for the Reform of Marijuana Laws v. United States Dep't of State, 452 F. Supp. 1226, 1231 (D.D.C. 1978).

[24] United States Dep't of State, *supra* note 12, at 3.

[25] 22 U.S.C. § 2291(d) (1976).

[26] 22 U.S.C. § 2291(d)(1) (1976).

[27] International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 502(a)(1) 95 Stat. 1519, 1538–39 (codified at 22 U.S.C. 2151 (1976)), replaced the Percy Amendment with a requirement that the Secretary of Health and Human Services monitor the health of marijuana consumers and report to Congress any ill effects of paraquat spraying programs. See 22 U.S.C. § 2291(d) (Supp. V 1981).

Mexico and Belize are the only countries currently using paraquat to kill marijuana.[28] The DEA still maintains Mexico's fleet of aircraft but provides no direct assistance to the country's spraying program.[29] Belize receives direct aid from Mexico, but none from the United States.[30] So far, the State Department has been unable to persuade either Colombia, the largest single source of marijuana consumed in the United States (eighty-one percent) or Jamaica, the second largest source (ten percent),[31] to use herbicides in their eradication programs.

II. NEPA: PROCEDURAL REQUIREMENTS

The DEA was established in 1968 as an agency of the Department of Justice under the control of the Attorney General.[32] Its actions are therefore subject to judicial review under the Administrative Procedure Act (APA).[33] The APA creates procedural requirements for federal agency decision making and provides for judicial review of those decisions. It does not, however, establish procedural requirements for agency decisions which, as in this case, are informal actions rather than formal adjudications or rule-making.[34] Such informal actions are subject to judicial review only when there is a specific law that applies to the type of action the agency has taken.[35] Because

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[28] Telephone interview with Rayburn F. Hesse, Special Assistant to the Assistant Secretary for International Narcotics Matters (Oct. 21, 1983).

[29] *Id.*

[30] *Id.*

[31] U.S. Dep't of State, *supra* note 12, at 28 table 3-3 (estimating the supply of marijuana to the United States market in 1980).

[32] Reorg. Plan No. 2 of 1973, 3 C.F.R. 1158 (1971–1975), *reprinted in* 5 U.S.C. app. II at 1145 (1976).

[33] Administrative Procedure Act, 5 U.S.C. § 701(b)(1) (1982) provides judicial review to "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." An alternative, but problematic, ground for review might be to seek review in the United States Court of Appeals for the District of Colombia Circuit under 21 U.S.C. § 877 (1976), which provides review for "all final determinations, findings, and conclusions of the Attorney General under" Title II of the Controlled Substances Act. The DEA's marijuana eradication program is conducted pursuant to the Controlled Substances Act, Title II § 503(a)(5), (21 U.S.C. § 873(a)(5) (1976). For an examination of what constitutes a final determination, finding or conclusion see C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3942 (1977).

[34] *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 481, 524–26 (1979); Verkuil, *A Study of Informal Adjudicative Procedures*, 43 U. CHI. L. REV. 739 (1976); *Cf.* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:4 (2d ed. 1978).

[35] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).

the DEA's decision to spray paraquat has a potential effect on the environment, it is subject to judicial review under the requirements of the National Environmental Policy Act (NEPA).

NEPA was designed to mandate the careful consideration of environmental factors when federal decisions that could affect the environment were being made. It has two sections.[36] The first, Section 101, instructs the federal agencies to give weight to environmental factors when making decisions.[37] The extent to which the agencies must consider these factors is unclear.[38] The second section, 102, provides a detailed list of procedures that every government agency must follow when making a decision which could affect the environment.[39] The courts have rigorously enforced the requirements of this section.[40] One of its most important procedural requirements is the filing of an Environmental Impact Statement (EIS).

The DEA initially filed a paper called a Programmatic Environmental Assessment and Finding of No Significant Impact, probably in order to avoid the burden, expense, and delay of preparing an EIS.[41] It completed this on July 19, 1983.[42] This document explains why the Administrator felt that the spraying program would not significantly affect the environment, and why an EIS was unnecessary. The courts, however, did not agree with this finding. In both the District of Columbia and the Georgia cases, the district court judges ruled that the DEA should

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[36] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

[37] 42 U.S.C. § 4331(b) (1976) states, in part, that federal agencies should seek to (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

[38] *See* Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 3–13 (1983); Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 248 (1973).

[39] 42 U.S.C. § 4332 (1976).

[40] *See* Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1114–15 (D.C. Cir. 1971).

[41] Under the Council for Environmental Quality Guidelines, an agency may prepare an environmental assessment, not in lieu of an EIS, but to aid its determination of whether the environmental impact will be great enough to require the preparation of an EIS. The environmental assessment should be more concise than the EIS but, like the EIS, must include a discussion of the reasonable alternatives to the agency's chosen action. *See* 40 C.F.R. § 1501.3 (1982) (when to prepare an environmental assessment), 40 C.F.R. § 1501.4 (1982) (whether to prepare an environmental impact statement), 40 C.F.R. § 1508.9 (1982) (environmental assessment)

[42] F. Mullen, Jr., *supra* note 9.

be enjoined from implementing its program until an EIS was prepared.[43] The DEA is now in the process of preparing an EIS.[44]

The EIS is required to "include a detailed statement of alternatives to the proposed action."[45] Only reasonable alternatives must be considered.[46] In deciding if the EIS's discussion of alternatives is sufficient, the court will analyze each possible alternative in the context of the following questions: does the alternative achieve the same goal as the proposed action? should the agency have been aware of the existence of the alternative? does the alternative avoid undesirable environmental effects?[47]

Of the available alternatives to the paraquat spraying program, there are three that invite comparison. First, there is manual or mechanical eradication; Second, there is aerial spraying of paraquat without later manually destroying the plants; Finally, there is the proposed program — a hybrid of the first and second — employing both spraying and manual eradication. The first two alternatives are both feasible and have been used by the DEA in the past. Since 1980, the DEA has employed the manual eradication method in the United States.[48] The spray-only method is currently being used by Mexico with the DEA's assistance.[49]

Since all three methods achieve the same object — destruction

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[43] Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 7, 1983); *see* Sierra Club v. Mullen, Nos. 83-2592 and 83-2595 (D.D.C. Nov. 9, 1983) (consent judgment directing defendants not to use paraquat until after filing an EIS); North Georgia Citizens Opposed to Paraquat Spraying v. Reagan, No. 83-1710A (N.D. Ga. filed Aug. 15, 1983) (temporary restraining order entered Aug. 15, 1983).

[44] Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 7, 1983).

[45] 42 U.S.C. § 4332(2)(C)(iii) (1976).

[46] *See* Concerned About Trident v. Rumsfeld, 555 F.2d 817, 825 (D.C. Cir. 1977); Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972); Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908, 922 (D. Or. 1977).

[47] *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551–54 (1978); Trinity Episcopal School Corp. v. Romney, 523 F.2d 88, 93 (2d Cir. 1975) ("[W]here . . . the objective of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible agent is required to study, develop and describe each alternative for appropriate consideration."); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974) ("The range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project."); *see also* CEQ Guidelines, 40 C.F.R. §§ 1500.2(e), 1500.2(f), 1505.1(e) (1982).

[48] Telephone Interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 7, 1983).

[49] Telephone interview with Rayburn F. Hesse, Special Assistant to the Assistant Secretary for International Narcotics Matters, Dep't of State (Oct. 21, 1983).

of marijuana plants — the only benefits to be compared are the efficiency with which the plant is destroyed and the environmental impact of the program. Alternative one, manual eradication, would avoid most of the undesirable environmental effects. Alternative two, the spray only method, is probably the most cost-effecient of the three, but involves the danger that some of the sprayed marijuana may reach the market if the grower acts quickly enough to harvest the plants before they wither. The DEA has rejected this alternative because of the public controversy that it is likely to generate.[50] Alternative three (the hybrid method) is environmentally safer than alternative two (the spray only method) because paraquat-contaminated marijuana could not reach consumers. However, it is more dangerous than manual eradication because of the risks of spray drift and of contamination of wildlife habitats.

To justify its use of alternative three, the DEA has claimed and will probably state in its EIS that spraying the plants makes eradication easier since dried plants are less difficult to remove from the ground than are healthy, unsprayed plants.[51] The DEA can defend itself against claims that it is endangering the environment by citing its spraying guidelines. Pursuant to these guidelines, only certified applicators are permitted to handle the concentrated paraquat. Also, all instructions on the warning label must be followed, each site will be evaluated to avoid contamination of water, wildlife, or human habitations by spray-drift, and vehicular spraying will be used when appropriate to avoid adverse environmental effects.[52] Under these conditions, the DEA has a defensible claim that its program will present no more danger to the environment than is created by the farmer's use of paraquat on his crops.

Although the DEA's claims of environmental safety are theoretically valid, recent experience with defoliants, such as Agent Orange and other pesticides including DDT, has created a deep public skepticism about the safety and efficiency of man-made toxins. Even if the danger of the contamination of food and water is relatively low, the potential for harm if such contami-

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[50] Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 21, 1983).

[51] *See* A. GLASS, *supra* note 6, at 6; Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration Administration (Oct. 21, 1983).

[52] *See* A. GLASS, *supra* note 6, at 4–6.

nation does occur is extremely great. The extreme toxicity of paraquat is no myth, as is evidenced by the requirement that drug enforcement agents wear respirators, gloves, long underwear, and face shields when handling the substance. Query what protection or warning the unfortunate hiker will have who happens to be passing the wrong part of the forest at the wrong time? Trees will also be exposed to much of the spray, as will any wild berries in the area which may later be eaten by wildlife or humans.[53]

III. NEPA: Substantive Review

In addition to the questionable safety claims, the DEA's selection of alternative three is subject to attack on efficiency grounds. Unlike in Mexico or Colombia, production of marijuana in the United States is primarily in small plots.[54] Aerial spraying of paraquat in the manner proposed by the DEA is particularly inefficient for use on small plots. A ground security force would have to reconnoiter the area before the spraying to ensure that no one would be inadvertently exposed to the spray. A helicopter or plane would then have to fly out to spray the plot. Under constant guard, the plants would be left to die for three days.[55] Finally, another crew would have to be sent to the site to uproot the plants and burn them.[56] Common sense suggests that even larger fields of sixty or more plants could be more efficiently destroyed by hand.

In evaluating whether the DEA has complied with the requirements of NEPA, the court may also consider whether the agency's choice of one marijuana eradication method over other alternative methods was arbitrary and capricious. The test for arbitrary and capricious actions, as outlined in *Citizens to Preserve Overton Park v. Volpe*,[57] involves two areas of judicial inquiry. First, the court must determine whether the agency action is "within the scope of its authority"[58] and second, the

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[53] *Cf.* Wisconsin v. Butz, 389 F. Supp. 1065, 1068 (E.D. Wis. 1975).
[54] *See* A. Glass, *supra* note 6, at 1.
[55] Telephone interview with R. David Hoover, Public Information Specialist, Drug Enforcement Administration (Oct. 21, 1983).
[56] *See* A. Glass, *supra* note 6, at 6.
[57] 401 U.S. 402 (1971).
[58] 401 U.S. at 416.

court must decide whether the agency has made a "clear error in judgment".[59]

There is no doubt that the decision to use paraquat is within the DEA's scope of authority. The DEA derives its statutory authority to carry out eradication programs from § 503 of the the Controlled Substances Act, which empowers the DEA to "conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted."[60] This section gives the Administrator wide discretion in choosing the method of eradication and does not require him to give a reason for his choice.

In light of the requirements imposed by NEPA, however, it appears that the Administrator's choice of the paraquat eradication program is an error in judgment. Assuming that the Administrator has considered the "relevant factors," that is, the comparative inefficiency of the proposed method and the risk of environmental harm, his decision to implement an environmentally hazardous drug eradication method when an equally effective, less costly alternative that poses fewer environmental risks is available seems to be unjustifiable. Title I § 101 of NEPA,[61] says that federal governmental agencies have a "continuing responsibility to use all practicable means, consistent with other essential considerations of national policy," to protect the environment.[62] This statement indicates that an agency must give great weight to the environmental risks posed by an action. An agency decision like the DEA's, which seems to disregard the risks to the environment, does not satisfy this requirement.

The problem with the courts performing a substantive review of an agency decision is that NEPA may not provide a basis for this type of judicial review.[63] The Supreme Court has supported the use of NEPA to require agencies to examine the environmental impact of their decisions.[64] When, however, the lower courts have attempted to pass judgment on the merit of an agency decision to use one alternative over another, the Supreme Court has been less supportive. To date, there have been only eight such NEPA cases before the Supreme Court, and in

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[59] *Id.*
[60] 21 U.S.C. § 873(a)(5) (1976).
[61] 42 U.S.C. § 4331 (1976).
[62] 42 U.S.C. § 4331(b) (1976).
[63] *See* Goldsmith & Banks, *supra* note 38 at 3–13; Sax, *supra* note 38 at 248.
[64] *See* Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

all eight cases the Court has reversed the lower court's decision on the theory that it was based on a substantive review of the agency decision.[65] In each decision, the Court narrowed the scope of judicial review though it did not foreclose substantial review altogether. The Court simply stated that NEPA is "essentially procedural,"[66] and therefore, when reviewing a NEPA case, a court should restrict itself to ensuring that the agency followed the procedures required by the Act.

If the court is empowered to evaluate the DEA's selection of the paraquat eradication method, and if it also finds the environmental danger and inefficiency arguments persuasive, it could require the DEA to develop a more thorough examination of the alternatives in the latter's EIS. Even though NEPA does not require the preparation of a detailed cost-benefit analysis, some courts have held that under certain circumstances, such an analysis may be both feasible and appropriate.[67] The test is whether the examination of alternatives is sufficient to provide an opportunity for the public and the reviewing court to evaluate the reasonableness of the agency's decision to reject them.[68] If the DEA can substantiate with concrete figures its claim that the proposed method is the most efficient, it will have satisfied NEPA's requirements. And even if it is unable to do so, it may

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[65] The most recent case was Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983), which was remanded by the Court in 1978 under the name Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). The others are Weinberger v. Catholic Action, 454 U.S. 139 (1981); Strycker's Bay Neighborhood Council v. Korlen, 444 U.S. 223 (1980); Andrus v. Sierra Club, 442 U.S. 347 (1979); Flint Ridge Dev. Co. v. Scenic Rivers Assn, 426 U.S. 776 (1976); Kleppe v. Sierra Club, 427 U.S. 390 (1976); Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Policy, 422 U.S. 289 (1975).

[66] Strycker's Bay Neighborhood Council v. Korlen, 444 U.S. 223, 227 (1980) (*quoting* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978)).

[67] The courts are generally unwilling to require a cost-benefit analysis because of the difficulty of reducing environmental effects to quantifiable figures. They may be willing to impose such a requirement when, as here, the costs of two alternatives would be easily obtainable. *Cf.* Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974); Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908, 935 (D. Or. 1977) (discussion of alternatives to aerial herbicidal spray found inadequate for lack of specific data); Sierra Club v. Coleman, 421 F. Supp 63, 67 (D.D.C. 1976) ("The speculation and conjecture with which the document's discussion is replete are not justified by any limitations of available information sources or analytical tools, and do not satisfy the agency's obligations under NEPA."); Kelley v. Butz, 404 F. Supp 925, 931–932 (W.D. Mich. 1975) ("This court . . . is mindful of the importance attached to relative costs in the balancing of interests process.")

[68] *See* Natural Resources Defense Council v. Calloway, 524 F.2d 79, 93 (2d Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974).

still be able to justify its program on foreign policy grounds as suggested earlier.[69]

The DEA's argument would probably be that under section 101 of NEPA, its drug eradication program must be "consistent with other considerations of national policy"[70] and that our present national policy is to encourage marijuana producing countries to spray paraquat on their marijuana crops. Colombian officials have often cited the United States' reluctance to use paraquat against its drug producers as a major factor behind their refusal to implement spraying programs in their own country.[71] It would be difficult to demonstrate by a preponderance of the evidence[72] that the DEA's use of paraquat will not tend to promote the use of paraquat by other governments. In addition to this, Congress has expressed an interest in encouraging such programs.[73] Although the DEA is not charged with the task of encouraging other countries to initiate paraquat programs, it is responsible for coordinating international efforts to curb the production of illegal drugs.[74] The reviewing court would be unlikely to find that a foreign policy justification is either without basis in fact or is simply inappropriate for DEA consideration. Once the court has found that the justification is appropriate and has some validity — no matter how slight — it cannot dismiss it without violating the rule established by the Supreme Court in *Strycker's Bay Neighborhood Council v. Korlen* which

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[69] *Cf.* McQueary v. Laird, 449 F.2d 608, 612 (10th Cir. 1971); Concerned About Trident v. Schlesinger, 400 F. Supp. 454, 482–83 (D.D.C. 1975).

[70] NEPA § 101(b), 42 U.S.C. § 4331(b) (1976).

[71] One report made the following finding:

> The amendment banning the herbicide paraquat was cited as the main reason why the Colombian government has not allowed an eradication program in the past. Now that the amendment has been repealed, the Colombian government is still reluctant to spray the marihuana fields, citing the . . . apparent U.S. reluctance to use paraquat against marihuana fields in the U.S.

STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., REPORT OF THE STAFF STUDY MISSION TO LATIN AMERICA, S.E. ASIA, AND PAKISTAN, OCTOBER 22, 1981, TO APRIL 3, 1982 app. 1, at 20 (Comm. Print 1982)' (Country Reports on International Narcotics Control).

[72] *See* Sierra Club v. Morton, 510 F.2d 813, 818 (5th Cir. 1975).

[73] Congress has given the Department of State the responsibility under 22 U.S.C. § 2291 (1976), of concluding agreements and providing funds for any programs relating to international narcotics matters.

[74] The DEA is charged with the task of "maintain[ing] worldwide operations, working closely with other nations, to suppress the trade in illicit narcotics and marihuana," Reorg. Plan No. 1 of 1968, 3 C.F.R. 1061 (1966–1970) (message of the President), *reprinted in* 5 U.S.C. app. at 1124 (1982). This function is assigned to the DEA through 28 C.F.R. § 0.100 (1982).

held that agencies should not elevate "environmental concerns over other appropriate considerations."[75]

IV. Conclusion

Opponents of the DEA decision to use aerial spraying of paraquat in its drug eradication program may be able to use the procedural requirements of NEPA to delay the implementation of the program. But once the DEA Administrator has met the procedural requirements, he will be free to implement whichever method he likes, as long as he can provide a reasoned and logical basis for his choice. Ironically, it may be better for marijuana consumers that he be free to choose what may be the most costly of his alternatives, the spraying in combination with manual destruction. A more rigorous standard of review might force him to adopt the most efficient of his alternatives, the spray-only method, which increases the likelihood of poisoning among marijuana consumers. With the current status of substantial review under NEPA as uncertain as it is, the odds of obtaining a judicial reversal of the Administrator's decision, whatever it might be, are slim at best.

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[75] Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 1035 S. Ct. 2246 (1983); Strycker's Bay Neighborhood Council v. Korlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

COMMENT

LEGISLATIVE ISSUES IN COMPUTER CRIME

LESLIE WHARTON*

Over the past thirty years computers have become an integral and necessary part of modern living. The very characteristics that make the computer a valuable tool, its speed and storage capacity, however, make it a potential source of criminal manipulation.[1] Evidence confirms that computer crime[2] is a growing problem.[3] It is estimated that only one in every one hundred computer crimes is ever detected,[4] and only fifteen per cent of those detected are reported.[5] Although computers can be secured by limiting access and by building controls into operating procedures,[6] such measures can seldom match the pace of tech-

*B.A., Boston University, 1973; Ph.D., Princeton University, 1979; member, Class of 1984, Harvard Law School.

[1] A. BEQUAI, WHITE-COLLAR CRIME: A TWENTIETH CENTURY CRISIS 107–09 (1978). Bequai categorizes computer vulnerability according to the five points of access: input, programming, CPU, output, and data transmission.

[2] Not all crimes committed on or with the aid of a computer have been accorded the status of "computer crime." Battery committed with a modem or remote terminal is as much battery as that committed with a telephone or typewriter. On the other hand, several states include within their computer crime statutes provisions aimed at damage to computers, computer facilities and so forth, in apparent recognition of the computer's status as a special target for industrial sabotage, terrorist activity, and similar crimes. *See* D.B. PARKER, CRIME BY COMPUTER 211–17 (1976) [hereinafter cited as CRIME BY COMPUTER]; D.B. PARKER, FIGHTING COMPUTER CRIME 125–29 (1983) [hereinafter cited as FIGHTING COMPUTER CRIME]; Ingraham, *On Charging Computer Crime*, 2 COMPUTER L.J. 429 (1980).

[3] Burnham, *Computer Fraud in 12 U.S. Agencies Put Far Above 172 Cases*, N.Y. Times, Oct. 27, 1983, at A26, col. 1. There is, however, some dispute over the accuracy of current statistics on computer crime. *See* Taber, *A Survey of Computer Crime Studies*, 2 COMPUTER L.J. 275 (1980). Taber criticizes the reliability of a Stanford Research Institute study and finds that a study made by the General Accounting Office is reliable but inadequate. *See also Interview with Tom Arbogast, Financial Crimes Unit Supervisory Special Agent with the FBI*, 1 COMPUTER L. REP. 808–09 (1983). Arbogast focuses on the bank industry, since bank fraud and embezzlement exceed any other white collar crime. Arbogast assumes that the increase in computer use in business will produce more computer-related crime. *But see* CRIME BY COMPUTER, *supra* note 2, at 23–40; FIGHTING COMPUTER CRIME, *supra* note 2, at 12–27; Parker, *Computer Research Abuse Update*, 2 COMPUTER L.J. 329 (1980).

[4] Note, *A Suggested Legislative Approach to the Problem of Computer Crime*, 38 WASH. & LEE L. REV. 1173, 1176 (1981) [hereinafter cited as Note, *A Suggested Approach*].

[5] Volgyes, *The Investigation, Prosecution, and Prevention of Computer Crime: A State-of-the-Art Review*, 2 COMPUTER L.J. 385, 388 (1980).

[6] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. J 29 2:C86, COMPUTER CRIME: COMPUTER SECURITY TECHNIQUES (1982). Although both techniques can be used in large organizations to increase security, small businesses do not have

nological advancement making new abuses possible.[7] Twenty-one states have responded to computer vulnerability by passing computer crime bills,[8] and the House of Representatives[9] and Senate[10] are considering similar legislation.

This Comment analyzes major provisions most commonly found in computer crime statutes, pinpointing certain conceptual problems peculiar to the computer and computer crime legislation. Section I reviews briefly the debate over the desirability of computer crime legislation. Section II addresses the scope of computer crime legislation as determined by the applicable definition of computer. Sections III and IV focus respectively on problems that arise in drafting laws criminalizing the use of the computer to commit fraud or embezzlement and in extending the definition of property for the purpose of larceny to include a computer's electrical impulses. This Comment concludes that computer crime statutes are needed but that they only address a part of the problem raised by computer crime.

I. THE NEED FOR NEW LAWS

Advocates of computer crime legislation argue that traditional criminal statutes have proved inadequate for the prosecution of

the personnel to employ the first method and cannot afford the latter. *But see* Pollack, *Electronic Trespassers*, N.Y. Times, Nov. 10, 1983, at D2. Casual computer trespassing by "hackers" dialing random telephone numbers or guessing at typical passwords can be stopped by relatively simple dial-back devices. Such devices do not prevent unauthorized access gained through data communication networks, such as Tymnet and Telenet, in which telephone traffic from many users cannot be traced. However, "password management software," which uses the computer's own power to search for intruders who reveal themselves by testing one password after another, is now being marketed for $20,000 to $30,000.

[7] Sokolik, *Computer Crime--The Need for Deterrent Legislation*, 2 COMPUTER L.J. 353, 361 (1980).

[8] ALASKA STAT. §§ 11.46.985, 11.81.900(45) (1983); ARIZ. REV. STAT. ANN. §§ 13-2301(E), 13-2316 (1978); CAL. PENAL CODE § 502 (West Supp. 1983); COLO. REV. STAT. §§ 18-5.5-101 to -102 (Supp. 1982); DEL. CODE ANN. tit. 11, § 858 (Supp. 1982); FLA. STAT. §§ 815.01–.07 (1981); GA. CODE §§ 16-9-90 to -95 (1982); ILL. REV. STAT. ch. 38, ¶ 16-9 (1981); ME. REV. STAT. ANN. tit. 17-A, § 357 (1983); Act of May 31, 1983, ch. 147, [1983] 3 Mass. Adv. Legis. Serv. 38 (Law Co-op.) (to be codified at MASS. GEN. LAWS ANN. ch. 266, § 30); MICH. COMP. LAWS §§ 752.791–.797 (1979); MINN. STAT. §§ 609.87–609.89 (West 1983); MONT. CODE ANN. § 45-2-101(54)(k), (69)(a)(iii) (1981); N.M. STAT. ANN. §§ 30-16A-1 to -4 (Supp. 1983); N.C. GEN. STAT. §§ 14-453 to -457 (1981); OHIO REV. CODE ANN. §§ 2901.01(J), 2913.01(L) (Page Supp. 1982); R.I. GEN. LAWS §§ 11-52-1 to -5 (1981 & Supp. 1983); UTAH CODE ANN. §§ 76-6-701 to -704 (Supp. 1981); VA. CODE § 18.2-98.1 (1982); WASH. REV. CODE § 9A.56.010(10) (1981); WIS. STAT. ANN. § 943.70 (West Supp. 1982–1983).

[9] H.R. 1092, 98th Cong., 1st Sess. (1983). A revised version of H.R. 1092, H.R. 3970, 98th Cong., 1st Sess., was introduced by Rep. William Nelson (D.-Fla.) on Sept. 22, 1983. *See also infra* note 13.

[10] S. 240, 96th Cong., 1st Sess., 125 CONG. REC. 1190 (1979). The equivalent version of S. 240 in the current session is S.1733, 98th Cong., 1st Sess. (1983).

computer criminals.[11] For instance, courts have been reluctant to hold that the theft of electrial impulses meets the statutory definition of larceny.[12] As a result, prosecutors must frequently "shoehorn" computer crimes into statutes designed to address other criminal activities.[13] This process consumes unnecessary time and effort and reduces the likelihood of obtaining a conviction.[14] In addition, commentators hope that computer crime legislation will help increase computer security[15] and deter potential offenders by providing explicit notice and heavy penalties.[16]

Despite a general perception that current criminal statutes do not reach most computer crimes,[17] some commentators oppose computer crime legislation. J.D. MacFarlane argues that legislators should address the "purpose of the criminal act" and not "get all hung up simply because things are done electronically as opposed to other time tested methods."[18] Roy N. Freed cautions that lawyers and judges would do better by becoming

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[11] Sokolik, *supra* note 7, at 360.

[12] *See, e.g.*, United States v. Seidlitz, 589 F.2d 152 (4th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); *see also* Rivlin, *A Multi-Million Dollar Crime Has Just Been Committed in This Room*, 10 STUDENT LAW. 15, 18 (1982).

[13] Sokolik, *supra* note 7, at 373; *see, e.g.*, People v. Gauer, 7 Ill. App. 3d 512, 288 N.E.2d 24 (1972).

[14] The investigation of a computer crime is itself a difficult task sometimes requiring painstaking review of millions of lines of computer printouts and program codes. Rivlin, *supra* note 12, at 18; Telephone inteview with Stanley D. Halper, National Director of Auditing, Coopers & Lybrand, New York City (Oct. 7, 1983).

[15] Sokolik, *supra* note 7, at 372–73. Sokolik also argues that successful prosecution of computer crimes will induce computer users to cooperate in the prevention and detection of computer crimes and may persuade manufacturers to improve security in computer design. *Id.* at 374. One author, while admitting that mandatory security requirements are impractical, advocates legislation that may provide economic incentives for the development of security features or establish minimum security features in all computer systems. Note, *A Suggested Approach*, *supra* note 4, at 1184–86. The Small Business Computer Crime Act of 1983, H.R. 3075, 129 CONG. REC. H8563 (daily ed. Oct. 24, 1983), introduced by Rep. Ron Wyden (D.-Or.), would establish a task force to investigate the effects of computer crime on small businesses and direct the Small Business Administration to establish a clearinghouse for information on this subject and to develop guidelines to support small business security efforts. *Small Business Computer Crime Prevention Act: Hearings on H.R. 3075 Before the Subcomm. on Antitrust of the House Comm. on Small Business*, 98th Cong., 1st Sess. (1983) (in press) (statement of Rep. Ron Wyden (D-Or.)).

[16] The stringent penalty provisions of S. 240 and H.R. 1092, which include imprisonment and heavy fines, are intended to make the federal legislation a powerful deterrrent. Roddy, *The Federal Computer Systems Protection Act*, 7 RUT. J. COMPUTERS, TECH. & L. 343, 351 (1980). Many state statutes, although varying widely in the grading of statutory penalties for computer crimes, are formulated to maximize deterrent effect. *See, e.g.*, GA. CODE § 16-9-93(b) (1982); MICH. COMP. LAWS § 752.797 (1979).

[17] N.Y. Times, Sept. 18, 1983, at A1, col. 1.

[18] *Computer Systems Protection Act of 1979, S. 240: Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 8 (1980) (statement of Hon. J.D. MacFarlane, Atty. Gen. of Colorado, President of the Nat'l Ass'n of Attys. Gen.) [hereinafter cited as *1980 Hearing*].

computer literate so that they can interpret the "rules of law in light of the new technological developments. Existing laws usually are entirely adequate to accommodate the transactions, activities, and situations that involve computer technology compatibly with prevailing public policies."[19] Both Freed and MacFarlane agree that computer crime statutes multiply criminal laws unnecessarily.[20] These opponents of computer crime legislation fear that we are in danger of mystifying the computer through the invention of insupportable legal concepts such as "stealing time."[21]

An empirical comparison of prosecutorial experience under traditional criminal statutes and the new computer crime laws might resolve some of the questions raised by this debate. However, it is too early to evaluate the success of computer crime statutes in those states that have adopted them. The oldest statute has been in effect for only five years.[22] Only a few cases have been brought under any of these new laws.[23]

This Comment assumes that there is a need for computer crime statutes, without entering the debate on those terms. That assumption being made, it is not practical to wait for all the evidence to come in and every refinement in the interpretation of existing statutes to be made. The problem needs to be addressed now. The following three sections of this Comment will examine typical computer crime statutory provisions from the perspective of the drafter rather than the prosecutor.

II. The Definition of Computer

Any statute addressing computer crime must first define its subject matter. The rapid rate of technological advancement in the computer industry makes the adoption of fixed definitions

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[19] *Conference on Computer-Related Crime: Hearings Before the Comm. on Criminal Justice of the House of Representatives of the Commonwealth of Massachusetts*, at 2–3 (Sept. 1, 1982) (statement of Roy N. Freed, partner, Powers & Hall).

[20] *1980 Hearing*, *supra* note 18, at 5–6; Telephone interview with Roy N. Freed, Powers & Hall, Boston (Oct. 5, 1983).

[21] Telephone interview with Roy N. Freed, Powers & Hall, Boston (Oct. 5, 1983).

[22] Florida's Computer Crimes Act became effective on August 1, 1978. Florida Computer Crimes Act, ch. 78-92, 1978 Fla. Laws 139 (codified at Fla. Stat. §§ 815.01–.07 (1981)).

[23] California and Colorado are two states which have had several prosecutions under their computer crime statutes. Stanford Research Institute is now conducting a survey for the Department of Justice to identify cases brought under computer crime statutes. Telephone interview with Donn B. Parker, Stanford Research Institute (Oct. 5, 1983).

in this context especially problematic.[24] The Senate bill, S. 240, after which many of the state statutes are modeled,[25] defines a computer as "an electronic device which performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses."[26] The Senate bill errs on the side of conservatism and will require amendment if it is to avoid obsolescence. The House bill, H.R. 1092, anticipating technological developments, adopts a more sweeping characterization. It defines the computer as "any electronic, magnetic, optical, hydraulic, organic or other high speed data processing device or system performing logical, arithmetic, or storage functions."[27] The House version suffers from overbreadth. All living organisms are in some sense "organic systems" that perform "high speed data processing and storage functions."

The special purpose microprocessor presents an especially difficult drafting problem.[28] Statutes which define the computer as a device which performs logical, arithmetic, and memory functions include the microprocessors found in electric typewriters, pocket calculators, automobile fuel injection systems, and other common electrical devices.[29] Under the terms of the statute, a secretary typing a personal letter on her office calculator might be commiting a computer crime.[30] To avoid some of these extreme consequences, H. R. 1092 explicitly excludes "an automated typewriter or typesetter, a portable hand-held calculator, or any computer designed and manufactured for, and which is used exclusively for, routine, personal, family or household purposes, and which is not used to access, to communicate with, or to manipulate any other computer."[31] The Illinois statute

[24] *See* E. FEIGENBAUM & P. MCCORDUCK, THE FIFTH GENERATION (1983).

[25] *See* ARIZ. REV. STAT. ANN. § 13-2316 (1978); CAL. PENAL CODE § 502 (West Supp. 1983); COLO. REV. STAT. §§ 18-5.5-101 to -102 (Supp. 1982); GA. CODE §§ 16-9-90 to -95 (1982); ILL. REV. STAT. ch. 38, ¶ 16-9 (1981); N.M. STAT. ANN. §§ 30-16A-1 to -4 (Supp. 1983); N.C. GEN. STAT. §§ 14-453 to -457 (1981); R.I. GEN. LAWS §§ 11-52-1 to -5 (1981 & Supp. 1983).

[26] S. 240, 96th Congress, 1st Sess. § 3(c)(2), 125 CONG. REC. 1190 (1979).

[27] H.R. 1092, 98th Cong., 1st Sess. § 3 (1983).

[28] A special purpose or dedicated machine is one that is constrained to perform a specific program. A general purpose machine is one on which in principle any program can be run.

[29] Gemignani, *Computer Crime: The Law in '80*, 13 IND. L. REV. 681, 709 (1980) [hereinafter cited as Gemignani, *The Law in '80*].

[30] Taber, *On Computer Crime (Senate Bill S. 240)*, 1 COMPUTER L.J. 517, 532 (1979) [hereinafter cited as Taber, *On Computer Crime*].

[31] H.R. 1092, 98th Cong., 1st Sess. § 3 (1983).The bill as drafted attempts to exclude the now ubiquitous home computer except where connected through telephone wires or by other means to another computer. With the advent of home banking, shopping, and other services, this exception may soon have only limited applicability.

avoids the necessity of framing more or less complete lists of exclusions by defining the computer as a "general purpose digital device."[32] But excluding devices is dangerous when technology is changing.[33] The innocuous typewriter used by today's office worker may function in the future as a powerful computer. Rather than exclude particular machines, legislators might heed Donn Parker's advice and allow particular uses such as letter writing and checkbook balancing.[34]

Focusing on uses will avoid the criminalization of routine practices while allowing computer crime statutes to apply broadly to all forms of computer abuse. Dedicated microprocessors are as subject to criminal manipulation, if of a different sort, as general purpose data processing machines. The increasing use of robots in manufacturing raises a problem of industrial sabotage beyond arson or physical attacks on machinery. A recent case illustrates the potential for abuse of microprocessor-run machinery. In a Lake Tahoe casino, a slot machine signaled a $1.7 million jackpot.[35] The winner was more a beneficiary of computer expertise than luck. Apparently the microprocessor which controls the slot machine and prevents more mundane forms of cheating was tricked into producing a winner on demand. In a state with a restrictive definition of computer, these acts would not come under the computer crime statute. As a matter of policy it seems better to define the computer as broadly as possible. This expresses the legislative intent to cover all criminal uses of computer technology and reduces the need for future amendment.

III. Deception, Old and New

Many of the questions raised in the debate over the need for and adequacy of current computer crime statutes are exempli-

[32] Ill. Rev. Stat. ch. 38, ¶ 16-9 (1981). Typewriters, calculators, and similar devices use dedicated microprocessors not capable of being further programmed by the user.

[33] Fighting Computer Crime, *supra* note 2, at 242–43.

[34] *Id.*

[35] Turner, *Computer Wizardry Led to $1.7 Million Slot Machine Jackpot*, N.Y. Times, Sept. 24, 1983, at A5, col. 1. Nevada does not have a computer crime statute. For research purposes, Donn Parker includes all computer-related crimes in the broad category of computer abuse. Crime by Computer, *supra* note 2, at 12–22. What should or should not be denominated a computer crime is only significant when considering legislation. Several states include within their computer crime statutes provisions aimed at damage to computers, computer facilities, and so forth. These provisions may be based on a vision of computers and computer facilities as a special target for industrial sabotage, terrorist activity, and other crimes directed at the computer system as a system. *See* Crime by Computer, *supra* note 2, at 211–27; Fighting Computer Crime, *supra* note 2, at 125–29.

fied by the approach these laws have taken toward the computer as an instrument of deception. Although fraud, forgery, and embezzlement statutes have in many cases been sufficient to address computer crimes, the special facts of computer crimes have in some cases fallen outside the statutory definitions. In *United States v. Jones*,[36] Michael Everston, an employee of a Canadian firm, altered records causing his employer's computer to issue checks to Amy Everston Jones in Maryland. Mrs. Jones was indicted under two federal statutes that make the interstate transportation of stolen, converted, or fraudulently obtained securities a crime.[37] Because the statutes expressly exclude forgeries of checks of a foreign corporation, the case turned on the question of whether the creation of a false account number and the issuance of checks totaling $130,000 to Mrs. Jones constituted fraud or forgery. The District Court dismissed the indictment on the ground that the checks were forgeries.[38] On appeal, the Fourth Circuit reversed, holding that Everston's acts constituted a fraud.[39]

The *Jones* case demonstrates one potential advantage of computer crime legislation. Under a provision such as Section 502 of the California Penal Code, "any person who intentionally accesses or causes to be accessed any computer system . . . for the purpose of (1) devising or executing any scheme or artifice to defraud or extort or (2) obtaining money, property, or services with false or fraudulent intent, representations, or promises" commits a computer crime.[40] Michael Everston, had he committed his fraud within the United States, could have been indicted and convicted under a computer crime statute without ever reaching the issue of fine distinctions between fraud and forgery.[41] Other cases, in which small amounts are stolen from

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[36] 414 F. Supp. 964 (D. Md. 1976), *rev'd*, 553 F.2d 351 (4th Cir.), *cert. denied*, 431 U.S. 968 (1977). Checks are included in the definition of securities for the purposes of 18 U.S.C. §§ 2314–2315 (1982).

[37] 414 F. Supp. at 965; *see* 18 U.S.C. §§ 2314–2315 (1982).

[38] 414 F. Supp. at 971.

[39] 553 F.2d 351 (4th Cir.), *cert. denied*, 431 U.S. 968 (1977).

[40] CAL. PENAL CODE § 502(b) (West Supp. 1983); *see also* ARIZ. REV. STAT. ANN. § 13-2316 (1978); COLO. REV. STAT. § 18-5.5-102(2) (Supp. 1982); FLA. STAT. § 815.05 (1981); GA. CODE § 16-9-93 (1982); ILL. REV. STAT. ch. 38, ¶ 16-9 (1981); MICH. COMP. LAWS § 752.794 (1979); N.M. STAT. ANN. § 15-1A-13 (Supp. 1983); N.C. GEN. STAT. § 14-454 (1981); R.I. GEN. LAWS § 11-52-3 (Supp. 1983); UTAH CODE ANN. § 76-6-703 (Supp. 1981); WIS. STAT. ANN. § 943.70 (West Supp. 1982–1983).

[41] Of course, Everston was convicted under Canadian law. Mrs. Jones probably could not have been indicted under the California or any other computer crime statute unless it was found that she caused the computer to be accessed. None of the computer crime statutes have provisions directed at those receiving property or information fraudulently obtained through a computer.

numerous bank accounts or the computer is used to make a series of fraudulent credit purchases, also can be prosecuted under a computer crime statute without requiring the prosecutor to allege and prove every instance of criminal activity.[42] As such, computer crime statutes operate as a kind of enabling legislation so that the complex crimes made easy by the use of computer technology can be prosecuted without the excessive time and effort required under existing statutes.[43]

Questions arise as to whether the comprehensive approach to deception taken by Section 502 and similar statutes achieves too much. Since computers have become a mainstay of business and government financial accounting, does not virtually every consumer debtor, mail order purchaser, and entitlements beneficiary "cause to be accessed" a computer system whenever he files an application or initiates a transaction? If so, an extremely broad spectrum of deceptive transactions would be subject to prosecution as computer crime. It is unlikely that such an addition to the criminal law would promote either the uniformity of judicial treatment or the notice to potential offenders sought by supporters of computer crime legislation. Drafters also should consider the implication of eliminating distinctions among various types of "deception" for the purpose of a computer crime statute. Section 502(b) combines false promise, false representation, fraud and even extortion. The computer process may well obscure the differences among them, yet one consequence of discarding the legal distinction is that an offense such as false promise, typically subject to tort or contract action, becomes a felony subject to fine and imprisonment if a computer is involved.

The *Jones* case points to additional, more subtle problems in addressing crimes of deception perpetrated through the use of computers. Both the district court and the Fourth Circuit ex-

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[42] Telephone interview with Don Johnson, Chief Counsel, Pennsylvania Crime Commission (Oct. 13, 1983); Statement of Edward G. Rendell, District Attorney of Philadelphia, made to the House of Representatives, Commonwealth of Pennsylvania, at 3 (Mar. 1983).

[43] *Embezzling Case at Wells Fargo: Keys Are Computers and Volume*, N.Y. Times, Feb. 23, 1981, at A1, col. 3. An employee of Wells Fargo Bank embezzled approximately $21 million over a two-year period by using the bank's computerized system for interbranch transactions to withdraw funds from another branch while hiding the losses by creating fake credits to the accounts. Policzer, *Alleged Smith Co-conspirator Describes Theft Beginning*, L.A. Daily J., Nov. 16, 1981, at 2, col. 2. An employee of the Social Security Administration had the computer issue $500,000 of phony benefit checks to her. *Secret Service Seeks Help in Cracking SSA Fraud*, COMPUTERWORLD, Aug. 4, 1980, at 13.

pressed great concern with the role played by the computer in the commission of the crime. The district court insisted that Everston drew the check himself though he used the computer as an instrument.[44] The court of appeals found that Everston's actions deceived the accounts payable department into issuing a check via the computer.[45] Donald G. Ingraham has suggested that the crime lay, not in the issuance of the check, but in Everston's "having implicitly deceived the computer and those who fed it into believing there was a bona fide obligation."[46]

Two states also have expressed legislative concern about the role of the computer in the commission of such crimes. Alaska has enacted a special provision declaring that "for an offense that requires 'deception' as an element, it is not a defense that the defendant deceived or attempted to deceive a machine."[47] The Utah Computer Fraud Act makes it a crime to access a computer in order to "obtain money, property or services including the unauthorized use of computer time under false pretenses representations, or promises, *including representations made to a computer* . . . ."[48] Under the Alaska and Utah statutes, the computer can be deceived and representations can be made to it.

The traditional idea of deception, one embraced by this Comment, is that only human actors can be deceived.[49] The computer performs tasks that once were and still are performed by people. We are accustomed to viewing people as agents, as authors of their own acts. When machines begin to perform the same tasks, sometimes seemingly on their own initiative, we must decide whether to admit them to the ranks of actors or to leave them among the acted upon. This may not appear to be a serious issue under current technology, but developments in artificial intelligence, robotics, and "expert systems" are bringing us to the point where computers can be made to operate as decision-makers instead of mere processors of the decisions made by their programmer operators.[50] It would be a grave mistake to

[44] 414 F. Supp. at 964.

[45] 553 F.2d at 352.

[46] Ingraham, *supra* note 2, at 431.

[47] ALASKA STAT. § 11.46.985 (1983). The section goes on to include vending machines, computers, turnstiles, and automatic teller machines within the meaning of machine.

[48] UTAH CODE ANN. § 76-6-703 (Supp. 1981) (emphasis added).

[49] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 107, at 700 (4th ed. 1971) (An intentional misrepresentation "involves the intent that a representation . . . shall be directed to a particular person or class of persons.").

[50] *See generally* E. FEIGENBAUM & P. MCCORDUCK, *supra* note 24.

begin treating computers as quasi-human beings without serious human consideration of the legal consequences both for criminal laws and areas such as contract and tort.

IV. Property Crimes

A. *Larceny*

Legislators encounter similar definitional and conceptual problems in framing statutes to control crime directed at the computer as property. The conversion of the contents of the computer, the programs, data bases, and information stored in its memory may fall outside the scope of common law definitions of crimes against property.

The problem raised by intangible property, such as program codes, is illustrated in *United States v. Seidlitz*.[51] In that case, the defendant accessed his former employer's Maryland computer from his Maryland home and Virginia office through the telephone lines and obtained a copy of a valuable computer program. Prosecutors could not bring the case under the Maryland statute governing theft because its definition of property did not cover computer programs.[52] They were equally unsuccessful in using the statute dealing with the interstate transportation of stolen property.[53] The defendant was finally convicted on two counts of wire fraud in violation of federal law.[54] If the defendant had not used his Virginia office computer on two occasions, the indictment would probably have been dismissed.[55]

Seidlitz illustrates judicial resistance to the expansion of tra-

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[51] *United States v. Seidlitz*, 589 F.2d 152 (4th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).

[52] Volgyes, *The Investigation, Prosecution, and Prevention of Computer Crime: A State-of-the-Art Review*, 2 Computer L.J. 385, 398–99 (1980). A year later Maryland amended § 340 of its criminal code to include computer programs and software. *See* Md. Ann. Code art. 27, § 340(h)(12) (1982).

[53] Volgyes, *supra* note 52, at 398–99.

[54] 18 U.S.C. § 1343 (1982):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000 or imprisoned not more than five years, or both.

[55] Volgyes, *supra* note 52, at 399.

ditional statutory concepts such as "property" or "thing of value" to include products of a new technology.[56] Most of the state legislatures that have adopted computer crime legislation have amended the definition of property for the purposes of the computer crime statute.[57] Property subject to theft now includes "information, including electronically produced data, and computer software and programs in either machine or human readable form, and any other tangible or intangible item of value."[58]

In extending the concept of property, computer crime statutes go far beyond the realm of copyright[59] and trade secrets[60] by creating a per se property interest in information. While this seems reasonable when we consider the private business records that have been at issue in almost all computer crime cases to date, it may lead to future problems if legislative drafters and courts begin to characterize information in general as property. The real objective of computer crime statutes is to protect data and records stored in a computer system just as similar records stored on paper are protected today by laws that make breaking and entering, trespass, and theft of tangible property crimes. Rather than expand the concept of property to include information, a better solution might be that reached by Florida. The

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[56] The problem raised by intangible property is further illustrated by the case of Commonwealth v. Yourawski, 1981 Mass. Adv. Sh. 1954, 425 N.E.2d 298. There the defendant owned a cassette tape containing a pirated copy of *Star Wars*, raising the question of whether images and sounds on the tape were property subject to larceny under Massachusetts law. The court determined they were not and dismissed the indictment. The *Yourawski* case was one of the reasons behind the Massachusetts legislature's amendment to its larceny statute defining property to include "electronically processed or stored data, either tangible or intangible, data while in transit. Act of May 31, 1983, ch. 147, [1983] 3 Mass. Adv. Legis. Serv. 38 (Law Co-op.) (to be codified at MASS. GEN. LAWS ANN. ch. 266, § 30).

[57] The following states have adopted this or similar language in defining property within a separate computer crime statute: ARIZ. REV. STAT. ANN. § 13-2301(E)(7) (1978); COLO. REV. STAT. § 18-5.5-101(8) (Supp. 1982); FLA. STAT. § 815.03(8) (1981); GA. CODE § 16-9-92(7) (1982); MICH. COMP. LAWS § 752.793 (1979); N.C. GEN STAT. § 14.453(8) (1981); R.I. GEN. LAWS § 11-52-1(E) (1981); TENN. CODE ANN. § 39-3-1403(11) (Supp. 1983); UTAH CODE ANN. § 76-6-702(5) (Supp. 1981); WIS. STAT. ANN. § 943.70(1)(h) (West Supp. 1982–1983).

[58] MICH. COMP. LAWS § 752.793 (1979).

[59] Federal copyright law under the 1980 amendment covers computer programs. 17 U.S.C. § 101 (1982).

[60] More than twenty states have enacted trade secret legislation. Gemignani, *The Law in '80*, *supra* note 29, at 695. To obtain protection under trade secret law, the information, design, process, or formula must be a secret not generally known to the public and must give its possessor an advantage over competitors. Usually the owner must demonstrate measures taken to prevent the secret from becoming available to all those not chosen by the owner. For examples of trade secret regulation, see generally CAL. PENAL CODE § 499c (West Supp. 1983); N.J. STAT. ANN. § 2C:20-1(i) (West 1982); TEX. PENAL CODE ANN. § 31.05 (Vernon 1974).

Florida computer crime statute includes information and data within the concept of intellectual property, but makes it a crime to take or disclose data or information obtained through a computer only if such information is a trade secret or confidential by law.[61] Because most statutes make it a separate offense to access a computer knowingly, willfully, or intentionally without authorization, the person accessing the computer and taking non-confidential, non-proprietary information still can be prosecuted.[62]

Some state computer crime statutes compound the inconsistencies produced by defining computer-generated information as property in their fraud provisions. The Rhode Island Computer Crime Act, to take one example, makes it a felony to access a computer to obtain money, property, or services by means of false or fraudulent pretenses, representations, or promises.[63] Under the applicable definition, information, including electronically produced data, is property.[64] A person who uses someone else's password to access the computer, and obtains a printout or other copy of some data stored in the computer, is guilty of a felony.[65] The person who takes some inconsequential data already in the public domain and the person who uses the computer to commit a million-dollar fraud are equally guilty under the statute because the statute does not distinguish according to the value of the property or services taken.[66] As a result, drafters must calibrate appropriate penalties for each offense. The similar treatment of dissimilar cases weakens the deterrent effect of computer crime statutes. Inadequately drafted statutes also may fail to provide potential offenders with unequivocal notice of their criminal activity, one of the principal purposes of computer crime legislation. Notice is necessary in the area

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[61] FLA. STAT. § 815.04(3) (1981).

[62] See, e.g., the following computer crime statutes that make the knowing, intentional or willful unauthorized accessing of a computer a crime in itself: GA. CODE § 16-9-93 (1982); N.M. STAT. ANN. § 30-16A-4 (Supp. 1983); N.C. GEN. STAT. § 14-454(a) (1981); WIS. STAT. ANN. § 943.70 (West Supp. 1982–1983).

[63] R.I. GEN. LAWS § 11-52-2 (1981).

[64] *Id.* § 11-52-1(E); *see also* ARIZ. REV. STAT. ANN. § 13-2301(E)(8) (1978); CAL. PENAL CODE § 502(7) (West Supp. 1983); N.C. GEN. STAT. § 14-453 (1981).

[65] For a particularly strong statement of the ethical issues involved in computer abuse, see FIGHTING COMPUTER CRIME, *supra* note 2.

[66] See Note, *Addressing Computer Crime Legislation: Progress and Regress*, 4 COMPUTER L.J. 195 (1983), for a discussion of the failure of computer crime statutes to differentiate penalties on the basis of abuse.

of computer crime in particular because many computer "hackers"[67] do not perceive their activities as criminal.

B. *Theft of Time and Services*

Legislators may extend the concept of property interests beyond computer-held information to include computer time and services.[68] Courts currently do not regard the use of the computer as a property interest under state laws. In *Lund v. Commonwealth*[69] a graduate student at Virginia Polytechnic Institute used more than $25,000 worth of unauthorized computer time. Found guilty of grand larceny, the student appealed on the ground that computer time and services are not the subject of larceny under the Virginia Code. The Virginia Supreme Court agreed with the defendant and reversed the conviction.[70]

In *People v. Weg*,[71] the defendant, a programmer working for the New York City Board of Education, was indicted for using his employer's computer in violation of the New York Theft of Services Act. Under that statute, a person is guilty of theft of services when, "Obtaining or having control over . . . business, commercial or industrial equipment or facilities of another person . . . he uses or diverts to the use of himself . . . such labor, equipment or facilities."[72] Arguing that the legislature could not have intended to make "criminals of the thousands of employees in government and the private sector who make unauthorized use of their employers' computers,"[73] and relying on a technical interpretation of the word "business" in order to exclude the Board of Education's computer, the court dismissed the case.[74]

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[67] The term "hacker" originally referred to a person who knew computers inside out and who derived great pleasure from constructing programs and contemplating their beauty. The term is more often used today to refer to electronic vandals and technological trespassers.

[68] See, e.g., the following state statutes defining the theft of computer crime or services as a crime: ME. REV. CODE ANN. tit. 17A, § 357 (1983); VA. CODE § 18.2-98.1 (1982); WASH. REV. CODE § 9A.56.011(10) (1981). Most computer crime statutes implicitly include the use of a computer when they make unauthorized access a crime. However, while it may be easy to "value" the theft of computer time or services for the purposes of determining the severity of crime and the appropriate penalty, such valuation may be far more difficult if not impossible under a statute that makes access itself a crime.

[69] 217 Va. 688, 232 S.E.2d 745 (1977).

[70] *Id.* at 692, 232 S.E.2d at 749.

[71] 113 Misc. 2d 1017, 450 N.Y.S.2d 957 (Crim. Ct. 1982).

[72] N.Y. PENAL LAW § 165.15(8) (McKinney Supp. 1982–1983).

[73] 113 Misc. 2d at 1023, 450 N.Y.S.2d at 961.

[74] *Id.*

Federal courts have adopted a much more expansive view of computer time and services as property subject to theft. In *United States v. Sampson*,[75] the defendant was indicted under a federal statute for stealing a "thing of value" belonging to the government. The court refused to accept the defendant's claim that computer time and services were not property within the meaning of "thing of value," holding that "the consumption of its time and the utilization of its capacities seem . . . to be inseparable from the physical identity of the computer itself.[76] In *United States v. Kelly*,[77] the court went one step further, declaring that the defendants' use of their employer's computer time and storage capacity constituted a fraud because it deprived their employer of "the honest and faithful performance of their duties as employees."[78]

Computer crime statutes that prohibit the unauthorized use of computer time and services bring federal and state law into accord and establish that the use of the computer is itself an asset.[79]

C. *Accessing the Computer*

Statutes that prohibit the unauthorized access to a computer in effect are creating a new crime, electronic trespass.[80] In proscribing unauthorized access, state computer crime statutes make the equivalent of an employee entering a records storeroom without authorization into a criminal offense.[81] Many find this too harsh.[82] Employees could be subject to fines or imprisonment for minor errors or innocent confusion over the extent of their authorization.[83] Such provisions, however, are not intended to cover employees only. With the development of remote terminals, microcomputers, and network systems, many

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[75] 6 Computer L. Serv. Rep. (Callaghan) 879 (N.D. Cal. Apr. 4, 1978).
[76] *Id.* at 880.
[77] 507 F. Supp. 495 (E.D. Pa. 1981)
[78] *Id.* at 499–503.
[79] *See supra* note 68.
[80] *See supra* note 62.
[81] Many statutes make it a crime to access, alter, damage, or destroy a computer or its contents without authorization. Since it is easier to accept the intentional alteration or destruction of data and programs as a criminal offense, I focus here on the less serious crime of unauthorized access.
[82] *See* Gemignani, *The Law in '80*, *supra* note 29, at 709; Taber, *On Computer Crime*, *supra* note 30, at 531.
[83] CAL. PENAL CODE § 502(d) (West Supp. 1983).

people are capable of gaining unauthorized access to a computer. Statutory language is needed that will allow the prosecution of non-employees while protecting employees from unreasonable applications of the statute. The California Computer Crime Act approaches this problem by limiting criminal prosecution to those who "maliciously" access a computer without authorization.[84] Authorization also could be defined to include a presumption that employees or agents of the owner have authorization unless explicitly disproved.[85] Either solution protects privately ordered employer-employee relations without giving full scope to the prosecution of criminal activities.

IV. CONCLUSION

Opponents of computer crime legislation assert that these new statutes create an unnecessary multiplicity of laws and establish confusing new conceptualizations. Supporters point to benefits such as easier prosecution and investigation and notice to offenders. The degree to which computer crime legislation fulfills the expectations of its proponents may largely be a function of how skillfully these statutes are drafted.

However, legislators face substantial drafting problems including several not yet addressed in this Comment. Gathering and presenting computer-generated evidence remains a serious problem for prosecutors under existing statutes.[86] The Federal Rules of Evidence classify computer-generated evidence as hearsay and seldom admit it under the business records exception.[87] Some prosecutors may prefer charging a computer crime under a theft statute in order to avoid presenting evidence on the computer system itself. The investigation of a computer crime presents its own unique problems, sometimes requiring experts to spend hundreds of hours of time combing through computer print outs.

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[84] *Id.*

[85] Testimony of Louis T. Fanti, Chairman, Computer Crime Comm. of the Am. Bar Ass'n, before the Judiciary Comm. of the Pennsylvania House of Representatives, at 4 (Mar. 28, 1983).

[86] Telephone interview with Michael Cudahy, Assistant Attorney General, Phoenix, Arizona (Oct. 7, 1983).

[87] Gemignani, *The Data Detectives: Building a Case From Computer Files*, Nat'l L.J., May 25, 1981, at 28, col. 1 (summarizing the evidentiary difficulties). *But see* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 1001(4)[07] (1983) (arguing for admissibility of computer evidence).

The reporting of computer crime by the victims of computer abuse is crucial if computer crime statutes are to be effective. Few cases are now reported.[88] Businesses hesitate to publicize the vulnerability of their computers. Investigation can tie up a computer system for days or weeks, causing greater losses than the crime itself.[89] Only one state has passed a law to encourage the reporting of computer crimes.[90] The Georgia law makes it a duty to report suspected computer crimes and provides immunity from civil liability for such reporting.

While most computer crimes to date have involved employee use of employer computers, employees are not the only unauthorized users. One group of electronic trespassers, the hackers, have gained notoriety over the past year for their penetration of business and government computers around the nation.[91] No statutes have addressed themselves directly to this problem. Legislatures could resolve this problem by making it a misdemeanor to use or publish the passwords and access codes used to gain access to these computers and computer systems.[92] Such a law would increase computer security by making it more difficult for hackers and other unauthorized users to gain access to computers. It would allow law enforcement personnel to stop computer crimes before they happen.

Are the critics of computer crime legislation correct in arguing that computer crime statutes only muddy the legal waters with unnecessary laws and murky distinctions? Traditional laws do not reach the theft of information from a computer or the unauthorized access and use of the computer. However, in defining the role played by the computer in fraud or embezzlement or the property interests owners have in the content and use of their computers, we are extending notions of property and deception far beyond the traditional concepts.

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[88] *See supra* text accompanying notes 22–23.

[89] Telephone interview with Stanley D. Halper, National Director of Auditing, Coopers & Lybrand, New York (Oct. 7, 1983).

[90] GA. CODE §§ 16-9-90 to -95 (1982).

[91] N.Y. Times, Oct. 14, 1983, at A1, col. 2.

[92] *Cf.* CAL. PENAL CODE § 502.7(c) (West Supp. 1983) (making it a misdemeanor to publish a telephone credit card number or code).

BOOK REVIEWS

CREATIONISM, SCIENCE, AND THE LAW: THE ARKANSAS CASE. Edited by *Marcel C. La Follette*. Cambridge, Mass.: The MIT Press, 1983. Pp. xii, 236, bibliography, appendixes, indexes. $9.95 paper.

*Review by Susan P. Sturm**

"Creation-science" is the latest fundamentalist strategy to tailor public education to the literalist Biblical account of origins set forth in the book of Genesis.[1] Having lost the battle to introduce this account of creation directly into the public school curriculum,[2] creationists now present their literalist Biblical conception as an alternative scientific explanation of the origin of the universe, earth, life, and human beings. By donning the

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* Silverglate, Gertner, Baker & Fine, Boston, Mass. B.A., Brown University, 1976; J.D., Yale Law School, 1979. Ms. Sturm was a staff attorney with the American Civil Liberties Union and participated in the litigation of McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982).

[1] The Balanced Treatment of Creation-Science and Evolution-Science Act, Act 590, 1981 Ark. Acts 1231, which was overturned by the court in the Creation Case, defines "creation-science" as

> the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes within only fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds.

The organizing principle of "creation-science" is the creation of the universe, earth, and life by the Creator—God—as described in Genesis. This is the conceptual framework integrating each of the so-called scientific evidences into the creation model. It is also the sole inference drawn by each of the so-called scientific evidences included in the definition of creation-science. *See* Gilkey, *The Creationist Controversy: The Interrelation of Inquiry and Belief*, in CREATIONISM, SCIENCE, AND THE LAW: THE ARKANSAS CASE 129 [hereinafter referred to by page number only].

The term "creation-science" has no meaning outside the context of the Creationism controversy, and epitomizes the fundamentalists' effort to divert attention away from the religiosity of Creationism by presenting Creationism as an alternative scientific theory. This strategy, although unsuccessful in the courts, can quite effectively sway public opinion. It capitalizes on the public's ignorance and awe of science, as well as on the sensitivity of the progressive legal and academic communities to claims of censorship. This strategy is discussed in greater detail in my essay, *Creationism, Censorship and Academic Freedom* (p. 125).

[2] Creationists first attempted to prohibit the teaching of evolution in the public schools. The Supreme Court declared this approach unconstitutional in Epperson v. Arkansas, 393 U.S. 97 (1968). Creationists next attempted to require balanced treatment of evolution and the Genesis account of creation in the public schools. This approach was declared unconstitutional in Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974), and Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975).

mantle of science, creationists have managed to shift the focus of public debate from the religiosity of Creationism to its status as and effect on science.

Creationism, Science, and the Law: The Arkansas Case explores the Creationism controversy from the perspective of participants in and observers of *McLean v. Arkansas Board of Education*[3] (the "Creation Case"), a recent successful judicial challenge to the Arkansas statute introducing creation-science into the public school curriculum.[4] The book is a collection of materials and essays written primarily by lawyers, scientists, theologians, and philosophers who participated in presenting the plaintiffs' case in *McLean*. It also contains reprints of the Arkansas Creationism legislation, similar legislation passed by the Louisiana legislature,[5] the court's decision declaring the Arkansas statute unconstitutional, and excerpts from the pre-trial briefs and proposed findings of the parties.

Creationism, Science, and the Law summarizes the evidence presented in court demonstrating the religious motivation and content of creation-science. It traces the fundamentalist roots of Creationism, both as a social phenomenon and as a body of thought. The materials present the creationists' arguments and quote from the creationists' literature, correspondence, and testimony, all of which vividly demonstrate the religiosity of creation-science.

The book also exemplifies the success of the creationists in presenting the Creationism controversy as a scientific debate. The recurring theme of the essays is how best to present the case that creation-science is not science, without compromising the integrity of the on-going philosophical and scientific debates about the meaning of science and the mechanisms of evolution.

Creationism, Science, and the Law thus exposes the controversies generated by the judicial resolution of these issues, ne-

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[3] 529 F. Supp. 1255 (E.D. Ark. 1982).

[4] Balanced Treatment of Creation-Science and Evolution-Science Act, Act No. 590, 1981 Ark. Acts 1231. The *McLean* court's opinion describes in detail the circumstances surrounding the passage of Act 590. 529 F. Supp. at 1262–64.

[5] On July 10, 1981, the Louisiana legislature enacted Act 685 requiring "balanced treatment of creation-science in public schools." The statute defines "creation-science" to mean "the scientific evidences for creation and the inferences from those scientific evidences." It requires that "public schools within this state shall give balanced treatment to creation-science and to evolution science . . . to the extent that . . . lectures, textbooks, library materials or educational programs deal in any way with the subject of the origin of man, life, the earth or the universe." Litigation challenging the constitutionality of the Louisiana Creationism legislation is currently pending in federal district court (pp. 228–30).

cessitated by the creationists' resort to the political process to circumvent the First Amendment. As such, the book is an invaluable aid to individuals seeking to prevent the introduction of creation-science into the public school science curriculum. The book also serves to highlight the unduly narrow, reactive role that professionals opposing Creationism often assume, and the necessity for attorneys, scientists, and other concerned professionals to redefine the Creationism controversy in terms of the underlying political reality.

I. The View from the Inside

Creationism, Science, and the Law is a window into the controversies and concerns of attorneys, expert witnesses, and sympathetic observers of the case against Creationism legislation. In many respects, the book can best be described as an artifact rather than an analysis of the trial. Many of the issues presented in the essays were hotly debated within the ranks of the Creationism opponents during trial preparation. Several of the essays summarize the evidence actually presented by the plaintiffs at trial. The articles are, with few exceptions, argumentative in tone, reiterating and elaborating on the positions stated in testimony or argument at trial.[6]

For example, Dorothy Nelkin, a sociologist whose testimony on plaintiffs' behalf is prominently featured in the opinion of the court, summarizes and updates her view in her essay entitled "From Dayton to Little Rock: Creationism Evolves," that "today's scientific creationists represent a modern manifestation of a deep fundamentalist current in American social history" (p. 74). She traces the social underpinnings of Fundamentalism as a defensive response to modernization and industrialization, and describes the persistent theme of fundamentalists that evolution is responsible for the world's social ills (pp. 74–76). The essay then brings the fundamentalist movement up to date, describing the fundamentalists' promulgation of the "balanced treatment" legislation and creation-science as the newest tactic

[6] One of the most interesting aspects of the Creation Case was the interaction with experts at the forefront of their respective disciplines. As David Klasfeld and Eric Holtzman point out in their essay, *The Arkansas Creationism Trial: An Overview of the Legal and Scientific Issues*, we had to learn one another's language and struggle with the constant tendency to broaden the legal issues to encompass the current debate in each of the fields of expertise involved in the case (pp. 90–91).

in a continuing series of attempts to alter social and moral norms to reflect their views. Nelkin describes the attempts of the moral majority[7] to distance itself from the Creation Case, and to turn the defeat into an advantage by portraying creation-scientists as an oppressed minority within the scientific community. The essay concludes with the prediction that, despite judicial invalidation, the creationist effort is likely to persist.

Langdon Gilkey, a theologian who testified concerning the religiosity of creation-science, succinctly summarizes his position in "The Creationist Controversy: The Interrelation of Inquiry and Belief":

> Of all the statements about God that could be made, the proposition that God creates "out of nothing" is the *most* religious . . . . Act 590, therefore, is religious not because it refers explicitly to a doctrine or appeals to scripture, but because the notion of the agency of a supra-natural being is essential to each of the constitutive elements of the creationist model and that is, ipso facto, religious speech (p. 133).

Gilkey thus exposes the basic error, embraced by proponents of the Creationism legislation, that evolution and Genesis provide "equivalent, logically comparable and mutually exclusive" explanations of origins (p. 129).

Gilkey goes on to identify misconceptions of both science and religion that, in his view, fuel the Creationism controversy. First, creationists posit scientific facts and evidence as the embodiment of science, when instead the hallmark of science is the theoretical structure and methodology of acquiring knowledge. Creationists also fail to distinguish between ultimate and proximate origins, and essentially ignore the restrictive canon of the scientific method that science cannot include "the divine as a central cause of a historical event . . ." (p. 132). Gilkey thus explains the Creation Case as a manifestation of a more complex problem of "misinterpretation, on many levels, of two

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[7] Nelkin describes the moral majority as a broader social movement evident in the "revival of Fundamentalism" (p. 83). She equates the moral majority with the "New Right." Quoting from R. VIGUERIE, THE NEW RIGHT: WE'RE READY TO LEAD (1981), Nelkin identifies the goals of the New Right to include

> reinstating prayer in the schools, blocking the Equal Rights Amendment, prohibiting abortion, banning books, and removing the civil rights of homosexuals . . . . In the fundamentalist tradition, New Right activists resist the influence of "secular humanism," a term loosely used to describe a world view that is human-centered and secular . . . . For the [m]oral [m]ajority, secular humanism is a "civil religion"—shorthand for the forces of evil (p. 83).

essential and pervasive aspects of cultural life"—science and religion (p. 134). He concludes that it is a misrepresentation to portray the lawsuit as a battle between science and religion. He attributes this portrayal to a failure of churches to reinterpret religious faith in light of modern science, and to the hostility of the scientific community to religion.

Whereas Gilkey's analysis assumes that prevailing conceptions of both science and religion are correct and beyond legitimate controversy, creationists take issue with the accepted definition of science as excluding reference to supernatural forces. Joel Cracraft, in his essay "The Scientific Response to Creationism," provides another perspective on the difficulty of reconciling science and religion in the context of the Creationism controversy. He points out that the creationists' belief in the literal truth and inerrancy of the Bible causes them to regard the Bible as the ultimate source of scientific truth (p. 139). Thus, unlike religions espousing a non-literalist interpretation of the Bible, fundamentalist Christianity—the source of Creationism—rejects the possibility of a "true" science that excludes the Bible as a source of truth.

Several articles set forth the principle creation-science claims, the methods used to support those claims by creationists, and the arguments marshalled at trial to demonstrate their non-scientific nature. Michael Ruse, a philosopher of science and an expert witness at trial, identifies several defining features of science: It is based on natural law, explanatory, predictable, falsifiable, and tentative. He then assesses whether creation-science meets these criteria of science, and concludes that it fails miserably. Ruse discusses the logical fallacy of creation-science's "two-model approach." This approach assumes that there are only two possible and mutually exclusive explanations of origins, so that critiques of evolutionary theory constitute positive proof of Creationism or—more simply put—God. As Ruse puts it, "[d]enying evolution in no way proves Creationism" (p. 156).[8] Ruse also decries the creationists' use of distortion, misrepresentation, and partial quotation of evolutionists,

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[8] The assumption underlying the "two-model approach"—the existence of two mutually exclusive explanations of origins—is wrong on both sides of the equation. There is more than one scientific explanation for the origins of life, earth, and the universe. Similarly, there is more than one religious explanation for origins, *e.g.*, the literal Biblical explanation, that provided by Buddhism, and non-literal theistic explanations.

citing these tactics as further evidence of the non-scientific nature of creation-science.

Several other essays in the collection elaborate on Ruse's testimony, pointing out specific examples of references to God in creation-science texts, as well as of the creationists' tendency to distort and mischaracterize to make their points. Examples of the creationists' attempts to disguise the religious doctrine underlying creation-science are also given. Particular reference is made to the creationists' publication of two versions of the same text—one for private, sectarian schools and another for public school use. The latter edition, though identical in content, deletes many of the former edition's express references to God (pp. 108–09).

The essays in the collection thus offer a good overview of the case against creation-science. Although slightly repetitive in substance, the book provides a rare opportunity to see public law litigation from the perspective of both the attorneys and the experts actually involved. Indeed, one article describes how the decision to participate in the case was made by the cooperating counsel to the American Civil Liberties Union, and details how work was allocated among the trial team to prepare for trial.[9] The book is thus interesting both as a litigation aid for future cases and as a piece of data for study and analysis by social scientists and legal scholars.

II. The Participants' Definition of the Controversy: Science as the Linchpin

Ruse's testimony concerning the nature of science and the plaintiffs' science case in general is the central focus of the continuing debate over creation-science as reflected in this collection of essays. The very title of the book—*Creationism, Science, and the Law*—reflects the preoccupation with creation-science's status as science, both by the participants at trial and beyond. Nine of the thirteen articles contained in the collection focus on the issue of whether and how to knock creation-science off its self-proclaimed scientific pedestal. The collection publishes a debate between Ruse and Larry Lauden concerning the appropriateness of challenging the status of creation-science as science, rather than disputing the validity of specific claims of

[9] *See* Kerr, *The Creation-Science Case and Pro Bono Publico* (p. 114).

creation-science. Lauden's concern is that the court's rejection of creation-science as science, although proper, perpetuates a false stereotype of what science is and how it works.

Lauden's position is vigorously and persuasively challenged. Ruse points out that the debate must take into account the nature of the immediate controversy. Where, as here, the decision involves a distinction between day and night, rather than dawn and day, criteria defining the general features of science are both useful and appropriate. As David Klasfeld and Eric Holtzman point out in their essay, the *McClean* court was neither equipped to consider nor interested in hearing a point by point refutation of the scientific validity of any particular claims[10] (p. 94). They also recognize that, by debating the creationists' claims point by point, they would risk elevating those claims to a legitimacy otherwise absent (p. 91). And Mark Herlihy states that, by relying on expert testimony and avoiding making broad factual findings concerning the nature and validity of evolutionary theory, the *McClean* court properly limited its role and left to the scientific community the task of debating and resolving issues of the legitimacy of various scientific theories (pp. 101–02).

In "Science as an Apologetic Tool for Biblical Literalists," Gary Crawford argues that a resolution of the scientific validity of creation-science is not necessary to a determination of its constitutionality because creation-science "was developed and is disseminated to promote a belief that the book of Genesis, literally interpreted, is a scientifically and historically accurate statement of events and hence to engender a Biblical-literalist world view" (p. 104). Crawford's extensive quotes from creation-science texts are perhaps the best evidence of their religious content.

Despite the recognition of the limited role of the court with respect to the determination of the validity of evolutionary theory, the creationists' use of science to legitimize their claims and circumvent the First Amendment causes some uneasiness.[11]

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[10] *See also* Herlihy, *Scientific Disputes and Legal Strategies* (p. 102).

[11] This uneasiness within the civil libertarian camp demonstrates the success of the creation-science strategy. As I discuss in *Creationism, Censorship and Academic Freedom* (p. 125), the liberal academic community is particularly sensitive to claims of censorship and impingement on academic freedom made by the creationists. Civil libertarians do not want to be accused of stifling legitimate, secular scientific discussion. However, a review of the creation-science literature, correspondence, and tenets demonstrates that the distinguishing feature of creation-science is "the leap to Genesis,"

One commentator identifies the most fundamental question underlying the Creation Case to be "who should decide what should be taught as *science* in the public schools" (p. 86). Another essay states that "[t]he most controversial element of the *McLean* opinion may be Judge Overton's use of the testimony of philosophical and scientific experts regarding the status of 'creation-science' as science" (p. 101). Marcel La Follette criticizes the press for failing to treat the Creation Case as a matter presenting issues of purely scientific concern.

The civil libertarians have, at least to some extent, taken the creationists' bait. Implicit in the preoccupation with issues concerning the proper presentation of the scientific issues is a concern that science is at the heart of the current Creationism debate. As Gary Crawford points out in "Science as an Apologetic Tool for Biblical Literalists," "[p]artisans on both sides of the . . . controversy take the . . . debate so seriously because many mistakenly believe that its outcome is dispositive of the legal claim" (p. 105). Moreover, the judicial debate over the scientific issues diverts public attention from the political debate underlying the Creationism controversy and confounds the civil libertarians' awareness of their responsibility for involvement in that debate.

III. The Need for a Redefinition of the Role of Professionals in the Creationism Controversy

In the aftermath of the Creation Case, the preoccupation with how to address the scientific issues presented by Creationism should be reevaluated. Although these are clearly important issues that society needs to address, they are not the issues fueling the Creationism controversy, nor are they properly addressed to the courts. The judicial debate on these issues simply cloaks the difficult but harsh political reality underlying the movement to teach creation-science in the public schools, namely a struggle between mutually exclusive value systems.

Indeed, the attributes that enable the courts to resolve the issue of the constitutionality of Creationism legislation limit its capacity as an effective tool for confronting the basic issue underlying the Creationism controversy. The courts must im-

which embodies the organizing principle of creation-science. Religion pervades creation-science. Exclusion of creation-science is thus not censorship. Rather, it preserves the First Amendment rights of individuals to be free from the imposition of state-sponsored orthodoxy.

pose decisions because of the inherent conflict between the value system of creationists and those reflected in the establishment clause of the First Amendment.[12] Although there is no inherent inconsistency between religion and science, Biblical literalists are threatened by scientific inquiry that contradicts the literal truth of the Bible, and thus perceive a conflict between evolution and their religious beliefs.[13] At the same time, the pluralist conception embodied in the First Amendment cannot tolerate the evangelical absolutist approach of fundamentalists who insist upon imposing their religious and moral world views on the community at large. The establishment clause is an expression of a political choice, embodied in the Constitution, to protect this pluralistic conception. Therein lies the political conflict.

My view is that effective analysis and confrontation of the issues at the heart of the Creationism controversy require that scientists, attorneys, and other concerned professionals expand their respective roles to meet the creationists on the political level fueling the debate. The professionals leading the creationists' efforts, motivated by evangelical zeal, use their professional knowledge in service to a larger, politically and religiously defined goal. As many of the contributors to the collection acknowledge, creationists are not deterred by litigation losses.[14] They bring the Creationism campaign to the local level by attempting to influence decisions made by teachers, school boards, and textbook publishers, in addition to legislatures. At this level, the creationist campaign is more likely to escape judicial scrutiny based on First Amendment principles.

Effective confrontation of the Creationism controversy thus requires that attorneys, scientists, theologians, and other concerned professionals become involved in the political debate at the community level. It is on this level that exposure of the religiosity of creation-science—and the consequent unconstitutionality of teaching it in the public schools—is necessary. Because the political debate will likely determine the ultimate resolution of the Creationism controversy, professionals who become involved at the community level stand to influence that resolution.

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[12] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.")

[13] *See, e.g.*, Note, *Freedom of Religion and Science Education in the Public Schools*, 87 YALE L.J. 515 (1978).

[14] Indeed, another Creationism trial is currently underway in Louisiana. *See supra* note 5.

CHILDREN IN THE CROSSFIRE: THE TRAGEDY OF PARENTAL KIDNAPING. By *Sally Abrahms*. New York: New York, Atheneum Press, 1983. Pp. 297, appendices, suggested reading, index. $14.95 cloth.

Review by Senator Paula Hawkins and Nanette Crist***

In *Children in the Crossfire: The Tragedy of Parental Kidnaping*, Sally Abrahms ambitiously chronicles the problem of parental kidnaping (also known as child snatching), a phenomenon that she refers to as the domestic issue of the 1980's (p. 5). The book is divided into five sections, dealing with the legal, psychological, and sociological perspectives of the problem as it pertains to the children, the abductors, and the custodial parents.

Abrahms initially demonstrates the enormity of the problem of parental kidnaping. Estimates show that anywhere from 25,000 to 400,000 abductions of children by non-custodial parents occur each year (p. 5). Abrahms also dispels the myth of the parental abductor as a loving parent, recounting tales of neglect and abuse, both physical and emotional. In few instances does the abductor steal the child out of love or concern; instead, the child frequently becomes a highly effective weapon for harming an ex-spouse.

In her introduction, Abrahms mentions a variety of reasons for the seemingly sudden onslaught of child snatching. The increasing divorce rate, the emerging idea—still largely unrecognized by the courts—that fathers can be single parents, and the costs of prolonged custody battles find places near the top of her list. But perhaps the most compelling "reason" for the rise in this crime is the lack of legal deterrents at both the state and federal levels. Abrahms posits that the current system effectively provides parents with legal incentives to snatch their children rather than to obtain custody through the court system. For example, penalties for child snatching are virtually nonexistent; often the abductor does not even lose visitation rights when the child returns to the custodial parent. *Children in the Crossfire* addresses both the reasons for and ramifications of the current system, and provides some suggestions for change.

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* Senator Paula Hawkins (R.-Fla.). Sen. Hawkins is a member of the Labor and Human Resources Committee and is the original sponsor of the Missing Children's Act.

** B.A., Mount Holyoke, 1983; member, Class of 1986, Harvard Law School. Miss Crist worked on the staff of Sen. Hawkins during the summers of 1981 and 1982.

Throughout the book, one central issue emerges: the extent of parental kidnaping flows directly from inadequate legal response to this problem. A major obstacle to satisfactory legal treatment has been the traditional reluctance on the part of all law enforcement agencies—whether local, state, or federal—to intervene in what they perceive to be "domestic disputes" (pp. 93–94). This reluctance to intervene is epitomized by the specific exemption of parental kidnapers from the original federal kidnaping statute[1] (the "Lindbergh Act"). Many states have modeled their kidnaping statutes after this legislation, preserving the parental exemption either explicitly or through judicial interpretation (p. 91). In addition, those state laws that recognize the criminality of child snatching pertain only to the parental action following the court's granting of a custody decree. Because seventy to eighty percent of abductions occur before the decree's issuance (p. 4), such provisions exempt a majority of victims from legal recourse.

Further problems arise when officials attempt to enforce existing laws. Each state has developed its own approach to handling parental kidnaping; for example, some states make it a felony while others label it a misdemeanor. Moreover, states often refuse to cooperate with one another and deny requests to extradite abductors once they have been located. Some states deny the legitimacy of a custody decree issued in another state. And jurisdiction problems frequently arise when a child is moved by a custodial parent from his or her home state.

Abrahms does not point out the significant inconsistency of state treatment of child snatching with other family law issues such as marriage, divorce, and adoption. In each of these other matters, the states readily recognize the legitimacy of decrees issued in other states and act accordingly. In addition, when other "domestic" laws have been violated, such as nonsupport laws, states have not exhibited a similar reluctance to extradite criminals.[2] In contrast, state hesitation to extradite permits the circumvention of legal custody decrees and effectively allows kidnapping. When compared to the stringent requirements for adoption and other child custody proceedings, this contrast becomes even more apparent and incomprehensible.

Federal legislative initiatives have responded to inadequate

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[1] 18 U.S.C. § 1201(a) (1966).

[2] UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 5, 6 U.L.A. 647 (1968).

and inconsistent state laws. Abrahms identifies two leading statutes as the Uniform Child Custody Jurisdiction Act[3] and the Parental Kidnaping Prevention Act of 1980.[4] The UCCJA is designed to enhance the enforcement of original custody decrees, as well as to encourage cooperation between states. It specifically addresses the question of jurisdiction when a child is taken across state lines. The UCCJA limits jurisdiction, with certain exceptions,[5] to either the home state or the district with which the child has the most significant ties.[6] To establish residency for purposes of custody litigation, the child must have been living in a state for at least six consecutive months before the time involved.[7]

Abrahms points out, however, that the UCCJA has serious flaws that prevent it from accomplishing its goals. First, the non-mandatory nature of the UCCJA poses a problem. Only forty-five states have enacted the statute, resulting in "haven states"[8] that diminish the potential benefits of the UCCJA. Second, extradition of child snatchers is not mandated even within a signatory state. Third, the UCCJA is effective only when the parental kidnaper attempts to initiate a judicial proceeding—for example, when an abducting parent seeks legal custody of the child he has taken across state lines. But difficulties exist even when the custody dispute reaches the courts. For example, the UCCJA does not provide a method of verification to detect the existence of an original custody decree, leaving the path open for the enforcement or issuance of fraudulent decrees. Also, all a parent need do to avoid the jurisdictional provision of the UCCJA is to wait the required six months to establish the child's residency in the new state. The parent can then argue that the child's best interests will be served if the child remains legally within the state's borders.

The PKPA is another example of legislation that, though well-intentioned, is ineffective in actually curtailing child-snatching. The PKPA supplements the UCCJA by confining jurisdiction to the home state so long as the child or the custodial parent lives

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[3] UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 116 (1983) [hereinafter refered to as the "UCCJA"]. The UCCJA has been adopted by all fifty states except for Massachussetts, Mississippi, Tennessee, Texas and Vermont.

[4] Parental Kidnaping Prevention Act, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3566, 3568-73 (1980) [hereinafter refered to as the "PKPA"].

[5] UCCJA §§ 3(a)(3), (4), 9 U.L.A. 116 (1983).

[6] UCCJA §§ 3(a)(1), (2), 9 U.L.A. 116 (1983).

[7] UCCJA §§ 3(a)(1), 9 U.L.A. 116 (1983).

[8] *See supra* note 3 and accompanying text.

there and the action is commenced within six months of the child's abduction.[9] This provision is mandatory, thereby eliminating the problem of haven states. The PKPA also authorizes the use of Health and Human Services's Federal Parent Locator Services to find the abductor-parent through, for example, the computer tracking of such documents as IRS returns.[10]

Again, Abrahms establishes that this legislation looks better on paper than in practice. States must independently enter into an agreement with the Office of Child Support Enforcement to gain access to the computer (p. 102). This reinforces the states' reluctance to involve themselves in "domestic" matters. In addition, information provided by the computer may not be updated frequently, and the FBI and the Justice Department are reluctant to enter child snatching cases, despite Congress's specific authorization. Relying on the Lindbergh Act,[11] the FBI requires documentation that a child is actually being abused or endangered before taking action, as well as a commitment by the requesting state law agency that it will extradite and prosecute the offending parent. For the parent attempting to locate a snatched child, the problems this poses are often insurmountable. The evidence of the FBI's dilatory enforcement effort is that between the date of the PKPA's passage on December 28, 1980 and September 30, 1982, the FBI acted on only 31 of the 576 parental kidnaping complaints that it recieved.[12]

Though the UCCJA and the PKPA admittedly fall short of their goals, they represent a step in the right direction. Abrahms devotes a portion of her book to examining what further responses to parental kidnaping should be made, not only at the state and federal legislative level, but with respect to public awareness (pp. 247–61). Three themes emerge in Abrahms's analysis: education, enforcement, and change.

First, Abrahms makes it clear that extensive education efforts need to be exerted to make all people—from children to judges to teachers—aware of the phenomenon of child snatching and methods to protect against this tragedy. Until this education occurs, parental kidnaping will probably not be recognized as the serious threat that it presents to our society today.

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[9] PKPA, Pub. L. No. 96-611, § 8(a), 94 Stat. 3566, 3572 (1980).
[10] PKPA, Pub. L. No. 96-611, § 9(b), 94 Stat. 3566, 3572 (1980).
[11] 18 U.S.C. § 1201(a).
[12] U.S. DEPT. OF JUSTICE, FIFTH REPORT TO CONGRESS ON PARENTAL KIDNAPING (1982).

Abrahms does not specify, however, the shape this education program should take. Clearly, both legislators and lawyers could play a significant role in enhancing public awareness of this crime. For example, legal scholars interested in family issues could start writing about this topic, bringing it to the foreground of legal debate. This writing could find a forum not only in legal journals, but also in forums influencing general public opinion, such as newspaper editorials. Second, legislators should combat parental kidnaping with proposed legislation reaching beyond UCCJA and PKPA, and thus bring the problem and proposed solution to the attention of their constituents. Even were legislation not enacted, such efforts would introduce this issue to the political agenda.

Educating lawyers could ease the problem of child snatching. As Abrahms points out, attorneys have been known to advise parents to abduct their children as the most effective and simple method of obtaining custody (p. 231). This practice defies professional ethics as well as a general sense of morality. Attorneys must be educated further as to the serious ramifications of kidnaping a child.[13] This education should be coupled by the imposition of strict sanctions for an attorney's advisory participation in a kidnaping. Attorneys should become more familiar with legitimate means of gaining custody.

Second, Abrahms suggests more vigorous enforcement of child snatching laws already in effect. Though Abrahms' analysis reveals that these laws are riddled with difficulties, stricter enforcement still would represent a move in the right direction. Enforcement efforts should also extend to problems not addressed by the current laws. For example, Abrahms briefly mentions that a relationship often exists between the custodial parent's denial of visitation rights and a subsequent kidnaping; if visitation rights were more carefully enforced, it follows that snatchings might become less frequent. In addition, some parents might kidnap a child in order to avoid child support payments. Courts and legislatures in some states have already started linking the enforcement of child support payments and visitation rights in the hopes of avoiding, among other things, child snatching.[14]

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[13]In the first section of her book, Abrahms explores children's responses to abduction. In interviews conducted by Abrahms, children talk about feelings of fear, confusion, and depression during this period of their lives. Moreover, the long-term psychological effects of the abduction appear enormous.

[14] *See e.g.*, Ledsome v. Ledsome, 301 S.E.2d 475 (1983) (visitation rights upheld despite nonpayment of support).

Finally, Abrahms turns to general policy changes that she believes would help alleviate parental kidnaping. In addition to her specific statutory solutions, Abrahms believes that the entire custody determination process should depend on a different philosophical foundation. Joint custody should be given more serious consideration in a large number of cases. Courts should at least encourage spouses to seek an agreement outside the courtroom regarding custody, perhaps with the assistance of a mediator. If parents feel that they have had their say in the determination process, they may be less likely to resort to kidnapping even if they are not granted full custody.

Overall, Abrahms's suggestions provide a useful starting point for legislators, lobbyists, and other persons interested in changing the legal response to the parental kidnaping problem. In addition to the ideas and developments that Abrahms discusses, current developments promise further improvement in the general treatment of this crime. Congressional awareness of problems affecting children seems to be on the rise. Congressional consideration and passage of the Missing Children Act[17] drew public attention to the controversy surrounding the restrictive requirements of the PKPA. The Department of Justice subsequently modified its policy and, in December of 1982, announced that it would institute for a one-year trial period a program in which parental kidnaping cases will be handled on the same basis as other fugitive felon cases.[18]

While Congressional oversight hearings will be necessary to gauge the success of this year-long experiment, the heightened Congressional awareness of the dangers to the children of parental kidnaping is likely to result in the extension of this less restrictive FBI policy. Furthermore, the Reagan Administration recently has formed the Attorney General's Task Force on Family Violence.[16] This body will address, among other things, child abuse. Because considerable abuse and neglect of abducted children takes place, the issue of parental kidnaping clearly could, and should, fall under the purview of this group. Overall, both of these developments reveal the government's increased willingness to intervene in "domestic issues."

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[15] *See supra* note 3 and accompanying text.

[16] Address by Pres. Reagan, Executive Women in Gov't Tenth Anniversary (Sept. 19, 1983).

[17] MISSING CHILDREN'S ACT, Pub. L. No. 96-292, 96 Stat. 3566 (1982).

[18] Letter from William French Smith, U.S. Att'y Gen., to Sen. Paula Hawkins (Dec. 1982) (discussing the PKPA).

But as Abrahms points out, society must address the factors which encourage parents to snatch their children. All parties involved—Congress, the states, law enforcement agencies, and especially parents—must realize that any abduction of a child, whether by a stranger or by a parent, constitutes a threat to that child's well-being. *Children in the Crossfire* provides an excellent and highly readable introduction to the enormity and tragedy of this important issue.

RECENT PUBLICATIONS

TECHNOLOGIES OF FREEDOM. By *Ithiel de Sola Pool.* Cambridge: Belknap Press of Harvard University Press, 1983. Pp. 251. $20.00 cloth.

In this timely publication, Massachusetts Institute of Technology Professor Ithiel de Sola Pool addresses the issue of the public's increasing reliance on governmentally controlled media for news and ideas, media that often are highly regulated and afforded little First Amendment protection. The author fears that the value of print media as the fundamental source of public information in our society is rapidly declining due to the phenomenal growth of electronic media as a means of communication. Government regulation and control threaten to inhibit present and future freedom of expression, as the introduction of electronic modes of communication blurs the lines between areas traditionally protected by the Bill of Rights and commonly accepted spheres of government involvement, such as broadcasting and common carriage.

Pool asserts that the failure of electronic media policymakers to propound a consistent scheme for protecting the public's First Amendment rights is primarily a result of bureaucratic habits and technical ignorance, and not an intentional attempt to subvert free speech and expression. In fact, Pool is optimistic that the inherent commitment of American society to pluralism and individual rights, as affirmed and defended by the courts, will guarantee that our civil liberties will be preserved. His book serves as a warning to policymakers and the public at large of the danger in limiting the protections of the First Amendment to traditional means of communication, and sets forth the concerns that should be taken into account in articulating a constitutional communications policy in an electronic era.

Pool deftly structures his argument that governmental controls have intruded upon areas deserving First Amendment protection by demonstrating the fluid connection between the print media, valued so highly by the framers of the Constitution, and the electronic media of the present and future. The evolution of free speech and a free press in American society, responsive to British restrictions on expression, is traced through the production and distribution of newspapers and magazines to the evolution of electronic media as a significant means of disseminating news and ideas. Within the electronic media, Pool details the

progress from telegraph and telephone to cable television and time-sharing networks. Pool's detailed technological and legal history of the communications media provides a convincing foundation for his argument that the electronic media are entitled to the same constitutional protections as their predecessors.

Pool identifies the current threat to freedom of expression as a result of the "convergence of modes," in which one physical means carries communications provided by various media that previously had to be provided in separate ways, or in which communications provided by any one medium can now be provided in several different (and overlapping) physical means. In the electronic media's early years, decisionmakers could draw sensible lines among print media, common carriers, and broadcasting—areas that traditionally have been subjected to different levels of governmental control. Pool's central thesis is that it is no longer possible to distinguish rationally among these various modes of communication. There are three reasons for this. First, technological advances have eliminated the distinctions among the physical means used by "the media" to communicate information. Second, development and growth of conglomerate cross-owning of print and electronic media has reinforced distinctions between these two modes of communication, despite government efforts to prevent or minimize cross-ownership. Third, there has been an increasing use of computing systems as telecommunication systems. Pool believes that this trend of convergence among media will continue, and that freedom of expression may be unconstitutionally constrained unless policymakers expand the scope of their vision to incorporate electronic media under the mantle of the First Amendment.

Pool traces government policy of protecting (or inhibiting) First Amendment rights in three distinct historical areas: the print media, common carriage, and broadcasting. He examines in detail the various tests relied upon by the Supreme Court at different times in each area to distinguish between speech and communications that the government may regulate in some manner and those communications that are fully protected by the First Amendment. While the print media and common carriers are generally subject to standards that ensure freedom in communication, freedom of expression has been severely limited in the broadcasting area. Pool asserts that the proliferation of governmental control and regulation of broadcasting resulted from an unawareness by policymakers that speech and the press were

being regulated by their decisions. Even if the reader disagrees with the author's thesis, Pool's historical analysis of government's choice to regulate broadcasting instead of leaving it unregulated (like the print media), treating it as a common carrier (thereby assuring access to all), or making it a governmental monopoly, is a clear account of an inconsistent and incoherent government policy resting on the false assumption that the broadcast spectrum is a scarce resource, entitled only to limited constitutional protection. In the era of cable television and microelectronics, Pool argues, the concerns that prompted government regulation of broadcasting have virtually disappeared. Policymakers must look to the future and take considerable care that myopia does not lead them to restrict freedoms of speech and the press by refusing to recognize the electronic media as worthy of constitutional protection.

Pool concludes by predicting that the future trend of communications technology will lead to increased interconnection among communications systems. In order to ensure the preservation of constitutional freedoms, Pool articulates a set of principles that must govern communications policy in order to ensure the broadest possible scope of First Amendment protections for the electronic media. Even though these principles seem simple to effect, the book's historical and legal analysis of American communications policy clearly shows that it will take concerted effort by policymakers to guarantee First Amendment freedoms as the use of electronic media grows as a means of communication in our society. Pool's book is a strong and thoughtful statement in defense of our traditional freedoms. Readable and clear in its presentation of technical issues, *Technologies of Freedom* should be read by those interested in this significant subject.

Andrea O. Stang

SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY. By *Bernard Schwartz*. New York, N.Y.: New York University Press, 1983. Pp. 853, notes, index. $29.95 cloth.

Earl Warren's Supreme Court fundamentally changed the nature and aspirations of American jurisprudence in a way un-

matched by any other Supreme Court. From racial desegregation to reapportionment of state legislatures, from the right to free and timely counsel to the application of exclusionary rules to state criminal cases, Warren's Court moved sweepingly and boldly, largely overwhelming the Holmesian traditions of judicial restraint and legal laissez-faire. In *Super Chief*, a mosaic of extensively documented facts and quotations, Bernard Schwartz creates an exhaustive yet mostly unrevealing account of Earl Warren and his Court.

Relying strongly on documentary sources—mainly the conference notes, memoranda, draft opinions, and final opinions of the members of the Warren Court—and little on oral sources, *Super Chief* is accurate, respectful, balanced, and almost referential. The lack of intimate gossip will no doubt be a relief to some and a disappointment to others. In painstakingly reconstructing the behind-the-scenes decisionmaking process of the Warren Court, however, Schwartz seldom transcends mere compilation. More disturbingly, the interesting analysis Schwartz displays early in the book becomes sparser and more rudimentary as the narrative progresses, until it degenerates into a tedious case-by-case litany—unbroken by comment and monotonous in presentation—of case facts, certiorari votes, conference votes, opinion drafts, opinion shifts, and final results.

The first two hundred pages are the finest in the book, relating the metamorphosis of Earl Warren's legal philosophy from initially conservative leanings to later liberal activism. Schwartz shows the tension in Warren's philosophy by contrasting his early devotion, as district attorney and Attorney General of California, to civil rights with his key role in the internment of Japanese-Americans during World War II, a role he publicly acknowledged as a mistake only in his posthumous memoirs (pp. 16–17). He took leadership of a Court as divided as he was, a Court racked by the personal and theoretical antagonism that pitted Justices Black and Douglas against Justices Frankfurter and Jackson. Schwartz comments with some insight on Warren's use of strategy, political skill, and leadership in stampeding a Court previously divided on *Brown v. Board of Education*[1] into a unanimity that became traditional in racial discrimination cases.

In outlining Warren's initial conservatism on the Court,

[1] 347 U.S. 483 (1954).

Schwartz depicts Warren as being largely under Frankfurter's influence. However, even Frankfurter dissented when Warren, in *Irvine v. California*,[2] sustained a state criminal conviction that relied on illegally obtained evidence. At that time, Warren believed that the appropriate remedy for police violations lay with the prosecution of law enforcement agents, not with the exclusionary rules of evidence. But when, despite Warren's personal urging, the Department of Justice failed to act against the responsible law enforcement agents, his faith in the effectiveness of judicial restraint in protecting constitutional rights plummeted. This case, Schwartz posits, marked the turning point in Warren's move towards judicial activism (p. 137), a move accelerated by the dilatory enforcement of the Court's desegregation rulings.

The book begins to bog down after the arrival of Potter Stewart on the Court during the 1957–58 Term. With Stewart swinging back and forth between the liberal views of four Justices and the conservative outlook of four others, the unbroken series of case reports becomes metronomic in its repetitiveness. Schwartz, of course, cannot be held solely responsible for this tediousness. But he is responsible for the minimal elaboration and interpretation of the cases and their consequences, the scarcity of illuminating anecdotes about the Justices' lives, relationships, and conflicts, and the paucity of thoughtful critique of the effect of the Court as a whole.

This is not to say that the book lacks for interesting content. *Super Chief* does chronicle landmark cases: *Mapp v. Ohio*,[3] which started as a First Amendment obscenity case and ended up binding state criminal courts to the exclusionary rule; *Baker v. Carr*,[4] which mandated evenly reapportioned state legislatures and was described by Warren as his most important case; *Engel v. Vitale*,[5] which caused a national controversy by outlawing school prayer but little controversy within the Court; *Gideon v. Wainwright*,[6] which resulted from a search directed by Warren for a good right-to-counsel case; and of course *Miranda v. Arizona*.[7] Regrettably, however, Schwartz manages to defuse his

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[2] 347 U.S. 128 (1954).
[3] 367 U.S. 643 (1961).
[4] 369 U.S. 186 (1961).
[5] 370 U.S. 421 (1962).
[6] 372 U.S. 335 (1963).
[7] 384 U.S. 436 (1966).

exciting material with an unanimated and intellectually unprovocative style.

Super Chief will appeal to those readers looking for a reference that organizes the wealth of information regarding the Warren Court. But those readers seeking to be surprised, entertained, or enlightened by fresh insights will likely be disappointed. Little that has not appeared elsewhere appears here, and few readers will likely finish the book with a different or more profound understanding of the Warren Court.

Einer Elhauge

TOO HOT TO HANDLE? SOCIAL AND POLICY ISSUES IN THE MANAGEMENT OF RADIOACTIVE WASTES. Edited by *Charles A. Walker, Leroy C. Gould, and Edward J. Woodhouse*. Yale University Press, 1983. Pp. 209. n.p.

Despite decades of predictions of rapid growth, the nuclear power industry appears to have stalled. Rising costs and the spirited opposition of environmentalists have helped to render the atom moribund as an energy source. Nuclear energy, consequently, has been the subject of declining interest and saliency in both the public mind and the media in recent years. The authors of *Too Hot To Handle?* seek to revitalize and inform the debate over how our society will choose to dispose of the wastes that have already been generated by both peaceful nuclear energy and nuclear weapons plants. This question is of tremendous importance regardless of the future growth of nuclear energy because significant quantities of dangerous wastes already exist and must be disposed of. As Edward Woodhouse writes, "some forty years after the first production of radioactive wastes by the Manhattan Project, the U.S. still lacks viable long-term capacity for isolating wastes from the biosphere" (p. 166). While the authors scrupulously refuse to take a position on the wisdom of nuclear power, they seek to enable readers at least to understand the debate on how to dispose of radioactive wastes.

Leroy Gould provides an overview of the question in the first chapter. Noting that early optimistic predictions of safe and easy disposal have gone awry, he points out that only low-level wastes are currently being disposed of on even a semi-perma-

nent basis. This presents a difficult political choice, for while the industry would like to be rid of these wastes quickly, the federal government would prefer to study the various alternatives. Although the wastes are precariously close to the biosphere, federal policy rests upon the belief that more complete information will enable better policy choices in the future. Gould notes that society's pressing need for energy compounds the problems of a hesitant federal policy.

Charles Walker discusses the scientific aspects of the disposal problem. After a brief overview of the workings of a nuclear plant, he lists the advantages of several possible solutions. He gives special attention to the alternatives of recycling or reprocessing spent fuel and disposing of wastes deep within continental geologic formations. These different solutions are each measured against the unique difficulties created by nuclear wastes—the extraordinary time that wastes remain dangerous, the immense heat generated, the radiation emitted, and the ever-present risk of criticality (a nuclear chain reaction of the wastes that would release enormous heat). Walker estimates that disposing existing wastes and decontaminating and decommissioning all existing facilities will cost approximately fifty billion dollars.

In his effort to remain unbiased, Walker argues that solar energy produces concrete and steel "wastes" that also have an environmental impact. While literally true, this argument does not fully recognize the environmental advantages of solar as opposed to nuclear power. Solar wastes are not radioactive, do not emit much heat, and will not be a problem in twenty, much less 1,000 years.

Jan Stolwijk provides a very optimistic look at the health effects of radiation. Comparing radiation from nuclear plants with background levels and government safety standards, he argues that the radiation from the normal operations of the entire industry is well within acceptable limits. He also confidently asserts that due to the ease of monitoring radiation, any excess exposures could be quickly corrected. Stolwijk fails, however, to address the wealth of contradictory data about how much radiation nuclear plants emit. He quotes reports from governmental bodies and such proponents of nuclear energy as Bernard Cohen, but ignores the studies of many significant opponents such as the Union of Concerned Scientists, John Grofman, and Thomas Mancuso.

In the fourth chapter, Stanley Nealy and John Hebert focus on public attitudes towards radioactive wastes. They find these attitudes to be both widely divergent and frequently uninformed. Much of the data they quote seems only tangentially related to their thesis. Other items seem blatantly obvious. One of their insights, for example, is the revelation that environmentalists tend to be more worried about the risks associated with wastes than are nuclear industry engineers.

The book takes an interesting turn to address possible ways in which citizens and decisionmakers ought to evaluate the morass of conflicting data and arguments. Paul Slovic and Baruch Fischoff describe a variety of decisionmaking models, including "muddling through," comparative analysis, cost-benefit analysis, and decision analysis. While the discussion is informative for its listing of each model's benefits and difficulties, the authors leave one wondering to what extent the models would produce different results. How would the prescriptions of a decisionmaker using cost-benefit analysis differ from one using decision analysis? The answer is not clear from the chapter.

The authors demonstrate that consideration of the process of decisionmaking is crucial. They cite convincing psychological studies indicating that intelligent people frequently make irrational decisions when judging probabilities. People rely too heavily on unreliable data, fear dramatic risks no matter how unlikely, and tend to be far more confident of their decisions than existing evidence would justify. The authors conclude that we should identify our biases and learn to recognize uncertainty.

The degree to which these models are ignored in current decisionmaking becomes clear in Woodhouse's discussion of politics. He declares that "even if all the technical problems can be solved . . . the analysis suggests political reasons to fear that radioactive wastes may remain too hot to handle" (p. 151). He cogently identifies several imperfections in our government's response. One problem is the extreme fragmentation among policymakers in this field, where turf wars and power struggles seem to take precedence over substantive solutions. Woodhouse also notes the complacency of both government and industry engineers, who have long overestimated the ability of technology to provide simple solutions to the waste problem. Given the power of special interests to capture regulators and the degree to which the election cycle breeds a short-term mentality,

our government, Woodhouse argues, is not well-suited to the complex and long-term nature of this problem.

In the final chapter, the authors argue that the public must be involved in nuclear waste decisionmaking. While the authors express great confidence in the ultimate ability of technology to provide solutions to waste problems—a somewhat surprising conclusion in light of the preceding essays—they argue that, in a democracy, the benefits and risks must be weighed by the public. Scientists can measure the risks, but the normative decision to bear them should rest with the public. The editors conclude that "the values issues are at least as central as the technical ones" (p. 198).

One flaw that pervades much of the book is the authors' reliance on old evidence; the second, third, and fourth chapters each use only a single source from the 1980's. In several arguments, this omission is significant. For example, Gould dismisses solar energy as being economically marginal on the basis of a 1975 Library of Congress study. Given the 170% increase in oil prices within a year of the fall of the Shah of Iran in 1979 and the advances in solar technology, this evidence seems weak. Elsewhere he writes that "known reserves of petroleum and natural gas will be all but exhausted in a matter of decades" (p. 17), based upon studies done by the Federal Energy Administration and the Ford Foundation in 1974. Given the dramatic changes in the energy sector in the past nine years, this data is seriously outdated. Much valuable research has been done on the oil question since that time, and Gould could easily update his sources and conclusions. All of the public opinion data was gathered within a few years of the 1973 Hanford accident, in which 115,000 gallons of high-level radioactive wastes leaked into the soil around the Washington nuclear weapons facility, and none of it takes into account the events that occured at Three Mile Island in 1979. Because the data we are presented with shows a significant change from 1973 to 1974 and 1975, one wonders what the public is thinking eight years later. Likewise, almost all of the discussion of electoral politics focuses on the Carter years.

The authors do not claim to resolve the controversies associated with waste, and they do not. Typically they identify three different answers to a controversy, list several arguments for and against each solution, and move on. The reader may be

better able to understand the debate, but he is likely to be left with more questions than he had before. Yet, to the extent that this approach provokes further thought and research, it is admirable. The book represents the beginning, not the end, of inquiry.

Despite specific weaknesses and uneven chapters, the basic argument of the book is compelling. A central message of these writers is that far too little attention has been placed upon the process by which these decisions are reached. The entire history of nuclear energy rests on decisions reached by a few experts, decisions that the government then worked to implement and justify. The lesson of *Too Hot To Handle?* is that the decisions of a "scientocracy" are not preferable to those of the public, and that the decisions should be made by those who will bear the actual burdens.

F. Paul Bland

SPHERES OF JUSTICE. By *Michael Walzer*. New York, New York: Basic Books, 1983. Pp. 321, notes, index. $19.95 cloth.

For most of this century Anglo-American philosophy seemed to ignore ethical issues like social justice as it increasingly cloistered itself in linguistics, epistemology, and logic. The past two decades have seen a turnabout in that trend, producing and being produced by the works of writers such as John Rawls and Robert Nozick. *Spheres of Justice*, by Michael Walzer, injects a much-needed voice into the new and lively philosophical debate over what constitutes a just society. More than most works in the field of morality and ethics, *Spheres of Justice* is a book of interest for anyone concerned about social policy. It may greatly influence scholarly discourse about social justice and, in the process, help shape the ideas underlying more pragmatic discussions of reform and social change.

The subtitle of Walzer's book best describes his goal: "A Defense of Plurality and Equality." Plurality for Walzer means a plural number of conceptions of justice. Walzer's thesis is that these ideas of justice need not be competing concepts, but rather that a society should be organized for "complex justice." Under

complex justice, different human activities have different underlying principles of justice; no single principle of distribution can be applied to all social goods. For example, while promotion at the office might justly be based on merit and specific skills, one could never condone the allocation of political liberties based on those same merits. Emergency health care is justly distributed on the basis of need; it would be a gross injustice to distribute this care on the basis of talent. For Walzer, this is because critical health care and job promotions are in different social "spheres." In each "sphere" a different notion of justice will apply. In some spheres it is just that money should prevail, in others that intellect should dominate, and in others that all must share equally. Each major social good—money, power, education, work, honor, even love—has its own appropriate pattern of distribution; that pattern constitutes justice within its sphere.

It follows that grand schemes for social justice based on only one or two principles will ultimately lead to unjust societies. Any effort to produce uniform justice will destroy social arrangements that provide justice within particular spheres. Walzer's notion of justice is clearly meant to counter the unified, all-encompassing vision of Rawls's *Theory of Justice*. On that count, Walzer's thesis has been long overdue. Until now, Rawls's version of utilitarianism was usually confronted with either another axiomatic vision of justice or by criticisms targeted at very specific points of Rawls's theory. Instead, Walzer's approach is to implicate the entire goal of "simple justice" based on one overriding ideal. He shows that other theories of justice may have become too remote or too universalist to take in the complexity of human relations.

Walzer does not merely find injustice in grand, usually egalitarian, theories. He argues that more subtle, perhaps more malignant forms of injustice occur in everyday life when the just principles of one sphere overflow into another. Money can justly buy yachts, but when it buys votes there is injustice. For Walzer, when a principal of justice in one realm lapses into another, a kind of petty tyranny results. A society can become just by refusing to allow the distribution scheme of any one good to dominate the others and by applying what seem to be the appropriate principals of justice within each sphere.

The problem is that Walzer's spheres are not discrete. They are more like the circles in a Venn diagram: they overlap, some-

times three or four at one time. And when they do, one cannot be sure just what principles to apply. This is more than a nuisance to his theory because the great debates about justice tend to occur both on the peripheries of these spheres and in the places where they overlap. For example, health care in our society is a vivid case in which the sphere of free enterprise overlaps with the sphere in which goods are distributed on the basis of need. At such junctures we are left without any guidance; the music from these spheres produces cacophony, not harmony.

Unlike most philosophical writers, Walzer uses history with real dexterity and his examples are often fascinating, unusual, and bemusing. In his exploration of justice in different situations he considers Civil War conscription, free drama in Periclean Athens, the civil service examinations of ancient China, and Stalin's idealized citizens, the "Stakhanovites." Of course, with historical examples there is always the danger that the examples will be distorted and the history abbreviated to the point of rubbish; such liberty with history is especially difficult to detect when the theory is as well-crafted as Walzer's. Still, Walzer's analyses never strike the reader as apocryphal since he authoritatively details each example. This may be a Pyrrhic victory for Walzer, because while his presentation seems evenhanded, his examples do not always vividly prove his thesis.

It is doubtful that people in philosophy, public policy, and the social sciences will ever ramble on about "Walzerian justice" as they do about Rawls or Nozick. To its credit, *Spheres of Justice* simply will not generate partisans of that sort. Walzer's thesis is too subtle for that. It is also messier and more amorphous than the grand, architectonic schemes of justice in the tradition of Plato's *Republic*. Still, there is importance here—as counterweight if not keystone. Walzer's book is the kind of insightful work that can exorcise dogmatism from much of our thinking about justice. It is safe to say that people will be quoting Walzer a great deal, assigning sections of his book to their classes, and carrying on occasional Capitol Hill lunchroom debates on what it means to live in a society of "complex justice."

Justin Hughes

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