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POLICY ESSAY

THE RELINQUISHMENT OF CO-EQUALITY BY CONGRESS

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The United States government is structured upon the separation of the judicial, legislative, and executive powers. In this Article, Congressman Gonzalez argues that the historical equilibrium that has existed among these three powers has been disrupted because the Legislative Branch has relinquished its powers to the Executive Branch. Congressman Gonzalez points to three areas to illustrate his thesis. First, he describes how Congress has relinquished its power over war. Second, he examines Congress' yielding of its power over the budgetary process. Finally, Congressman Gonzalez explores the relinquishment of the powers relating to presidential succession and the general operation of government.

As I have observed during my thirty years in the House of Representatives, Congress has lost its position as a co-equal branch of the federal government. It has relinquished important rights and responsibilities under the United States Constitution. The loss is not due to any purposeful thought or action by members of Congress, such as abdication. Nor is the subjugation of congressional authority to the President due to pressure from external forces or erosion. Rather, and sadly, the loss results from the acquiescence of good men and women—both from the electorate and from the elected—who have allowed the President to usurp leadership, authority, and power. Through compliance and inertia the United States Congress no longer asserts its constitutional co-equality, and thus, the American people no longer exercise their proper representation and power over their own government.

When the Nation was young and Congress fiercely protected its position in the federal government, it was considered a great honor to be a member. In fact, President James Madison campaigned for and was elected to Congress after his term as President was finished—a move that was not considered to be a "step down." Ironically, as Congress has increasingly paid heed to the will of popular Presidents, it has become the object of

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great criticism and scorn. This is not to say that Congress is all bad. To the contrary, there are many dedicated and self-sacrificing members who serve and fight for the integrity of the authority and processes of Congress. Yet, as a collective body, the institution currently is not functioning as intended by the Framers of the Constitution.

The consequences of the relinquishment of power by Congress have been great. Who would have thought that in 1970 we would have had reports that Army domestic intelligence, which is ultimately responsible to the President as Commander-in-Chief, spied on members of Congress? In 1972 I offered an amendment to an appropriations bill that would prohibit any funding from being used to pay, directly or indirectly, for wiretaps or tapes on telephone conversations of members of Congress.[1] Those speaking in opposition to my amendment called it "ridiculous," and the amendment was defeated 124 to 66. Yet, tapes were made by the Reagan administration of the telephone conversations of members of Congress in the mid-1980s. The "ridiculous" notion that the Executive Branch might spy on the Legislative Branch became reality when the telephone conversations of then Majority Leader Jim Wright, current Majority Whip David Bonior (D-Mich.), and former Chairman of the House Subcommittee on Western Hemisphere Affairs Michael Barnes,[2] were taped in connection with electronic surveillance by the Administration of the Sandinista government in Nicaragua. Incredibly, it has been reported that information from the telephone calls was later used by the Administration (via the CIA) to confront Representative Barnes who was a critic of U.S. policy regarding the Contras.[3]

The responsibility for these activities lies not with the Executive Branch, but with Congress. Congress has supported legislation designed to limit constitutional rights, exemplified by legislation that authorizes wars on which the President has unilaterally embarked, and legislation that abdicates control of the Nation's purse strings. By supporting such legislative efforts, we, the members of Congress, helped to create the climate that resulted in these activities.

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[1] H.R. 14,989, 92d Cong., 2d Sess. (1972).

[2] All three were vigorous opponents of aid to the Nicaraguan Contras.

[3] Benjamin Weiser, *Fiers Describes CIA's Eavesdropping on Congressional Calls to Sandinistas*, WASH. POST, Sept. 20, 1991, at A5.

The nature of our government has been changing in a fundamental and dangerous way. Indeed, in the future, the government of this country may become an autocracy. The contest for power, which could result in an autocracy, is more than just a political struggle between ambitious men; it is a struggle for survival—survival of our national institutions and our constitutional government itself. To understand the dynamics of the struggle in which we are presently engaged and with which we have struggled for years, one must understand the nature of our government, how our government was originally intended to function, and how our government has changed and evolved over the past two centuries.

The federal government that grew out of the American Revolution was one dedicated to avoiding the grasping of power by executives who were heedless of laws and constitutional precedents. Such a taking of power was the single greatest fear of the Framers of the Constitution. In fact, James Madison wrote in No. 47 of *The Federalist* that "[t]he 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."[4]

As a consequence of this fear, during the first ten years of its national existence, this country did not have a President; instead, Congress alone governed the United States. Those who established the Continental Congress feared the power of an official who would act as a President and, thus, omitted such an executive office from the Articles of Confederation, the governing charter that preceded the Constitution. The Articles of Confederation did not create a judicial branch of government either. The only government institution created by the Articles of Confederation was a legislative branch.

Even under the primitive conditions of the time, it became clear that the United States could never grow and prosper, and might not even be able to maintain its independence, without an effective central government. There had to be some means of settling quarrels between the states and of regulating commerce. Under the Articles of Confederation, there was no cen-

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[4] THE FEDERALIST No. 47, at 313 (James Madison) (National Home Library Found. 1937).

tral government that could provide the needed money to stop the internal bickering and run the economy.

The revolutionaries had to resolve a difficult problem. They had to establish an effective government without restoring the evils of an all-powerful central government. In order to do this, they had to yield enough power to the central government to enable the federation to operate, but they could not give the central government so much power as to render it uncontrollable. As I have observed, it is easy to grant power to government, but it is not so easy to keep a leash on it.

The problem of how to keep the government on a leash was solved neatly enough: first, by listing just what powers the central government possessed; second, by splitting the power between the President and Congress; and further, by splitting the Congress into two bodies. The idea was that Congress would represent the people (in the House) and the states (in the Senate).[5] Laws would be passed if the states and the people could reach agreement.

The Founders, in creating their new government, emphasized the Legislative Branch. That is why the powers of Congress are listed first and are so clearly spelled out in the Constitution. In contrast, the office of the President is not as clearly organized in the Constitution. He would be a quasi-magistrate, the person who would be caretaker of matters while Congress was not in session. He would organize the printing of money, set up a taxing authority, and serve as Commander-in-Chief, when and if Congress gave him an army. The Founders even considered calling the position the Office of the Peace Magistrate of the Nation. That name was discarded because it implied too much of a judicial function. The word "president" was adopted because it better connoted what the Framers of the Constitution wanted, a person who would preside, rather than dictate and formulate policy. The role of the federal courts was even less clear, and it was only later that the courts emerged as a powerful element of the federal government.

The Founders seemed to have successfully created a central government that would govern with the necessary strength to make the federation work while at the same time maintaining the aims of the Revolution. However, no government works automatically. Every government depends on the minds and

[5] Senators, one should remember, were originally elected by the states, not the people.

wills of the people who run it. The early actions of a few individuals and the gravitation of power from the states to the central government influenced the subsequent development of democracy in America.

The Founders did not necessarily agree on how the government would work. Thomas Jefferson believed that the best government was the one that governed least. He feared an all-powerful government. This fear led him to promote the Bill of Rights. On the other hand, Alexander Hamilton, George Washington's right-hand man, believed that the central government had to be strong and vigorous. Hamilton wanted big government, at least by the standards of the day. As the first Treasury Secretary, Hamilton set up the decimal money system and financed operations of the government.

Congress did not trust Hamilton and his Federalist friends. Hence, a considerable amount of tension developed between the President, who supported Hamilton, and the Congress. Moreover, there was a contest for power between Hamilton, who aimed to print money, and Congress, which thought he was excessive in his claims of power. Hamilton believed the President was entitled to special courtesy and consideration from Congress. Congress, on the other hand, argued bitterly about whether to even let Washington visit the Capitol. The President was merely the first among equals.

The tension between the Federalists and the anti-Federalists, between the forces favoring a strong executive and those who wanted congressional government, led to the creation of political parties. It also set off the political feud that created a strong judiciary. The case of *Marbury v. Madison*[6] involved a straight political issue which allowed Justice Marshall to establish the doctrine of judicial review[7] and made the Supreme Court a truly equal branch of government.[8] After that, the referee between the Congress and the President was the Court.

The first federal government was essentially a congressional government. The President occasionally did something spectacular. For example, Jefferson bought up the West, and Jackson tore down Hamilton's Bank of the United States. Through it all, though, Congress maintained firm control.[9]

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[6] 5 U.S. (1 Cranch) 137 (1803).
[7] *Id.* at 163.
[8] *Id.* at 170.
[9] A strong President did emerge during the Civil War; however, that was an abberant

Before the turn of the century, Congress was able to dominate the government as long as the needs of the country could be met without a strong central government. Opening the West, expanding the Nation's borders, and otherwise developing a relatively empty land required benign neglect by the government. Congress provided the critical Northwest Ordinance and a few other necessary ingredients. Yet, on the whole, the country developed without government intervention. It was an agrarian society, not industrial, and it did not face any powerful external enemies. Thus, there was no need for regulation of industry, large taxing powers to take care of urban problems, or a massive military force.

The United States' development might have been smoother if the federal government had been somewhat more potent. Some of the financial panics might have been avoided with a central banking system as Hamilton had set up. However, Congress never restored it, nor did anybody except Lincoln try to do much about it. The government might have been wiser to offer money instead of land to the railroads, but that would have required higher taxes and, thus, a stronger central government. As it was, it did not take big government to enforce tariffs or hand out public lands. Congress ran the country effectively by setting a few basic policies.

But as the country matured, the need for a strong central government grew. With the industrial age, an executor was needed to keep the financial wheels turning. Furthermore, as the United States emerged as a world power, a representative was needed to direct foreign affairs. Finally, the growing cities and increasing urban problems required attention. All of these things demanded a continual exercise of greater powers. Since Congress itself could not be the executive, the Presidency had to grow stronger. With the need for a stronger central government and constant executive action by that government, the era of a singular congressional government had come to an end.

Theodore Roosevelt was one of the earliest to recognize the potential powers of the Presidency. He came into conflict with Congress over this, but succeeded in establishing presidential government. Roosevelt built the Great White Fleet and engaged

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situation. Congress soon reclaimed its power by impeaching Johnson, and Grant fumbled his chances away in scandals not unlike Watergate. Congress remained dominant until the turn of the century. After that, presidential government began.

in an aggressive foreign policy, taking over the Panama Canal project from the French and pushing it through, despite struggles with Congress.

Legend has it that Roosevelt wanted to send his Great White Fleet around the world, but Congress would not give him the money for the project. It cost too much, they said, and who needed a display of naval power anyway? Roosevelt did have enough money to send the Fleet out as far as Tokyo, where the money eventually ran out. He then gave Congress a choice: either give him the money to buy enough coal to get the Fleet back or leave it in Japan. So, the Fleet went around the world.

Legend or not, this story illustrates the dilemma of Congress in confronting a strong executive. The President has great powers not delineated in the Constitution, and by judicious use of these powers he can leave the Congress with little or no choice but to follow his lead. This is especially true in foreign policy,[10] and it is exactly what President George Bush did in conducting the Persian Gulf War. He committed U.S. troops to a position of great vulnerability and then turned to Congress to ask for support.

In the 1920s the Republicans attempted to do away with the burgeoning presidential government. They first torpedoed the League of Nations. Then they passed laws ensuring the neutrality of the United States in foreign affairs. Finally, under Harding and Coolidge, they attempted to return to a balance of power between the Executive and Legislative Branches. However, Hoover and the Depression soon ended any such attempt.

As Franklin Roosevelt began to exercise his great foreign and domestic powers, the decline of Congress as the dominant branch of government began. After Roosevelt, the only real role Congress has had in foreign policy is to approve treaties, to fork over the money required to do the President's bidding, and of course to make declarations of war. In domestic affairs Congress might object on occasion to presidential proposals, but it has

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[10] The Presidency by its nature carries strong powers in foreign policy. Under the presidential government regime, there has been a powerful use of U.S. forces: Roosevelt's "big stick"; Wilson's "gunboat diplomacy" in Central America and his policies leading to World War I; Franklin Roosevelt's policies before and during World War II; Truman's undeclared war in Korea; Eisenhower's intervention in Lebanon; Kennedy's Cuban Missile Crisis; Johnson's actions in Vietnam and the Dominican Republic; Nixon's ventures into Laos and Cambodia; Reagan's actions in Central America, Lebanon, Libya, and Grenada; and finally Bush's actions in Panama and the Middle East.

never developed the capacity to do more than merely frustrate the President.

Unless Congress remains a part of the policy-making machinery, we will have a wholly different kind of government—one in which the President alone decides what will be done. That is not what the Founders of this country intended, and it is not consistent with the United States Constitution.

Congress is at a great disadvantage in the struggle between the Legislative and the Executive Branches. It is divided into two houses and subdivided into conflicting parties, loyalties, and interests. It has no way to enforce its will. The President, on the other hand, has an enormous advantage. Although Congress may have diverse positions on a given issue, the President has only one position, and he can enforce it throughout the Executive Branch. He has access to vast public relations resources, to legions of government speakers and speech-writers, and he exercises complete domination over the mass media (nobody can command television time as does the President). Congress tends to diffuse issues, but the President can focus on them.

Because the President has such powerful access to the press and the media, he can usually state his case in his own terms. That is, he can fight all of his political battles on his chosen ground; he can control the issues that are debated in the public eye, and he can, by manipulating the facts and figures, sharpen or distort the case in any way he sees fit. Presidents do not hesitate to exploit these advantages.

If the President has unlimited foreign as well as domestic powers, what remains to prevent the development of a police state? What remains to keep the government from assuming all power in the name of one man? The answer is that Congress must share the power. The President may not like this, but if we want this government to survive, that is the way it has to be. When the flexibility and suppleness of the Constitution are gone and power is no longer divided, the revolution will be over, and the king will be restored to his throne.

There are three areas that have been addressed by Congress during the past thirty years that illustrate how Congress has relinquished its rights and responsibilities. These three areas will be addressed in the following Essay. Part I describes Congress' relinquishment of its power over war. Part II critically examines the appropriations and budgetary powers as those

powers are now exercised by Congress. Finally, Part III explores the powers relating to presidential succession and the general operation of the government.

I. The Relinquishment of War Powers

The most important area where Congress has relinquished its authority is in war-making, and the increasing use of presidential wars in this country is something that has deeply disturbed me for many years. Besides being unconstitutional, these wars threaten our nation's stability as well as our nation's soldiers. Yet, we take presidential wars for granted today.

We live in a time when it is considered sacrilegious to criticize the President. Every Member of Congress, whoever he or she is, wants to cooperate with the President. Since my election to Congress, I have maintained the independence that I think the Constitution gives the Legislative Branch. Whether it is John Kennedy, Lyndon Johnson, Ronald Reagan or George Bush as President, we must remember that, first, we are Members of Congress. Our oath of office compels us to protect the Constitution against all enemies, domestic as well as foreign. It is easy to think of external enemies to our Constitution. It is more difficult and quite a different task to consider the Constitution's domestic enemies.

As St. Paul warned his brothers in Corinth, "If the trumpet does not sound a clear call, who will get ready for battle?"[11] Unless the will of the people, expressed through their elected representatives in Congress, supports going to war, the effort will end tragically. Abdication of the responsibility to exert leadership exacts a tremendous price, as history has shown and as the future will unquestionably show. Throughout the history of mankind and warfare, no leader has been able to lead an unwilling people into war.

From the beginning of the Republic, constitutionally and historically, the area of foreign affairs has been primarily a presidential matter. However, Congress cannot disclaim responsibility for foreign affairs, for Congress has control of the purse strings and has the constitutional power to declare war. Although the President officially does not possess these powers,

[11] 1 *Corinthians* 14:8 (New International Version).

they have been indirectly delegated to the President because Congress, at critical times, has abdicated its responsibility.

My initial involvement in this issue came in the 1960s during the Vietnam War, when I was forced to cross Lyndon Johnson, a President for whom I held great respect. Congress had to vote on the Gulf of Tonkin Resolution[12] and on extension of the military draft.[13]

One morning in 1964 the headlines read, "Our Ship in Southeast Asian Waters Attacked by Communists." The bells rang signifying that a roll call vote had been called, and we were summoned to the House floor. At that time, roll call votes (as opposed to voice votes) were called relatively infrequently, so everybody was surprised by the bells. The Chairman of the Foreign Affairs Committee, Dr. Morgan of Pennsylvania, was there, and we were told that there was a resolution supporting the President, backing him in any action to defend the national interests.

I read the resolution, and it seemed very far-reaching—a backdoor declaration of war. I questioned Chairman Dr. Morgan. I said, "Doc, you know, this goes beyond our moral support of the President." Dr. Morgan was a very wonderful man, very patient and very genial, and he smiled and said, "Henry, do you want to deny President Johnson what we gave President Eisenhower in the case of Lebanon and President Kennedy in the case of the Berlin airlift?" I assumed the resolution had the same wording as these others had, although I had never seen them. Because of this assumption I answered, "Well, no, I guess you're right." I still hesitated, and I did not vote until after two of the three roll calls had been read.

Finally, because I would have been the only one voting in any way other than "aye," I succumbed to what I hope I have not since then and will not again succumb—to the fear of ridicule for not supporting the President.

The rest is history. That Resolution was the basis for an enlargement of the war effort on the part of the United States that led to the most divisive period in our society since the Civil War. How could it have been otherwise? It called into question,

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[12] Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).

[13] The Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604 was extended by the Selective Service Act of 1967, Pub. L. 90-40, 81 Stat. 100 (current version at 50 U.S.C.A app. §§ 451-473 (1990 & Supp. 1991)).

among other things, the system we were using to press young men into military service.

I remember well the history of the draft, both anecdotal and legislative. When we went to war in Korea, some of my childhood baseball playmates were called up, and they went over and died in Korea. The first man to fall in Korea was from my hometown, San Antonio. Furthermore, San Antonio had the most volunteers. These men did not wait to be drafted. San Antonio also had the greatest number of volunteers languishing in jails in Korea during the war. Seven of eight Medal of Honor winners hailed from Texas. So, the people who were later to become my constituents served in disproportionate numbers in Korea. Although this was prior to my election to Congress in 1961, I will never forgot this aspect of the history of the draft.

When the Selective Service Act[14] came up for renewal in August 1941, it passed by one vote, and then only when a clause was inserted that said, "Notwithstanding any of the hereinabove, no person subject to the terms of this act shall be compelled against his will to serve outside of the continental United States unless a declaration of war is expressly provided by the Congress."[15] Pearl Harbor came a few months later, on December 7, 1941. In response to this attack, a declaration of war was made the next day. Hence, the Selective Service Act was triggered.

By August 1965, over forty-five percent of our soldiers in the areas likely to see action in Vietnam were draftees. When the Selective Service Act came up for extension in 1967 and 1971,[16] I offered the same amendment that was already in the law, and had been since 1941, that said no American shall be compelled to serve unwillingly except under a declaration of war.[17] After World War II, all kinds of exemptions had been built into the Selective Service System, and the draft had become increasingly unfair.[18] In 1967, I could not get three Members to join me so that we could have some kind of a roll call on my draft amendment. Four years later, in 1971, when the Selective Service Act was up again for renewal, I offered the same amendment. We

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[14] Selective Training and Service Act of 1940, Pub. L. 76-783, 54 Stat. 885.

[15] Service Extension Act of 1941, ch. 362, §§ 1–6, Pub. L. No. 77-213, 55 Stat. 626, 626–27.

[16] The Selective Service Act of 1967, Pub. L. 90-40, 81 Stat. 100; Act of Sept. 28, 1971, Pub. L. 92-129, 85 Stat. 348.

[17] Both times, these amendments failed.

[18] *See, e.g.*, Selective Service Deferment Act, 50 U.S.C.A. app. §§ 456, 460 (1990).

got a voice vote, and 151 Members joined me on that occasion, but my amendment was defeated. I had introduced separate legislation on the subject as well, but it never received any favorable action.

The shame Congress felt over its abdication of responsibility during the Vietnam War culminated in the passage, over President Nixon's veto, of the War Powers Resolution.[19] This resolution redefined the constitutional authority of Congress to declare war and reasserted congressional power and responsibility in this area. The War Powers Resolution was drafted to counter the findings by the courts during the Vietnam War that appropriations bills and legislation extending the Selective Service Act were tantamount to a congressional declaration of war.

Yet, since passage of the War Powers Resolution, there have been a number of wars that have been relatively short on shooting but long on consequences, and the War Powers Resolution has not curtailed these presidential wars. Clearly, the Resolution must be strengthened to address these new-age wars. Even more clearly, Congress and the American public must summon the will to enforce their power to be the decision-makers when it comes to the Nation's war-making.

Short military incursions since the passage of the War Powers Resolution include our activities in Lebanon and El Salvador during the Reagan Administration, where no declaration of war was ever made and yet our soldiers and so-called advisers were at risk. I tried to get Congress and the President to address the War Powers Resolution in both cases, but was unsuccessful. In Lebanon it was tragic, as my worst fears about putting soldiers in the midst of a war without a defined mission and without a declaration of war or implementation of the War Powers Resolution were realized. I spoke out repeatedly before that tragic day in October 1983 when the lives of 241 Marines were lost, but my warnings went unheeded. The invasion of Grenada, which was done without even notifying Congress, was conducted to deflect public attention from Lebanon. Additionally, one can point to the bombing of Qadhafi, where we killed Qadhafi's child and created the wrath that was avenged in the bombing of Pan Am Flight 103.

Finally, under President Bush, we invaded Panama and entered into a war in the Middle East. In Panama, the President

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[19] 50 U.S.C.A. § 1541 (1991).

unilaterally invaded a country that we continue to occupy. In addition, we are currently prosecuting former Panamanian leader Manuel Noriega in the federal courts, and we are propping up a government that has neither the support of the people of Panama nor the effectiveness to curtail illegal drug trafficking and money laundering, both of which have increased dramatically since our invasion.

Despite legislation passed just prior to the shooting phase of the war, the President entered the Persian Gulf War without congressional consent. The President had taken the country to the edge, had committed us to a position where we could not turn back without greatly endangering the lives of our soldiers, and had told the country that he would proceed whether or not he received any authorization from Congress.

The Framers of the Constitution were well aware of the danger of presidential wars. James Madison wrote the following in a letter to Thomas Jefferson in 1798:

> The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging, and are more under the influence of prejudices, on that branch of their affairs, than of any other.[20]

Earlier, in 1793, Madison specifically addressed the power to declare war:

> Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper.[21]

Despite the grave consequences for our constitutional form of government that occur when a popular President embarks on

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[20] Letter from James Madison to Thomas Jefferson (May 13, 1798), *in* 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1751–1836, at 140–41 (J.B. Lippincott & Co. 1865).

[21] JAMES MADISON, THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

a course of action that plays on the emotions of the American public, it is extremely difficult for Congress to place any real constraints on such actions once they occur. This inability to restrain, however, does not absolve Congress of the responsibility to assert its prerogatives.

When the announcement was made in August 1990 to call up the Reserves, it seemed clear to me that it was the duty of the President to consult with Congress and that it was plausibly a violation of the clear intent of the War Powers Resolution. At once, I contacted the Speaker of the House of Representatives and asked him to join the majority leader in the Senate in the immediate convening of a special session of Congress so that the President could be asked why he was making war when Congress had not declared war. The Speaker did not respond. Neither did I receive any support, or even acknowledgement, of the legislation I introduced on the first day following the August recess, legislation invoking the War Powers Resolution.[22]

The time for Congress to have acted on the War Powers Resolution was when the first troops were sent in August, that is, at the first overt act of going to war. Instead, by waiting, Congress allowed the President to back us into a corner where we had no option but to give the President what he wanted. Toward the end of the fall session of Congress, I reintroduced the War Powers Resolution to call attention to the grave mistake Congress was making in refusing to act. In October I wrote to the Speaker once again and implored him to keep Congress in session to address the worsening situation, but again I received no response. The relinquishment of constitutional prerogatives was made even worse by the Speaker's and Senate Majority Leader's decision to create a bipartisan eighteen-member group that would be available to consult with the President during the adjournment period. Nowhere in the Constitution does it state that a coterie of the designees of congressional leaders can declare war in place of the Congress. This was as alien to the Constitution as was the President's war-making. Not surprisingly, in response to the apparent complete acquiescence of Congress to the President's actions, the President doubled the

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[22] Instead, Congress avoided the War Powers issue and passed legislation supporting the President's actions against Iraq. H.R.J. Res. 658, 101 Cong., 2d Sess. and S. Con. Res. 147, 101 Cong., 2d Sess. (1990).

number of troops being sent to the Persian Gulf immediately after Congress adjourned for the year.

The situation deteriorated into politics of the worst nature, and the issue became not whether the President was going to ask Congress for a declaration of war but whether Members of Congress were going to be loyal to the President. The options were gone, because we now had 450,000 of our soldiers in the Middle East. What were we going to do, deny them money, deny them arms? The actions of Congress and of the President in direct contravention of the letter and the spirit of the Constitution were more indicative of the Middle East monarchies for whom we were mercenaries than they were of our constitutional form of democracy. In abandoning our Constitution in this effort, we lost a greater war.

II. The Relinquishment of Budget Power

The federal budget is the second area that Congress has been decreasingly effective in addressing during the last three decades. A circumvention of both the traditional openness of government and the traditional legislative processes of Congress has led to disruptions in the budgetary process. These disruptions have caused obscene levels of federal debt and have brought us to our present financial crisis.

President Richard Nixon's attempts to control the federal budget were the beginnings of our current fiscal crisis. Certainly, there were many constitutional crises during the Nixon administration, but Nixon's attempt to usurp budgetary control has received very little attention. By circumventing congressional acts with the frequent use of impoundment, the President ignored the wishes of the American people as expressed through their elected representatives.[23] There were no open and public

[23] I sponsored a resolution, adopted by the Democratic Caucus of the House of Representatives in 1972, which denounced the President's impoundment of funds, which read in part:

> *Resolved*, That the massive and unprecedented impoundment of funds by the present Administration—
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> (1) has the general effect of limiting and changing, by unilateral action, and without the consent of the Congress, the programs and policies authored by the Congress;
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> (2) generally contravenes the intent of the Congress in making appropriations of funds to support those authorized programs and policies; and
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> (3) disregards the co-equal status of the legislative and executive branches under the Constitution of the United States.

118 Cong. Rec. E 5548 (daily ed. May 22, 1972).

debates on the impoundments that the Administration enacted; Congress had no role at all. Secrecy fueled suspicion and subversion of the intent of the Constitution.

The Framers of the Constitution established regulation of the economy as one of the fundamental purposes of the federal government. The Constitution explicitly gives Congress exclusive power to regulate commerce,[24] raise revenue,[25] and pay the Nation's debts[26]—in other words, the power to control the federal budget. Congress, in acquiescing to some of the President's moves, set in motion a gradual relinquishment of this power. Congress today has shirked its responsibility and has handed control over budgetary decision-making to Executive Branch agencies and to automatic triggers for spending cuts. This has resulted in an inflexibility in addressing the needs of a rapidly changing world. Congress, reflecting the mood of the people, has in effect abdicated a very serious trust. The Members of Congress are living the old saying that the worst of slaves are corrupted free men. By so acting, we have corrupted ourselves: we have abdicated a trust that the Constitution assigned to the Congress.

The budget crisis of the Nixon administration faded from our concern as the other constitutional crises of that administration arose. However, the radical change in the way Nixon controlled the federal budget and federal spending, with the creation of revenue sharing, set us on a course that turned the Nation upside down in the 1980s.

With the tax cutting and spending orgy of the Reagan administration, the ballooning deficit eventually demanded our immediate attention. Historically, legislation passed in the throes of a national crisis has been hastily drafted and unwisely passed. The Balanced Budget and Emergency Deficit Control Act of 1985[27] (the "Gramm-Rudman-Hollings Act"), our response to the ballooning deficit, was no exception. I opposed the Gramm-Rudman-Hollings Act and have repeatedly introduced legislation to repeal it. It was ill-advised, dangerous, and irresponsible—conceived in a spate of political expediency and perfected in an atmosphere of panic. It established a system where appro-

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[24] U.S. CONST. art. I, § 8, cl. 4.
[25] U.S. CONST. art. I, § 7, cl. 1.
[26] U.S. CONST. art. I, § 8, cl. 1.
[27] Pub. L. No. 99-177, 99 Stat. 1037 (1985).

priations were undone by acts that were less than laws[28] and of dubious constitutionality. Further, Congress passed and enacted the Gramm-Rudman-Hollings Act into law without public hearings, a process that is a complete subversion of congressional processes. It also represented bad policy because it did not distinguish in any way between activities that are worthwhile and basic to governmental function and activities that are of less value and soundness. It replaced judgment with rigid formulations, and it has never brought us closer to a balanced budget. It has created only secrecy in government and budget by misrepresentation. Gimmickry and "cooked books" have replaced reason and full disclosure of the government's assets and liabilities.

The Congress and citizens of the United States have lost control over our own money by relinquishing power and allowing someone else, or some rigid formula, to determine how our tax dollars should be spent. More importantly, we have relinquished our right to have a government that is required to operate under the full scrutiny of the American people. When the Gramm-Rudman-Hollings Act was enacted, we allowed the deficit targets to be technically met through the reshuffling of accounts and through labeling some spending "off budget," and we permitted the spirit of the law to go unheeded. Clearly, the crisis was never abated and, as a consequence, an even more pernicious action took place in 1990.

In August of 1990, as the federal deficit continued to soar, another subversion of the governmental processes occurred. So-called congressional leaders agreed to meet with the President's emissaries at a budget summit at Andrews Air Force Base.[29] This bothered me considerably because the summit—a term usually used to describe a meeting between the heads of different countries and not between two Branches of our own government—appeared to be the equivalent of a "super markup."

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[28] The Court in *Bowsher v. Synar* said the following:

> No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government standing alone will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."

478 U.S. 714, 736 (1986) (quoting Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 944 (1983)).

[29] *See* George Hager, *Outline Begins To Take Shape As Deadlines Come & Go*, CONG. Q., Sept. 15, 1990, at 2895.

A markup session is what Congress uses in committee when a piece of legislation is to be considered in great detail, that is where each line of the bill is literally "marked up" according to the consensus of Members on a committee having jurisdiction over the particular legislation. While most markups in Congress are open, the budget summit at Andrews Air Force Base was conducted in secrecy as the U.S. Military guarded the sequestered group. The summit was alien to the Constitution and destructive to the legislative process. There should be no secrets or hidden agendas in discussions of the budget. Instead, all discussions should be conducted in the open, for all to witness.

That August I wrote a letter to the Speaker of the House and pleaded with him to open up the sessions of the so-called budget summit. The Speaker never replied to my request. In that letter I pointed out that it was tantamount to a super-markup session, and that we in Congress hold our markups in open session. By working in the open, the American public would be privy to the interactions and views among the Members. As a result, Congress could preempt charges of partisanship that inflamed passions, thus accomplishing its business more efficiently. It was reported that the powerful Chairman of the House Appropriations Committee, Jamie Whitten (D-Miss.), protested vehemently that the budget summit was illegal.[30] He supported my view that Congress already had a perfectly good process for resolving budget problems without interference from the President, the traditional appropriations process in Congress.

I predicted that if leaders do not lead and communicate, and if leaders clothe themselves in secrecy, they are likely to lose their following. This is what happened to both the President and the congressional leaders who participated in that budget summit when Congress voted down the summit's proposed budget resolution. It was inevitable.

Unfortunately, the ultimate outcome of the 1990 budget work was an inflexible agreement that quickly became obsolete and tied our hands during last year's budgeting so that we could not adequately address our country's needs.

It is sad that the American people and Congress have become inured to a budget-making process done behind closed doors by a few people. By relinquishing our duty to make tough decisions on the budget, Congress has accomplished nothing, and the

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[30] *See* George Hager, *Playing Hardball*, CONG. Q., Dec. 7, 1991, at 12.

federal deficit problem has only grown worse. Although Congress should not evade its responsibilities of establishing a responsible and workable national policy, the budget agreements over the past few years have substituted dogma for thought, and formula for policy. The laws have not fostered responsibility, they have abdicated it. It is time to reopen our processes, to return to traditions of encouraging full participation and scrutiny by the American public, and to restore honesty and responsibility to the federal budget process. The deficit will never be eliminated through secrecy and clandestine negotiation. Congress must take the lead and regain its constitutional powers over the federal budget.

III. The Relinquishment of Leadership Choice

The third and least reported area where Congress has relinquished its authority during the past thirty years is presidential succession. Sadly, Congress has relinquished both its authority and that of the American public to elect their President. Congress did this by passing the legislation proposing the Twenty-fifth Amendment to the Constitution.[31]

The presidential succession amendment was passed in the frenzied aftermath of President Kennedy's assassination. It was originally intended to address the problem of a vacancy in the Vice Presidency when a Vice President becomes President, but the amendment as finally drafted addressed presidential vacancy as well. I introduced legislation on the subject of a vacancy in the Vice Presidency on January 21, 1964—just two short months following the President's assassination. I eventually opposed the legislation that was passed. The legislation that Congress passed in 1965 went much further than my original proposal, although it did contain substantially the same procedure for filling the Vice Presidency. The final act removed power from the people and gave it to the hands of a few, the very few who had the most to gain by declaring a President incompetent and taking it upon themselves to remove him from office.

I believe as strongly today as ever that the Twenty-fifth Amendment is a threat to the stability of elected government in this country. We value our Constitution because it ensures that

[31] U.S. Const. amend. XXV, ratified February 10, 1967 by the requisite 34 states.

the government is elected and that the elected government is bound by laws. But laws and constitutions are only as strong as the will of the people to keep and enforce them. A government respects law only if its leadership is committed to law, and we know that this is not always the case. The Twenty-fifth Amendment is a device intended to provide an orderly succession in the office of President. Proponents of the Amendment had the best of intentions, but the actual legislation falls short. The result is a standing invitation in the Constitution to overthrow the President through the operation of the Disability Clause of the Twenty-fifth Amendment.

Presidential succession has been an issue in nearly every Presidency since Woodrow Wilson's. Wilson's stroke and two-year disability while in office, Roosevelt's death, Eisenhower's heart attack, Kennedy's death, Nixon's resignation, Reagan's near assassination and later cancer surgery, and Bush's heart murmur and Graves' Disease all brought attention to this issue. I was the only opponent to the Amendment who took the floor in August 1965, and I have seen my worst fears confirmed.

The great crisis that ensued after the death of President Kennedy, and the subsequent assumption of the Presidency by Vice President Lyndon Johnson furnished motivation for the enactment of the Twenty-fifth Amendment. The Amendment was in part a response to the fact that Johnson did not have a Vice President for a year. It was to provide an efficient method for succession in this type of situation. Yet, if the Twenty-fifth Amendment was meant to eliminate chaos and provide for a smooth transition, it has not accomplished its purpose.

For example, during the Nixon Administration the Twenty-fifth Amendment was called into play: Vice President Spiro Agnew resigned and the House Minority Leader Gerald Ford was nominated to replace him. Under the Twenty-fifth Amendment, Congress is supposed to act independently on the President's vice-presidential nomination.[32] When President Nixon nominated a leader of the House of Representatives, he compromised the independence of Congress by making Congress, in a sense, a party to the transaction. To compound this, when the House leadership attended the President's announcement

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[32] "Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both houses of Congress." U.S. CONST. amend. XXV, § 2.

party, they too became an intimate party to the transaction. It would have been better if they, like the Supreme Court, had recognized the independence of the Legislative Branch of government and had respectfully declined to participate in the event. Despite my personal admiration for Representative Ford, I called repeatedly for his immediate resignation from his position of leadership and from Congress altogether in order to make his status similar to any other nominee coming before Congress for confirmation. It seemed inappropriate for the nominee to remain part of the body that was to be his judge.

A second incident concerning the Twenty-fifth Amendment arose in 1974. Chief of Staff Alexander Haig and Secretary of State Henry Kissinger, both sitting in positions which are filled by appointment, not by election of the people, threatened to invoke the Twenty-fifth Amendment if President Nixon did not resign. These two unelected officials were going to use the Disability Clause[33] of the Twenty-fifth Amendment to make a decision for the American people—to force the President out of office.

Later, upon the attempted assassination of President Reagan in 1981, Alexander Haig as Secretary of State was again at the scene claiming to be in charge of the country when, in fact, he was fourth in the line of presidential succession. Such ambition, and such ignorance of the Constitution and of the 1947 Presidential Succession Act,[34] is precisely the danger inherent in the Disability Clause of the Twenty-fifth Amendment.

In 1985 President Reagan's cancer surgery caused another crisis. The President's reluctance to turn over power during his recuperation period may have caused one of the worst scandals in recent history, the Iran-Contra affair. When President Reagan entered the hospital for surgery, he did not want to set a precedent and bind the hands of his successors. Thus, although he wrote a letter that followed the format of the Twenty-fifth Amendment, he did not label his action an action under the Twenty-fifth Amendment. He claimed that the Twenty-fifth Amendment did not apply to his temporary sedation for surgery. In addition, the President's legal counsel, Fred Fielding, together with Chief of Staff Donald Regan, made the decision for the President to resume the office of the Presidency immediately

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[33] U.S. CONST. amend. XXV, § 4.
[34] 3 U.S.C. § 17 (1948).

after his surgery.[35] Notably, it was two presidential advisers, not the doctors or the Cabinet, who made this decision. When asked about this, Mr. Fielding said that his and Regan's decision was based on the surgeon's saying that the President was "okay." They reportedly accepted this opinion on face value and did not question the physicians about the President's judgment. It was a terrible thing for the President to be brought back to office that soon and a terrible thing for the country.

Reports that President Reagan made presidential decisions during his recovery from cancer surgery lend additional credence to the former national security adviser McFarlane's contention that he received oral approval from Reagan for the arms shipment to Iran. Reagan underwent surgery on July 13, and the first arms shipment occurred the next month. The Twenty-fifth Amendment certainly did not help prevent this tragic mistake in judgment, and it possibly caused it because of the fear that power, once relinquished, could not be regained.

One of the drafters of the Amendment, former Senator Birch Bayh, has stated that there was concern that the language of the Amendment had created a means for a *coup d'etat*.[36] He has said that this concern led the drafters to include the President's Cabinet among those charged with ascertaining the President's ability to discharge the duties of his office. The Twenty-fifth Amendment, however, does not mention the President's Cabinet. Instead, it states the following:

> Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide . . . [determine] that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.[37]

In light of the fact that the Amendment was drafted in response to the assassination of President Kennedy, it is significant that Senator Robert Kennedy expressed grave concern about this provision of the Amendment. Senator Bayh has reported that Senator Kennedy objected to the language and told

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[35] Kenneth R. Crispell, *Presidential Disability*, *in* PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 43, 58 (Kenneth W. Thompson ed., 1988).

[36] Birch E. Bayh, Jr., *The Twenty-Fifth Amendment: Its History and Meaning*, *in* PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, *supra* note 35, at 1, 10–11.

[37] U.S. CONSTITUTION amend. XXV § 4.

Senator Bayh that "President Kennedy didn't know any of the members of his cabinet personally until he appointed them. They were not people who had been members of the family."[38] Senator Kennedy believed that the Cabinet, then, was not close to the President and could not possibly offer the kind of protection against a *coup* that Bayh and the other drafters of the Amendment intended. In fact, Senator Kennedy spoke out in the Senate in 1965, prior to final passage of the legislation proposing the Twenty-fifth Amendment, and called for Congress to slow down and delay final passage pending further consideration. I agreed with him. In my view, those with the most to gain from a decision should not be given nearly absolute power to make that decision; it will certainly be abused at some point.

It is ironic that the Twenty-fifth Amendment was set up to provide for an orderly transition in our government in the event of a crisis because by its design it creates a need for secret action of the most venal kind. If a Cabinet member makes it known that he or she believes that the President is unfit to carry out the duties of the Presidency, the President has complete authority to fire him or her. Remember, Cabinet members are appointed by the President, and they serve at his will. Thus, if the President were to be removed unwillingly from office, a majority of Cabinet officers would have to discuss the removal in secret among themselves in order to avoid being fired by the President before they could invoke the Twenty-fifth Amendment. This would require a considerable amount of discretion, amounting to a plot—a *coup*.

In addition to the dangers caused by the Disability Clause are the technical problems. For instance, what constitutes an "inability" to discharge the duties of the Presidency? Is this limited to medical disability, or does it include political inability to lead a country? What is the duty of the President's physician if he uncovers a serious illness that the President wishes to keep confidential—what happens to the physician-patient privilege against revealing such information? Further, if inability includes being under anesthesia, as many believe despite President Reagan's assertions to the contrary, does it also include being under the influence of sleeping pills? How about inebriation, or even changes in mood caused by prescription medication? With so much left to interpretation by those who are charged with the

[38] Bayh, *supra* note 36, at 10.

responsibility of making a determination of the President's ability to discharge his duties, there is much room left for mischief.

Since 1945, we have seen the rise of the imperial Presidency in this country. This phenomenon has been especially obvious in the last decade. I would assert that an overwhelming majority of Congress and citizens would say, if asked, that the President has more power under the Constitution and that he has greater authority than either of the other Branches. Such popular beliefs are in direct contradiction to the United States Constitution.

However contrary to the Constitution it may be, our Presidents have been approaching a position of absolute authority with greater momentum every day. Indeed, it has reached the point of absurdity. For example, in November of 1991, *Washington Post* columnist Michael Kinsley reported that the government has a secret list of people who will succeed to the Presidency in case of nuclear war.[39] This list disregards the official list prescribed by the Constitution and by statutes, a list that provides for seventeen successive positions, from Vice President through the House Speaker and members of the President's Cabinet. The secret list, which is not provided for by the Constitution or by law, was created in 1982 by the Reagan Administration.[40] This sort of mischief is what the Twenty-fifth Amendment, secrecy in government, an apathetic public, and a weak Congress allow to occur.

In the United States' first ten years of nationhood, there was no President. The early leaders sought to escape tyrannical, arbitrary and capricious power. Later, when the First Congress passed the first law regarding procedures for presidential succession, the Members provided for a new election should the President become disabled while he still possessed a year and a half or more in his term. The Framers of the Constitution would never have approved the Twenty-fifth Amendment and allowed such an easy mechanism for the bold and unwarranted assumption of presidential power.

The most revolutionary words to this day are the first words of the Preamble of our Constitution. I encourage every student in my district to memorize them because they represent the heart of our system. The Preamble emphasizes the role of the people: "We, the people of the United States, in order to form

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[39] Michael Kinsley, *The B List*, WASH. POST, Nov. 21, 1991, at A23.
[40] *Id.*

a more perfect union . . . ."[41] We, the people—not the Congress, and not the President. The United States has strayed from this notion. When it is possible for an unelected President and an unelected Vice President to rule the Nation, we must acknowledge that a sword is continually pointed at the very heart of our democratic form of government.

As the President gains greater power, it is imperative that Americans re-evaluate the Twenty-fifth Amendment. We must not allow provisions encouraging a *coup d'etat* to remain a part of our law. As a nation established on the principle that the power resides with the people, we have provided through the Twenty-fifth Amendment a means of relinquishing that power. Instead, we have devised a means for the establishment of that power in a few unelected government officials. We cannot allow this kind of presidential power, which our Founding Fathers feared and tried to prevent, to be held by an unelected President who has assumed power over the wishes of an elected President. The Twenty-fifth Amendment is dangerous and should be repealed.

IV. CONCLUSION

In the contest for power by the Executive and Legislative Branches, the pendulum has swung markedly from a congressional government to a presidential government. The Constitution is full of areas where tension between the Branches has been encouraged, and in many situations who should win the power struggle is undefined. As the President eviscerates the Constitution's structural tensions by his increasing assumption of power, the Constitution's lack of definition could provide the latitude needed to restore the federal government to the original concept of the Framers.

In the beginning of the Republic, when domestic concerns were paramount, the role of Congress was significantly greater than it has been in this century. At the turn of the century, foreign policy began to demand greater attention, and presidential government ascended. Congress today has been relegated to a position of nay-saying, that is, of trying to restrict an agenda set by the President, rather than to set an agenda of its own.

[41] U.S. CONST. pmbl.

This role of objector rather than initiator is a weak one. It is further weakened by Congress' inability to enforce its own checks on presidential actions, for example by utilizing the War Powers Resolution.[42]

Recent events have opened the door for Congress to recapture its position of co-equality. Because world conflict has moved from a military focus, where foreign policy is paramount, to an economic focus, where domestic policy is paramount, Congress may again assume its historic role. As the need to compete and invest grows, our country will have to focus on domestic policy, and Congress may begin to re-emerge.

Congress must restore the diffusion of power among the Branches. In relinquishing decision-making in the areas of war, the budget, and control over the Presidency, Congress has allowed the accumulation and consolidation of power in the Executive Branch. Thus, a tremendous disequilibrium now exists that is alien to our Constitution and unhealthy for the Nation. It has often been said that "[e]ternal vigilance is the price of liberty . . . ."[43] The American people and, especially, Members of Congress must dedicate themselves to vigilance in order to restore the delicate balance of power set out in the Constitution. By reasserting and recapturing its war-making, budget, and leadership powers, Congress can preserve the constitutional form of government that sets this country apart from the rest of the world. With this restoration of the true aims of the Constitution, Congress, along with the Executive and Judicial Branches, can lead the Nation into the twenty-first century with strength.

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[42] 50 U.S.C.A. § 1541 (1991).

[43] Wendell Philips, Address at the Harvard Phi Beta Kappa Centennial (1852) *in* RALPH KORNGOLD, TWO FRIENDS OF MAN, at 181.

ARTICLE

THE FLAG-BURNING CONTROVERSY OF 1989–1990: CONGRESS' VALID ROLE IN CONSTITUTIONAL DIALOGUE

CHARLES TIEFER*

The Supreme Court's decision in Texas v. Johnson, *ruling a Texas flag desecration statute unconstitutional, enraged much of the public and led to a call for congressional action to protect the flag. Amidst intense and spirited expert testimony, floor debates, and media attention, Congress considered a constitutional amendment, then settled on a federal statute to protect the flag. When this statute was struck down by the Supreme Court in* United States v. Eichman, *Congress again considered and rejected a constitutional amendment. Congress has been criticized widely for pandering to the public on the flag issue and for fostering a threat to the Bill of Rights.*

In this Article, Mr. Tiefer counters these critics and argues that Congress' performance during the flag controversy demonstrated the valid role that the Legislative Branch can play in the development of the understanding and application of constitutional values. Carefully analyzing the flag debate in Congress and the manner in which it was shaped by congressional processes and management by congressional leaders, Mr. Tiefer argues that the flag debate illustrates the important function of Congress in reconciling conflicts of democratic will and constitutional principle. Furthermore, he is critical of the arbitrary way in which the Supreme Court selected the flag issue for consideration and disposition in Texas v. Johnson, *and argues that Congress' superior agenda-setting processes may in fact make it a more appropriate body for deciding when certain constitutional issues should be debated and resolved.*

The flag-burning controversy of 1989–1990 presents an extraordinary chapter in the historic tug-of-war between judicial pronouncement and congressional response. In *Texas v. Johnson*[1] the Supreme Court established First Amendment protection for flag burning. Congress responded by enacting the Flag Protection Act of 1989 ("the Act").[2] Many commentators viewed this as yet another illustration that Congress was cravenly submissive to public whims, inclined to meddle in business belonging only to other branches of government, and thus unworthy of being entrusted with constitutional issues.

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[1] 491 U.S. 397 (1989).

[2] 18 U.S.C. § 700 (1989).

Curiously, distrust of Congress' role in constitutional issues serves as common ground for otherwise quite polarized liberal and conservative ideological camps:[3] both agree that Congress is unfit to address the flag issue. Liberal critics have complained that in enacting the Flag Protection Act, Congress "lack[ed] integrity" and had only "timidity," "irresolute vision," and plain "cowardice."[4] Conservative critics marshalled even stronger language to condemn Congress. Judge Robert Bork described congressional enactment as "an even more dangerous, a far more dangerous course than amending the Constitution because it would mean that Congress can overturn Supreme Court constitutional decisions by a straight majority vote and I don't think that is what our system of government imagines . . . ."[5]

I took part in the controversy as counsel representing Congress in the defense of the Flag Protection Act, culminating in the Supreme Court decision in *United States v. Eichman*.[6] I also witnessed the subsequent decisions by the House and Senate to reject the proposed constitutional amendment. What I saw differed starkly from what these critics described. The flag burning controversy was no one-dimensional struggle between (judicial) integrity, courage, and right and (congressional) weakness and threat. Instead, the government and the public grappled with

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[3] The conservative critics of Congress have focused on two constitutional areas: constitutional amendments to restrain Congress in any sphere, from balanced budgets to congressional pay; and asserted constitutional prerogatives of the President—over national security, appointment and removal, executive privilege, line-item bill vetoing, and the like. *See, e.g.*, THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); THE PRESIDENCY AND NATIONAL SECURITY POLICY (R. Gordon Hoxie ed., 1984). The liberal critics of Congress have focused on the constitutional areas at issue in "court-curbing" amendments, discussed in Part II. While these are often very different areas, both camps stress the asserted flaws in congressional processes, and the asserted tendency of short-term raw reaction to popular preferences, to justify positions of distrust for Congress. The flag issue happened to unite the disparate camps both in their substantive view (that the Supreme Court's constitutional decision in Texas v. Johnson left no room for congressional statutory action) and their process-oriented view (that Congress generally deserved no trust on such constitutional matters).

[4] David L. Faigman, *By What Authority?: Reflections on the Constitutionality and Wisdom of the Flag Protection Act of 1989*, 17 HASTINGS CON. L.Q. 353, 353 (1990) (discussing Congress' asserted timidity, irresolute vision, and lack of integrity); Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 U.C.L.A. L. REV. 925, 927 (1990) ("obsession about flag burning panders to an uninformed public and reflects cowardice about confronting hard problems").

[5] *Statutory and Constitutional Responses to the Supreme Court Decision in* Texas v. Johnson*: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *House Hearings*].

[6] 110 S. Ct. 2404 (1990) (prosecution under the Flag Protection Act of 1989 violates First Amendment).

whether the Bill of Rights would be amended for the first time in its two-century history. To that struggle, the Judiciary brought limited tools and processes which roiled the matter without resolving it. The Judiciary's ability to raise an issue to national prominence served only to take a previously quiet matter and inflame it into a major threat to the Bill of Rights.

Far from illustrating timidity and lack of integrity, or, to use the words of Judge Bork, even "a far more dangerous course," legislative solutions to constitutional disputes serve as examples of courage in office and of institutional processes for protecting the Constitution. The democratic accountability of Congress, and the power of its mechanisms to decide when and how issues are placed on the national agenda, enable Congress to play a vital role in achieving democratically legitimate resolution of constitutional controversies. Legislative involvement can provide invaluable opportunities for debating openly, and framing clearly, questions about public values and individual rights. The congressional process allows public participation in central public questions, and thus helps to mediate the eternal tensions of constitutionalism between the unelected Judiciary and the democratically sovereign public. The distrustful critiques of Congress' role describe what lawyers fear: political intrusions into their idealized system of law. This Article will show that carefully structured legislative debate of core values can help to hold together a national consensus about constitutional principles and allow the Constitution to survive in a workable fashion.

Part I of this Article starts with a review of the four critical stages of the flag-burning controversy: the Supreme Court decision in *Texas v. Johnson*;[7] congressional enactment of the 1989 Act; litigation over the Act in *United States v. Eichman*;[8] and the rejection of the proposed constitutional amendment. It presents the full cast of the actors in constitutional disputes that become public issues: Supreme Court Justices and lower court judges, congressional leaders, scholars, poll-takers, rank-and-file legislators, litigators, the Justice Department, the press, and others. This Part also reviews the original intent/sovereignty defense offered for the 1989 Act as reflecting a contribution that congressional efforts may offer.

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[7] 491 U.S. 397 (1989).
[8] 110 S. Ct. 2404.

Part II provides a general treatment of the process-oriented criticisms of Congress, and responds to such criticisms by contrasting the nature of agenda-setting in the Supreme Court and Congress. The Supreme Court's agenda-setting lies in the Court's discretionary choice of cases to review, and its choice of how broadly to rule in those cases. Legislative agenda-setting powers lie in a vaster and richer array of techniques for the timing and shape of debate and action by an institution much better at gauging reactions and legitimating the ultimate choice of action. As the flag matter demonstrates, the invaluable advantages of legislative agenda-setting make the congressional role a valid and vital one in constitutional controversies quite distinct from the picture painted by critics who focus on its supposed lack of integrity. This Part ends with an application of the Article's conclusions to a well-known issue, the validity of court-stripping legislation.

I. The Interaction of the Supreme Court and Congress on the Flag Issue

A. *Stage One:* Texas v. Johnson

The Supreme Court raised the flag issue to national prominence in 1989–90 with its decision in *Texas v. Johnson*. For the future course of constitutional dialogue on the flag issue, what was most important was not the outcome of the case (the Court's reversal of the criminal conviction and its invalidation of the Texas statute), but rather it was the Court's decision to take the case in the first place and, even more importantly, the breadth of its opinion, which created a major constitutional controversy in an especially inflammatory way.

Before *Texas v. Johnson* the Court had practiced in its draft-card-abusing and flag-abusing cases what scholars have called the "passive virtues"[9]—deferring to Congress, avoiding decisions when possible, or shaping them narrowly to avoid ultimate controversial issues. The Court's 1968 decision in *United States v. O'Brien*[10] deferred to Congress in upholding against First

[9] Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

[10] 391 U.S. 367 (1968).

Amendment challenge a federal statute criminalizing all burning of draft cards, whether expressive or not.[11]

The *O'Brien* opinion set forth a multipart test, which required, most significantly, that when regulating conduct that is expressive, Congress must have a government purpose "unrelated to the suppression of free expression."[12] By finding the draft-card statute "unrelated to the suppression of expression," the Court appeared to signal a willingness to accept as facially valid almost any federal statute dealing with conduct, even potentially expressive conduct, that was drafted neutrally.

At the same time, the *O'Brien* Court reserved the power to strike down non-neutral statutes.[13] Hence, the decision ceded a role to Congress, and reserved one for the Court, allowing future decisions regarding expressive conduct to turn on a variety of subtleties and considerations with a proper deference to content-neutral legislating. Pursuant to *O'Brien*, a seminal appellate decision, *Joyce v. United States*,[14] upheld a 1968 federal flag protection law[15] based on a key point unrelated to the views of particular flag destroyers, namely, the sovereignty interest discussed below. *Joyce* held that Congress' power to establish the flag "is *an incident of sovereignty* which inheres in the Government of the United States of America as a nation and which the Constitution recognizes and implements."[16] From this the court reasoned that the power to designate the flag as the nation's symbol "also implies the power to protect it against public acts which physically damage and degrade it."[17]

Since 1968 the Court has decided three significant cases of protesters violating state flag laws, each time finding ways to rule in favor of the protester and overturn the state conviction while keeping the sweep of the ruling narrow.[18] Particularly

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[11] 50 U.S.C. APP. § 462 (1990).
[12] 391 U.S. at 377.
[13] *Id.* at 382.
[14] 454 F.2d 971, 985 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972).
[15] Pub. L. No. 90-381, § 1, 82 Stat. 291 (1968).
[16] 454 F.2d at 985.
[17] *Id.* at 988.
[18] "On three occasions over the past few years the Supreme Court, on one narrow ground or another, has avoided definitively ruling on the constitutionality of convictions for politically inspired destruction or alteration of the American flag." John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1482 (1975). In 1969 the Court overturned a flag-burning prosecution by construing it as one for the flag-burner's words rather than his acts. Street v. New York, 394 U.S. 576 (1969). In 1974 it overturned a prosecution by finding a state statute vague (in explicit contrast to the counterpart federal statute which it deemed well-drafted). Smith v. Goguen, 415 U.S. 566 (1974).

noteworthy is a 1974 decision in which the Court overturned a prosecution for taping a peace symbol to a flag.[19] Its decision explicitly distinguished the ultimate question of a statutory prosecution for impairing the physical integrity of the flag.[20] Deciding that ultimate question in the negative could have raised an inflammatory national issue, for a sweeping answer of that kind could disable the government completely from protecting the flag. When the Fourth Circuit Court of Appeals upheld the 1968 federal flag protection statute in 1982, the Supreme Court denied certiorari in *Kime v. United States*.[21] Justice Brennan alone dissented from the denial of certiorari. The unwillingness of the other eight Justices to support granting certiorari confirmed that the Court did not seek to rule on the ultimate inflammatory question.

Given this history of implicit restraint in its prior flag decisions, the Court, when it took *Texas v. Johnson*, might have seemed likely to continue to exercise restraint. The case itself attracted little attention.[22] Johnson had burned a flag in Dallas during the Republican National Convention in 1984. Texas had prosecuted him for that act of flag burning, using a Texas statute that suffered on its face from not being drafted as content-neutral. The Texas statute only prohibited abuse of a flag in a manner that would "seriously offend one or more persons,"[23] making the test one that depended on the reactions of others. That test thus relied upon subjective reaction rather than, as in *O'Brien*, objective conduct.

The Texas statute thus offered the Court another opportunity to overturn a conviction while avoiding the ultimate question of whether the government could protect the physical integrity of the flag. The Court could reaffirm the requirement of content neutrality for any statutory restrictions on expression and invalidate the Texas statute as non-neutral. In fact, the opinion in

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[19] Spence v. Washington, 418 U.S. 405 (1974) (per curiam).

[20] *Id.* at 415.

[21] 673 F.2d 1318 (4th Cir.), *cert. denied*, 459 U.S. 949 (1982). Lower courts had read the Supreme Court's carefully crafted narrow opinions as leaving intact the federal government's power, expressed in the federal flag protection statute, to protect against actions assailing the flag's physical integrity, such as flag burning or trampling. Joyce v. United States, 454 F.2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972); United States v. Crosson, 462 F.2d 96 (9th Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[22] There were few *amicus* briefs, and none by the United States, despite the potential implications of this case for the federal government's own flag protection law, which the Solicitor General had zealously defended in previous certiorari applications.

[23] 491 U.S. at 411–12 n.7.

Texas v. Johnson did not wholly eschew this approach. The defendant "was prosecuted because he knew that his politically charged expression would cause 'serious offense,'"[24] Justice Brennan wrote in the majority opinion for the Court, quoting the statute. He continued, "[w]hether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. . . . [Which] tells us that this restriction on Johnson's expression is content based."[25] Justice Brennan therefore concluded that "[w]e must therefore subject the State's asserted interest . . . to 'the most exacting scrutiny,'"[26] a level of scrutiny that sounded the death knell for the provision.

Yet, with a slim five-to-four majority for support, Justice Brennan's opinion in *Texas v. Johnson* went much further than mere disapproval of non-neutral drafting. The Court's opinion borrowed the logic and some of the language of Justice Brennan's dissent from the denial of certiorari in *Kime*, going beyond simply attacking the drafting of the statute. The opinion found that a state's "interest in preserving the flag as a symbol of nationhood and national unity" constituted an interest "related 'to the suppression of free expression.'"[27]

This fundamental equation seemed to treat any government interest in the flag symbol as equivalent to suppression of views, even if the government wrote a neutral statute regulating conduct without regard to expressive or subjective elements. Taken by itself, this part of the opinion appeared to reach and resolve the ultimate question of whether the government could ever protect the physical integrity of the flag. Moreover, the vigor of the dissenting opinions seemed to confirm that the ultimate question so long and carefully avoided had been reached and resolved.[28]

Nevertheless, the *Texas v. Johnson* opinion did leave some ambiguity. The five-justice majority had dropped a suggestion of a potentially vital distinction between the invalidated Texas

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[24] *Id.* at 411.

[25] *Id.* at 411–12.

[26] *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[27] *Id.* at 410 (quoting United States v. O'Brien, 391 U.S. at 377).

[28] Chief Justice Rehnquist, in a dissenting opinion joined by two other Justices, delivered an intense defense of the flag as patriotic symbolism. He traced flag symbolism throughout American history, although with only a brief mention of the Framers' views. 491 U.S. at 421 (Rehnquist, C.J., dissenting). Justice Stevens wrote his own dissenting opinion. 491 U.S. at 436 (Stevens, J., dissenting). Neither dissent suggested that the majority opinion had any ambiguities or limiting principles.

provision and other potential ones. Justice Blackmun had authored a separate dissenting opinion in *Smith v. Goguen*,[29] a case that struck down a Massachusetts prosecution of a defendant who wore a flag on the seat of his pants. Justice Blackmun had written that Massachusetts "has necessarily limited the scope of the statute to protecting the physical integrity of the flag," and stated that "I, therefore, must conclude that Goguen's punishment was *constitutionally permissible for harming the physical integrity of the flag* . . . ."[30]

The *Texas v. Johnson* majority, a five-justice majority including Justice Blackmun, took this concept from Justice Blackmun's opinion in *Goguen*, accepted it, and cited the opinion with approval. *Texas v. Johnson* stated that "[t]he Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much . . . ."[31] Footnote six in *Texas v. Johnson* paid explicit homage to Justice Blackmun's position on this key point of the flag's physical integrity by stating as follows: "*Cf. Smith v. Goguen*, 415 U.S. at 590-591 (Blackmun, J., dissenting) (emphasizing that lower court appeared to have construed state statute *so as to protect physical integrity of the flag* in all circumstances) . . . ."[32] Justice Brennan's majority opinion also appeared implicitly, as well as explicitly, to make room for Justice Blackmun's *Smith v. Goguen* view distinguishing statutes neutrally protecting the physical integrity of the flag.[33]

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[29] 415 U.S. 566, 590–91 (1974) (Blackmun, J., dissenting).

[30] *Id.* at 591 (Blackmun, J., dissenting) (emphasis added).

[31] 491 U.S. at 411.

[32] *Id.* at 411 n.6 (emphasis added).

[33] Justice Brennan, while borrowing part of the logic of his dissenting opinion in *Kime v. United States*, visibly dropped the part criticizing statutes protecting the flag's physical integrity. When Justice Brennan wrote his dissent to the Court's denial of certiorari in *Kime v. United States*, he recognized the difference between Texas-type non-neutral statutes, and statutes protecting physical integrity. A non-neutral statute was "different from one that simply outlawed *any* public burning or mutilation of the flag, regardless of the expressive intent or non-intent of the actor." *Id.* at 954–55 (Brennan, J., dissenting). In his *Kime* dissent, he gave an "entirely independent reason" to strike down those different statutes protecting physical integrity. *Id.* at 954. A reading of *Kime* together with *Texas v. Johnson* suggests that Justice Brennan still recognized that statutes protecting physical integrity were different, but in *Texas v. Johnson* he withheld giving any such entirely independent reason to strike them down. This suggested that, after *Texas v. Johnson*, a majority of the Court might approve of Justice Blackmun's opinion in *Smith v. Goguen* that a neutral statute protecting the physical integrity of the flag was constitutional.

B. *Stage Two: The Flag Protection Act*

Texas v. Johnson enraged much of the country. Polls showed overwhelming popular support—typically seventy percent or greater—not just for the flag, but specifically for a constitutional amendment to protect it.[34] From the elected branches of government, *Texas v. Johnson* elicited two principal responses.

First, from President Bush, came a call for a constitutional amendment that received strong support in Congress from rank-and-file members. Second came a counter-proposal for a "legislative solution"—an adjustment to the federal flag-protection statute that could survive *Texas v. Johnson*. Here, the institutional structure of the Congress became significant. Congress exercises control over its own agenda through procedural channels managed by its party and committee leaderships. In this instance, those leaderships manifested a strong interest in considering the alternatives before adopting a constitutional amendment altering the Bill of Rights. The Speaker of the House of Representatives, Thomas S. Foley (D-Wash.), came out early against a constitutional amendment and in favor of considering a statutory solution. The chairmen of the House and Senate Judiciary Committees, Representative Jack Brooks (D-Tex.) and Senator Joseph Biden (D-Del.), and the chairman of the House Subcommittee on Civil and Constitutional Rights, Representative Don Edwards (D-Cal.), a well-known defender of civil liberties, were also on the side of a legislative solution. When critics of Congress express distrust of its members as unworthy of participating in consideration of constitutional issues, they fail to recognize the degree to which the structure of the institution allows responsible party and committee leaders to see that the debate respects the need to protect the Constitution.[35]

Quickly, the question in Congress became whether backers of a legislative solution could muster sufficient credibility to obtain its enactment, and thus defer adoption of a constitutional

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[34] *See, e.g., A Fight for Old Glory: The Supreme Court Rules that Flag-Burning Is Not a Crime—Sparking Outrage Across the Nation*, NEWSWEEK, July 3, 1989, at 18 (in a poll asking "[w]ould you support a new constitutional amendment that would make flag-burning illegal?" 71% said "yes," and 24% said "no"); Michelle Battle, *Poll: 69% Want Flag Protected*, USA TODAY, June 23, 1989, at 1A.

[35] Agenda management is discussed further in Part II. For discussions of the range of procedures involved, see Chapter 3, "Committee Procedure," Chapter 5, "Agenda Setting and Structuring House Proceedings," and Chapter 8, "Agenda Setting in the Senate," in CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 135–86, 251–337, and 547–621 (1989).

amendment. The vehicles for testing that credibility were the hearings and decisions on reporting bills by the House and Senate Judiciary Committees.[36] In the committee hearings, several leading academic defenders of civil liberties emerged as vigorous supporters of the proposal to enact a flag protection statute that would comply with *Texas v. Johnson*. At the House hearing, Law Professor Walter Dellinger of Duke University testified:

> I think for the committee's purpose, though, the central fact is that the Supreme Court is quite likely to sustain such a statute . . . . [F]ive members of the present Supreme Court[ ] have voted to uphold criminal convictions for flag desecration and flag misuse. That's the simple fact that's out there.
>
> Justice Blackmun, in 1974 in *Smith v. Goguen*, voted to affirm a conviction and penitentiary sentence of a young man who wore a flag patch on his trousers, saying that he, Justice Blackmun, understood the state statute to protect the physical integrity of the flag in all circumstances. Justice Blackmun adhered to that view in *Texas v. Johnson*.
>
> The court accommodated Mr. Justice Blackmun's view in *Texas v. Johnson* and therefore said the Texas statute . . . is different . . . .[37]

Professor Laurence Tribe of Harvard Law School similarly testified that *Texas v. Johnson* left room for a content-neutral statute:

> [An] option would be a flag-protecting statute that operates without any regard to whose flag is burned, where it's burned, how the audience might react, or why the individual chose to do what he did. The Supreme Court majority in *Texas v. Johnson* was very clear about the fact that its decision just didn't deal with statutes of that kind, either on their face or as applied to anybody.
>
> The Court referred specifically to a prior opinion by Justice Blackmun . . . .
>
> Now, how should this committee and Congress think about whether such a law would be upheld without need for constitutional amendment?
>
> One way and perhaps the most practical, certainly the most crucial in terms of knowing what the fate of a statute would be . . . is called counting votes. There are nine of them on the Supreme Court . . . . I count six, perhaps

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[36] *Hearings on Measures to Protect the Physical Integrity of the Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *Senate Hearings*]; *House Hearings*, *supra* note 5.

[37] *House Hearings*, *supra* note 5 at 51.

> seven—to uphold a neutrally drawn physical-integrity-of-the-flag law . . . .[38]

Two different groups (from the left and right respectively) assailed the effort to enact a statutory solution. One group consisted of traditional liberals, such as the American Civil Liberties Union, who believed the proposed statute would be inconsistent with First Amendment values. Some thought the Court would inevitably strike down a statute, while others admitted it might be upheld but opposed the statute nonetheless.[39] These civil libertarians hoped Congress would take no action to respond to the public outrage at allowing flag burning.

At the time, however, there was no realistic chance Congress would do nothing. Given the enormous popular support for President Bush's proposed constitutional amendment, complete inaction or mere hortatory responses were impossible. The realistic choice was between a constitutional amendment and a statute. Thus, the liberal critics of the statute, however well-intentioned, simply strengthened the hand of those pushing the only alternative, a constitutional amendment.

Posing an even greater threat to derail the legislative solution than the liberal critics were the conservatives. They were led by the Bush Administration's witness at the congressional hearings, William Barr (who was then Assistant Attorney General for the Office of Legal Counsel and is now Attorney General), and by Judge Robert Bork. Barr's testimony for the Administration[40] sought systematically to demolish the possibility that anything short of a constitutional amendment could protect the flag after *Texas v. Johnson*.

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[38] *Id.* at 102–03.

[39] Professor Greenawalt's article, *supra* note 4, based on a lecture in April 1990 given after the statute's enactment but before the Supreme Court's decision on the statute's constitutionality, provides a stark example of this liberal viewpoint. He excoriates the "cowardice" of those whose "obsession about flag burning panders to an uninformed public," and says "the result of cases considering the new law should be the same as in *Johnson*." *Id.* at 927, 941. Yet, he sees "substantial reason" to predict that the Court might uphold the statute:

> The new federal law, focusing on physical integrity, is evidently tailored to pick up the vote of the 1974 Justice Blackmun . . . . [A] Justice appalled at the idea of a constitutional amendment might be inclined to forestall that prospect by finding application of the new statute acceptable. Thus, proponents of the statutory route had substantial reason to hope their efforts would be crowned with success.

Id. at 937–38 (footnote omitted).

[40] *House Hearings*, *supra* note 5 at 166–99.

As it turned out, the defenders of the proposed statute had sufficient credibility—due to the Blackmun-based ambiguity in *Texas v. Johnson* described above—to sustain the bill against attacks from the left and the right. The House and Senate Judiciary Committees both voted in favor of reporting the statute, with even those who preferred an immediate constitutional amendment often voting in favor of the statute rather than seeming to attack a law that could protect the flag. The committee reports on the bill echoed and expanded upon the constitutional arguments for the statute offered by Professors Dellinger and Tribe.[41] Congress accepted this view in enacting the Act, which President Bush allowed to become a law without his signature. The Senate considered a constitutional amendment later in 1989, but voted against it to give time to see whether the Act would be upheld.[42]

C. *Stage Three:* United States v. Eichman

In enacting the Act, Congress anticipated immediate test cases, and provided for their quick resolution in the district courts and then, by direct appeal, in the Supreme Court.[43] Two test cases arose, one in Seattle and one in Washington, D.C., out of flag burnings on the day the Act became law.[44] This immediately set the stage for rapid decision of the Act's constitutionality.

1. The House Amici's Original Intent/Sovereignty Argument

In the circumstances of these cases, Congress' own litigation offices became active participants. The House and the Senate each have such offices; I am the deputy counsel in the House office. Among other duties, these offices have defended the

[41] FLAG PROTECTION ACT OF 1989: H.R. REP. NO. 231, 101st Cong., 1st Sess. (1989); THE FLAG PROTECTION ACT OF 1989: S. REP. NO. 152, 101st Cong., 1st Sess. (1989).

[42] 136 Cong. Rec. S13733 (Oct. 19, 1989).

[43] The Act included a special expedition section which provided that "interim" district court decisions on the Act's constitutionality could be appealed, without awaiting trial. Moreover, the expedition section provided that appeals would go directly from district courts to the Supreme Court, without court of appeals rulings, and the Act required that the Supreme Court give those appeals expedited consideration. Flag Protection Act of 1989, 18 U.S.C. § 700(d) (Supp. I 1989).

[44] United States v. Haggerty, 731 F. Supp. 415 (W.D. Wash. 1990); United States v. Eichman, 731 F. Supp. 1123 (D.D.C. 1990), aff'd 110 S. Ct. 2404 (1990).

constitutionality of statutes which the Justice Department opposes, such as the independent counsel statute upheld in *Morrison v. Olson*.[45] President Bush supported a constitutional amendment, and, as discussed above, Assistant Attorney General Barr had testified against a statute, suggesting the Justice Department might be less than enthusiastic in defense of the Act. Accordingly, the House and Senate litigation offices appeared in the Seattle and D.C. flag cases to present the principal arguments in defense of the Act on behalf, respectively, of House and Senate *amici*.[46] Oral argument and briefing preceded decisions by the district courts both in Seattle and in Washington, D.C. to follow *Texas v. Johnson* rigidly and strike down the Act.[47] Appeals in the Supreme Court followed.

As will be discussed in Part II, the Congress' agenda-setting powers produce a number of benefits in a constitutional controversy. One benefit of the particular enactment of this Act was that Congress thereby created the opportunity for the explication and presentation of arguments which, though suggested in Rehnquist's *Texas v. Johnson* dissent, had never been laid out systematically in the flag debate. One such argument, presented by the House *amici*, concerned the Framers' original intent on the flag and the First Amendment.

Texas v. Johnson's principal dissenting opinion, by Chief Justice Rehnquist, noted that the Framers' intent in adopting the flag was practical, not symbolic. "One immediate result of the flag's adoption was that American vessels harassing British shipping [during the Revolutionary War] sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war."[48]

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[45] 487 U.S. 654 (1988).

[46] It turned out that the Justice Department's position evolved in important ways. At the Supreme Court level, Solicitor General Ken Starr made the principled decision to put aside the Administration's political preferences and its previously stated belief that the bill would be unconstitutional, and to defend the Act with vigor and skill. "Under such circumstances, the Executive Branch enforced the statute and fulfilled its obligation to 'take care that the Laws be faithfully executed.' U.S. Const. art. II, § 3." Brief for the United States at 13–14 n.10, United States v. Eichman, 110 S. Ct. 2404 (1990) (No. 89-1433). Thus while I, and Assistant Senate Legal Counsel Clair Sylvia, gave the principal defenses of the Act in oral argument in the two district court cases, Solicitor General Starr personally gave the principal defense of the Act in the oral argument in the Supreme Court.

[47] *Eichman*, 731 F. Supp. 1123; *Haggerty*, 731 F. Supp. 415.

[48] Texas v. Johnson, 491 U.S. at 422 (Rehnquist, J., dissenting). *See also* BARBARA W. TUCHMAN, THE FIRST SALUTE 47 (1988) ("A flag was as necessary as commodore

Further study of the law of that era[49] revealed that like England's prior linking of the flag and sovereignty,[50] the Continental Congress tied closely its establishing and protecting the sovereign flag to its establishing a navy.[51]

As to the specific original intent of the First Amendment, James Madison drafted the Amendment and managed its passage by the First Congress, so the Supreme Court gives his statements particular weight in determining that intent.[52] Madison, as Secretary of State during the Jefferson Administration,

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or crew, for a national navy was nothing without it . . . . [F]or a ship on the trackless seas it was a necessity as a sign of identity so that it should not be taken for a pirate."); Hugh F. Rankin, *The Naval Flag of the American Revolution*, 11 WM. & MARY Q. 339, 340 (3rd series 1954) ("England considered as pirates all those not sailing under an established flag, and the usual punishment for proven pirates was death on the gibbet." (footnote omitted)); GEORGE H. PREBLE, HISTORY OF THE FLAG OF THE UNITED STATES OF AMERICA 227 (1880); LINCOLN LORENZ, JOHN PAUL JONES 55, 151–52 (1943); United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820) (treating a ship without the "protection of the flag" as a pirate).

[49] The original historic research was assisted in my office by Michael Travaglini and Dina Green, and by a team at the Congressional Research Service: David Ackerman, Louis Fisher, Kersi Shroff, and Mark Lowenthal. The views here are solely my own.

[50] England maintained its sovereignty over particular bodies of water through a requirement that ships salute the English flag. United States v. Maine, 475 U.S. 89, 96 n.11 (1986) (quoting L. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 223 n.3 (2d ed. 1973), which cites THOMAS W. FULTON, THE SOVEREIGNTY OF THE SEA 6–7 (1911)). Fulton explains the flag salute as follows: "[T]he custom of lowering the topsails and striking the flag" had its "earliest indication . . . [in] the much-discussed ordinance which King John issued in 1201." *See* JOHN SELDEN, OF THE DOMINION, OR, OWNERSHIP OF THE SEA 401–02 (1972 reprint of 1652 ed.) (classic treatise quoting King John's law). England fought wars against Holland and France over flag salutes. *See* United States v. Maine, 475 U.S. at 97 n.11; FULTON, at 12–13, 15; BARLOW CUMBERLAND, THE STORY OF THE UNION JACK 119–27 (1897).

[51] On June 14, 1777 the Continental Congress adopted two resolves: "*Resolved*, That the flag of the thirteen United States be [the Stars and Stipes]," and "*Resolved*, That Captain John Paul Jones be appointed to command the ship Ranger." 8 J. CONTINENTAL CONG. 464 (1777). *See also* T. C. JONES, SO PROUDLY WE HAIL: KEYSTONES OF AMERICAN FREEDOM 55 (1981) ("It was necessary to provide an authorized national flag . . . for England considered armed [American] vessels without such a flag as pirate ships and hanged their crews when they captured them. So the Marine Committee of the Second Continental Congress presented the Resolution . . . on the . . . Navy"); PREBLE, *supra* note 48, at 260; MILO M. QUAIFE, THE FLAG OF THE UNITED STATES 67 (1942); SCOT M. GUENTER, THE AMERICAN FLAG, 1777–1924 34 (1990).

The same Framers implemented this original understanding of the connection of the flag to sovereignty in diplomatic activity. "The number of letters written by Franklin directing naval operations made him virtually an overseas Secretary of the Navy. His letters contained constant references to the 'American Flag'." Rankin, *supra* note 48, at 350 n.43. John Paul Jones' demand of a flag salute figured as a cause of war between England and Holland. TUCHMAN, *supra* note 48, at 92.

[52] Marsh v. Chambers, 463 U.S. 783, 788 n.8, and sources cited (describing Madison as among "the men who wrote the First Amendment"); Engel v. Vitale, 370 U.S. 421, 436 (1962); McGowan v. State of Maryland, 366 U.S. 420, 440 (1961); Everson v. Board. of Educ., 330 U.S. 1, 13 (1947). *See* Myers v. United States, 272 U.S. 52, 111–31 (1926) (reciting and following Madison numerous times).

made several pronouncements on this subject.[53] Most notably, in 1802 Madison readily pronounced a flag defacement in Philadelphia to be a violation of law actionable in court, as Judge Bork himself, coincidentally, described in *Finzer v. Barry*:[54]

> [T]he tearing down in Philadelphia in 1802 of the flag of the Spanish minister, "with the most aggravating insults," was considered actionable in the Pennsylvania courts as a violation of the law of nations.[55]

Jefferson expressed a similar understanding of the flag on several occasions.[56]

The Framers' articulation of this original intent long preceded the later, derivative, symbolic interest:

> [T]he reverence which all Americans today pay to their flag was foreign to the minds of the men of 1777. A flag was essential to the conduct of warfare between ships at sea, and the Congress met the need . . . . It is obvious that their action was animated by considerations of practical need, and but slightly, if at all, by sentiment . . . .[57]

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[53] His earliest pronouncement concerned the incident "in October, 1800, when the Dey of Algiers forced a United States man-of-war . . . to haul down the flag of the proud young republic, replace it with that of Algiers, and sail to Constantinople." THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 101 (6th ed. 1969). Secretary of State Madison called this a dire invasion of sovereignty which "on a fit occasion" might be "revived." Letter from James Madison to William Eaton (May 20, 1801) *reprinted in* 2 AMERICAN STATE PAPERS 348 (Lowrie & Clarke eds., 1832). Shortly thereafter, "the Pasha of Tripoli declared war on the United States by the established custom of chopping down the flagpole of the consulate (May 14, 1801)." SAMUEL F. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 176 (5th ed. 1955). The United States consul on the scene wrote Madison that the Pasha told him that "he declared war against the United States, and would take down our flag-staff on Thursday . . . [o]ur flag-staff was chopped down six feet from the ground, and left reclining on the terrace." 2 AMERICAN STATE PAPERS, *supra*, at 355.

[54] 798 F.2d 1450 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds sub nom.* Boos v. Barry, 485 U.S. 312 (1988).

[55] *Id.* at 1456 (citing 4 J. MOORE, DIGEST OF INTERNATIONAL LAW 627 (1906) (which quotes a letter from Secretary of State Madison to Governor McKean dated May 11, 1802)). In a later incident involving the British, Madison said "'that the attack on the *Chesapeake* was a detached, flagrant insult to the flag and sovereignty of the United States.'" IRVING BRANT, JAMES MADISON: SECRETARY OF STATE 1800–1809 413 (1953) (quoting British dispatch). Madison described the public outrage resulting from the British boarding of the *Chesapeake* as a product of "the indignity offered to the sovereignty and flag of the nation . . . [which] demands . . . [as] an honorable reparation . . . *an entire abolition of impressments from vessels under the flag of the United States* . . . ." Letter from James Madison to James Monroe (July 6, 1807) (available in the National Archives). For the letter's background, see BRADFORD PERKINS, PROLOGUE TO WAR: ENGLAND AND THE UNITED STATES, 1805–1812 145–46 (1961).

[56] 9 THE WRITINGS OF THOMAS JEFFERSON 49, 54, 56–57 (mem. ed. 1903); 11 *id.* at 120, 410; 8 ANNALS CONG. 14 (1803) (Jefferson message).

[57] QUAIFE, *supra* note 51, at 66–67 (1942).

Hence, Congress could, and did, use the opportunity provided by the enactment of the 1989 Act to present the Court with this original intent defense of the Act.

2. Supreme Court decision: *United States v. Eichman*

The Supreme Court decision striking down the Flag Protection Act of 1989, *United States v. Eichman*, consisted of the same five-justice majority as *Texas v. Johnson*, speaking again through Justice Brennan. Focusing on the Act as a defense of the flag's symbolic role, the Court concluded that even "[t]hough the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is 'related "to the suppression of free expression,"'. . . and concerned with the content of such expression."[58] The symbolic interest was thus outside the scope of *O'Brien* and could not sustain the statute.

Amazingly, not a single word in either the majority or dissenting opinions even hinted at answering the question that had led to enactment of the Act: why *Texas v. Johnson* had incorporated Justice Blackmun's *Goguen* position. Despite the tremendous emphasis on this factor in both the legislative history and the briefs in support of the Act in *Eichman* and *Haggerty*, the Court pretended it did not notice. If the Court had an answer on the central aspect of its prior opinion that had engendered the year-long debate in Congress and the media, the Court did not deign to express it.

In *Eichman* the Court also addressed the original intent/sovereignty argument advanced by the House *amici*. The Court quoted the House *amici* brief and confirmed the history set forth as valid: "Appellant's *amicus* asserts that the Government has a legitimate non-speech-related interest in safeguarding this 'eminently practical legal aspect of the flag, as an incident of sovereignty.' This interest has firm historical roots."[59] Moreover, the Court confirmed the distinction between the sovereignty and

[58] 110 S. Ct. at 2408 (quoting Texas v. Johnson, 491 U.S. at 403).

[59] *Id.* at 2408 n.6 (quoting Brief for the Speaker and the Leadership Group of the United States House of Representatives as *Amicus Curiae* at 25 (No. 89-1433)).

symbolic-interest arguments, again quoting the brief of House *amici*:

> While the symbolic role of the flag is now well-established, the flag was an important incident of sovereignty before it was used for symbolic purposes by patriots and others. When the nation's founders first determined to adopt a national flag, they intended to serve specific functions relating to our status as a sovereign nation.[60]

The Court's acknowledgement of the historical validity of the sovereignty argument should have had a significant impact on its decision, considering the weight the Court purports to give to original intent,[61] particularly in the flag context.[62] However, the Court did not treat the issue as one of original intent, but rejected the argument: "*Amicus* does not, and cannot, explain how a statute that penalizes anyone who knowingly burns, mutilates, or defiles any American flag is designed to advance this asserted interest . . . ."[63] Yet, the Court's suggestion that general penalties fail to advance this sovereign interest ignores the historic judgment behind the original intent. The Framers would have understood such sovereignty-related functions to require

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[60] *Id.* (quoting Brief for the Speaker and the Leadership Group of the United States House of Representatives as *Amicus Curiae* at 9).

[61] The Supreme Court has long called original intent of the Framers, who wrote the Bill of Rights, "contemporaneous and weighty evidence of its true meaning," Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888), since "historical evidence sheds light not only on what the draftsmen intended the [First Amendment] . . . to mean, but also on how they thought [it] applied to the practice authorized by the First Congress—their actions reveal their intent," Marsh v. Chambers, 463 U.S. 783, 790 (1983). *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989); Edwin Meese III, The Law of the Constitution, Bicentennial Lecture (Oct. 21, 1986) *in* 61 TUL. L. REV. 979 (1987); Howard Kurtz, *Meese's View on Court Rulings Assailed, Defended*, WASH. POST, Oct. 24, 1986, at A12.

[62] Justice White's concurrence in Smith v. Goguen, 415 U.S. 566, 586 (White, J., concurring) strongly tied the flag to original intent: "It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, just as they had for the Union under the Articles of Confederation." *Id.* Accordingly, "[Congress'] powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag." *Id.* Moreover, reflecting its view of the flag as an instrument of "[n]ational sovereignty" relating to "the existence and sovereignty of the Nation," the Court in Halter v. Nebraska, 205 U.S. 34 (1907), stated that "it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag . . . ." *Id.* at 41.

[63] United States v. Eichman, 110 S. Ct. at 2408 n.6.

punishment for defiling the flag,[64] based on English,[65] early colonial,[66] and late colonial precedents.[67]

Even the subsequent history includes some dramatic reflections of what the Framers envisioned. During the Civil War, President Lincoln[68] and the Supreme Court[69] connected the

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[64] As the Supreme Court noted in Halter v. Nebraska: "[I]t has often occurred that insults to a flag . . . and indignities put upon it . . . have often been resented and sometimes punished on the spot." 205 U.S. at 41.

[65] John Selden's 1652 treatise describes how, under King John's law of 1201, those failing to give the salute described in United States v. Maine, 475 U.S. 89, 97 n.11, as required by sovereignty of the seas, "are to bee reputed enemies if they may bee taken, yea and their Ships and Goods bee confiscated as the Goods of Enemies . . . . [T]he Persons, which shall bee found in this kinde of Ships, are to bee punished with imprisonment, at discretion, for their Rebellion." SELDEN, *supra* note 50, at 401–02 (translating King John's law of 1201). Selden explains: "Penalties also were appointed by the King of England, in the same manner as if mention were made concerning a crime committed in som Territorie of his Island." *Id.* at 402.

[66] "John Endecott, who was to become governor of Massachusetts ten years later, cut part of the cross from the flag at Salem. Formal complaint was entered . . . that the flag had been defaced by Endecott . . . ." 9 ENCYCLOPEDIA BRITANNICA 402 (1972) (article on flags). A contemporary governor's account explains "that the ensign at Salem was defaced," and elaborates the charge: "Much matter was made of this, as fearing it would be taken as an act of rebellion, or of like high nature, in defacing the king's colours." JOHN WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649 146 (James Savage ed., 1972) (originally prepared contemporaneously in 1600s). Winthrop gives this contemporary account of the trial:

> Mr. Endecott was . . . called into question about the defacing . . . . [A committee of colonists] taking the charge to consider of the offence, and the censure due to it, and to certify the court, after one or two hours time, made report to the court, that they found his offence to be great . . . giving occasion to the state of England to think ill of us;—for which they adjudged him worthy [of] admonition, and to be disabled for one year from bearing any publick office . . . .

Id. at 158.

[67] Seamen "were not infrequently brought before the courts and fined for refusing to strike [the flag]. If a merchant vessel refused to strike until she was shot at, she was compelled to pay to the king's ship twice the value of the gunpowder and shot expended." FULTON, *supra* note 50, at 207. *See* 2 DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA 88 (R.G. Marsden ed., 1916) (describing fines); The King v. Barnes, 167 Eng. Rep. 473 (Ct. of Admiralty 1767) (concerning an action brought against the commander of an English vessel for "hoisting illegal colours").

[68] Lincoln received a requested report from Charleston that "four miles down the Harbor the Standard of the United States floated over Fort Sumpter the only evidence of jurisdiction and nationality." Letter to Abraham Lincoln (Mar. 27, 1861), in R.T. Lincoln Collection, at 8389 (available in Manuscript Division, Library of Congress). Lincoln described the firing on the flag as seeking "to drive out the visible authority of the Federal Union, and thus force it to immediate dissolution." Abraham Lincoln, Message of the President of the United States (July 4, 1861), CONG. GLOBE, 37th Cong., 1st Sess. app. at 1 (1861).

[69] The Supreme Court described a historic Civil War incident of punishment by court martial for damaging the flag as an incident of sovereignty. Union occupiers of New Orleans in 1862 "required the authorities to display the flag . . . [and then] directed the flag to be raised upon the Mint" as an incident of the sovereignty of the United States. The Venice, 69 U.S. (2 Wall.) 258, 275 (1864). *See* PREBLE, *supra* note 48, at 473 (reprinting sentencing order for William B. Mumford who was hanged for the "overt act thereof in tearing down the United States flag from a public building of the United States . . . .").

flag's physical integrity with sovereignty as, later, did President Wilson.[70] Congress relied on such incidents[71] in enacting 18 U.S.C. § 700.[72] As recently as 1987, the United States reflagged Kuwaiti tankers to project American sovereignty.[73]

Such foreign, wartime, and historic incidents obviously contrast with minor-league domestic protests, but as a matter of original intent there is nothing to suggest that the Framers intended such distinctions to guide protection of the flag's integrity. Madison's statement about the 1802 incident in Philadelphia, together with all the prior and subsequent history, seems to suggest that the Framers believed that the government has a legitimate role in protecting the incidents of sovereignty. The Court rejected this, however, instead considering whether flag burning significantly impaired sovereignty. It thereby rejected

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[70] The State Department had pronounced the United States, in order to maintain its sovereignty, "fully empowered and authorized to prevent the abuse and disgrace of its national emblem both at home and abroad." 2 MOORE, *supra* note 55, at 135. In 1916, when the British seized American flag vessels, Wilson's Secretary of State protested that "'nationality finds visible expression in the right to fly a flag . . . . It makes . . . [these ships] amenable to the sovereignty and to the laws'" of America alone. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1916 SUPPLEMENT, H.R. Doc. No. 810, 69th Cong., 2d Sess. 358 (1929) (quoting the London convention drafting committee commentary on Article 57 of the convention). *See* 16 MESSAGES AND PAPERS OF THE PRESIDENTS 8056 (1917); 52 CONG. REC. 3595 (1915).

[71] 2 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 128 (1941) (1935 tearing down of a German flag in New York); 5 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 174–75 (1974) (1941 Navy court-martial for tearing down German flag). *See also*, 2 MOORE, *supra* note 55, at 140–41 (1897 California burning of Portuguese flag); *id.* at 141–42 (1899 American hauling down of German flag).

[72] "It is difficult to demand apologies from other countries in which our flag is burned and torn to shreds, when we do nothing here at home when the same thing happens." *Desecration of the Flag: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 37 (1967) (statement of Rep. Quillen (R-Tenn.)). *See, e.g.*, 2 J.B. MOORE, DIGEST OF INTERNATIONAL LAW 136 (1906) (1863 protest of Nicaraguan "forcible and violent removal of the [American] flag"); WHITEMAN, *supra* note 71, at 178 (1958 Peruvian destruction of American flag, in connection with visit of Vice-President Nixon); *id.* at 179 (1959 Panamanian destruction of American flag); *id.* at 180 (1960 Venezuelan burning of American flag).

[73] Secretary Weinberger testified, in an explanation close to those of Madison and Wilson, "we obviously feel a particular obligation to ships carrying the American flag . . . [W]e believe they are entitled to the kind of protection that we give all of our citizens . . . ." *The Policy Implications of U.S. Involvement in the Persian Gulf: Joint Hearings of the Investigations Subcomm. & the Defense Policy Panel of the House Comm. on Armed Services*, 100th Cong., 1st Sess. 36, 48 (1988). The State and Defense Departments themselves cited in 1987 the previously described precedent of President Wilson, and explained that "our Navy will be there . . . to protect the ships carrying the American flag." *U.S. Policy in the Persian Gulf: Hearing Before the Subcomms. on Arms Control, International Security and Science & on Europe and the Middle East of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 18 (1987) (language regarding protection); *Kuwaiti Tankers: Hearings Before the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 73 (1987) (analogy to Wilson's position in 1915–16).

any limitations, drawn either from Justice Blackmun's previous opinion in *Goguen* or from the original intent argument, on the sweep of its ruling that flag burning is a protected activity, and left Congress only one option for imposing such a limit: a constitutional amendment.

D. *Stage Four: Congress Rejects a Constitutional Amendment*

As the Supreme Court decision on the Act approached, it seemed certain that if the Act were invalidated, a renewed drive for a constitutional amendment would ensue. Accordingly, "beginning in April [1990], almost three months before the decision in *United States v. Eichman* was expected, key members, including House Speaker Thomas S. Foley, and their staffs created a flag task force."[74] The task force encouraged the press to frame "the issue in terms of the Bill of Rights . . . [while] the supporters [of the constitutional amendment] were constantly forced to defend themselves against charges that they were politicizing the flag."[75] After *Eichman*, sensing that their grassroots efforts would benefit from delay,[76] "[b]ackers of the constitutional amendment had tried to stop it from being brought to the [House] floor [on] June 21," but failed to obtain this delay from the manager of the House's agenda, the House Rules Committee,[77] or through points of order.[78]

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[74] Joan Biskupic, *For Critics of Flag Measure, Advance Work Pays Off*, 48 CONG. Q. WKLY. REP. 1962 (June 23, 1990).

[75] *Id.* at 1963.

[76] Amendment supporters "were being hurt in two major ways. First, they relied heavily on veterans' groups . . . but the veterans were too slow to mobilize and the pressure never came. Second, the supporters were constantly forced to defend themselves against charges that they were politicizing the flag." Biskupic, *supra* note 74, at 1963.

[77] *Id.*; 136 CONG. REC. H4000–01 (daily ed. June 21, 1990) (statement of Republican Leader Robert Michel (R-Ill.) opposing the House "special rule" which brought the constitutional amendment to the floor quickly).

[78] The House Rules Committee had set the stage by reporting a special rule providing for immediate floor consideration under the procedure of "suspension of the rules," a procedure which allows no floor amendments. Representative Gerry Solomon (R-N.Y.) made the point of order that the special rule denied the opportunity to make a motion to recommit, normally a prerogative of the minority party which House Rule XI protects even against special rules. In overruling the point of order, the Speaker cited precedents indicating that while special rules cannot directly eliminate the motion to recommit, a special rule is still in order even if it has the indirect effect of such elimination. Resorting to suspension of the rules did not leave the minority party without protection; "[t]he protection of the rule is afforded by the requirement of the two-thirds vote attending any motion to suspend the rules where there is no previous question motion." 136 CONG. REC. H3997 (daily ed. June 21, 1990) (ruling of the Speaker). For a discussion of the motion to recommit, see CHARLES TIEFER, *supra* note 35, at 454–60 (1989).

The House then voted to adopt the special rule to bring the constitutional amendment quickly to a vote. That procedural vote, a harbinger of what was to come, reflected some of the subtlety inherent in agenda-setting. While it required only one-third plus one of the House to defeat the constitutional amendment, it required a majority of the House to adopt the special rule and move the question quickly. Thus, as often occurs in congressional agenda management, a complex response mechanism was created to address a conflict between popular feeling and constitutional principle.[79]

The passage of a year had worked a change in the national and congressional mood about a constitutional amendent. This was captured in the dramatic floor speech by Representative Tim Valentine (D-N.C.), who had previously been a co-sponsor of the amendment and yet rose in opposition to it:

> Mr. Speaker, our flag deserves protection, and I want to protect it. In fact, like many Americans in the immediate aftermath of the Supreme Court decision last year, my first instinct was to support a constitutional amendment if that is what it takes to prevent flag burning.
>
> But after much soul searching and reflection, I have concluded that we should not depart from two centuries of constitutional history by placing, for the first time, limitations on the Bill of Rights.[80]

After floor speeches by the two parties' floor leaders, and a rare floor speech by Speaker Foley, who courageously pitted his eloquence against a popular proposal,[81] the House defeated the proposed amendment by 177 votes against and 254 votes for, less than the two-thirds vote needed to adopt a constitutional amendment.[82]

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[79] As *Congressional Quarterly* described, "[o]pponents of the amendment were helped in their effort to move quickly H.R.J. Res. 350 to the floor by Judiciary Chairman Brooks, although Brooks actually supported the amendment. Brooks . . . was angered by what he said was Republican hounding to move the resolution through his committee." Biskupic, *supra* note 74, at 1964. Chairman Brooks said on the floor that "[i]t is my feeling that with 5 hours of general debate, the issues can be properly cast . . . . I appreciate the cooperation of Chairman Moakley [(D-Mass.)] and the Rules Committee in providing for the prompt consideration of this important matter on the floor of the House. I urge support for the rule." 136 CONG. REC. H4002 (daily ed. June 21, 1990) (statement of Judiciary Chairman Brooks).

[80] 136 CONG. REC. H4016 (June 21, 1990) (Statement of Rep. Valentine).

[81] 136 CONG. REC. H4086–87 (June 21, 1990).

[82] 136 CONG. REC. H4087 (June 21, 1990).

Although the Senate did not need to act, its leaders had already agreed to allow a vote, so the Senate next took up the issue. The Senate's floor consideration, like the House's, included a number of procedural and agenda-setting aspects. First, Senator Dale Bumpers (D-Ark.) offered another statute to protect the flag without a constitutional amendment.[83] Senator Pete Wilson (R-Cal.) invoked yet another of those special procedures by which the Congress reconciles popular democracy with the Constitution by making a point of order that the statute "would violate the Constitution."[84] The Chair noted that "[u]nder the precedents of the Senate, constitutional points of order are not decided by the Chair but by the entire Senate."[85] As former Majority Leader Howard Baker (R-Tenn.) once noted, while the Supreme Court could pass on the constitutionality of statutes, "it is equally true, and the precedent is just as old, that the Senate of the United States must first exercise its own judgment as to whether a matter before it conforms with or violates the Constitution."[86] The Senate sustained the point of order, voting the proposed statute out of order as unconstitutional.[87]

Senator Joseph Biden[88] and Senator Jesse Helms (R-N.C.) each offered floor proposals. Senator Helms's proposal was a jurisdiction-stripping statute (an issue discussed in this Article's second part) on flag issues. The Senate rejected both.[89]

Then, on final passage, the Senate rejected the constitutional amendment, with forty-two votes against and only fifty-eight votes for it, falling well short of the necessary two-thirds.[90] After

[83] 136 CONG. REC. S8694–96 (June 26, 1990).

[84] 136 CONG. REC. S8699 (June 26, 1990) (Statement of Sen. Wilson)

[85] 136 CONG. REC. S8699 (June 26, 1990). For a discussion of Senate constitutional points of order, see TIEFER, *supra* note 35, at 506–07.

[86] 130 CONG. REC. S5313 (daily ed. May 3, 1984) (statement of Sen. Baker).

[87] 136 CONG. REC. S8700 (June 26, 1990). Senator Jesse Helms (R-N.C.), rather than voting yea or nay, voted "present," since he did "not think any Member of the Senate knows whether this amendment is constitutional or not." 136 CONG. REC. S8769–70 (June 26, 1990).

[88] The Biden proposal would have allowed Congress, but not the states, to adopt penalties for flag burning. Senator Biden offered his amendment to the proposed constitutional amendment. By the massive vote of 93-7, the Senate rejected the Biden proposal. 136 CONG. REC. S8719–20 (daily ed. June 26, 1990). However, this, too, allowed a subtle interaction. Two Senators—Senator Biden and Senator Levin (D-Mich.)—voted for the Biden proposal, but then, when it was rejected, voted against the constitutional amendment. This allowed them to say that they did support constitutional protection for the flag, even though they did not support the version offered them for final passage.

[89] 136 CONG. REC. S8704 (daily ed. June 26, 1990) (rejection of Helms's proposal).

[90] 136 CONG. REC. S8736–37 (daily ed. June 26, 1990); *see* Joan Biskupic, *Flag Amendment: Critics of Measure Win Fight, But Battle Scars Run Deep*, 48 CONG. Q. WKLY. REP. 2063 (1990).

the vote, Senator Patrick Moynihan (D-N.Y.) offered his own evaluation of the fragility of the Bill of Rights:

> At the end of this day the Bill of Rights is intact, and yet it ought to be noted that a majority of this body were prepared to see it amended for the first time in nearly two centuries . . . . [I]t is something to keep in mind that the Supreme Court, having said that this was, however much one may wish it one [sic] not to be, protected speech under the first amendment, we were prepared to that degree to change the first amendment . . . . [I]t has sustained that travail today but only just.[91]

It can be argued that Congress' enactment of the 1989 Act represented what the critics of Congress suggest: cowardice, weakness, or pandering to illegitimate public preferences. Some may look at the record described above and see neither honesty nor bravery, but at best stalling or trickery in a legislative process unworthy of constitutional issues.

Presumably, the record reflects more legitimacy than this in the quest for a statutory solution. The ambiguity left by Justice Blackmun's position in *Goguen*, the testimony by witnesses such as Professors Tribe and Dellinger, and the arguments for the Act in *Eichman* (including content-neutral drafting and the Framers' original intent), should indicate at least some legitimacy for the legislative solution. Yet the ultimate explanation of how the flag episode demonstrates the legitimate role for Congress in constitutional issues lies not in the merits of the 1989 Act as a substantive matter, but in a subtler dimension. It requires consideration of the events of 1989-90 in terms of management of the nation's issue agenda. It is to agenda management that Part II turns.

II. Validity of the Legislative Role in Constitutional Issues

The 1989–90 flag interactions raise some central issues regarding the validity of the legislative role in constitutional issues. Many legal commentators denigrate Congress' role. They contrast Congress unfavorably with the courts, which they consider, because of more independent processes, more likely to produce

[91] 136 Cong. Rec. S8738 (daily ed. June 26, 1990) (statement of Sen. Moynihan).

a sound answer on the merits of constitutional issues.[92] However, upon closer scrutiny, the key issues in constitutional controversies often concern agenda-setting along with ultimate decisions on the merits. Besides the function of deciding the merits of constitutional issues, the Supreme Court has a major agenda-setting function in selecting which cases to consider and, of these, deciding which it will resolve on their merits and how broadly it will resolve them. Congress, of course, also has a major agenda-setting function; it decides which proposed measures to consider, and when.

Congress' superior capability for agenda-setting consists of a number of related aspects: it sets its agenda publicly, with public debate and democratic accountability, and it thereby achieves public legitimacy, while at the same time the elaborate institutional (committee, party, and floor) mechanisms for setting that agenda provide much more flexibility than the judiciary possesses. In light of its agenda-setting capabilities, Congress has an eminently legitimate and vital role in constitutional issues. A focus on this public legitimacy in agenda-setting sheds light on the court-stripping issue.

A. *Agenda-Setting in the Supreme Court and Congress*

1. Criticism of the Legislative Process

Professor Paul Brest, one of the most thoughtful contemporary commentators on Congress' role in constitutional issues, set forth a process-oriented critique of Congress in his article "Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine."[93] He noted that "[a]mong today's most controversial issues in constitutional law is the scope of Congress' power to counteract Supreme Court decisions with which it disagrees."[94] The article gives a paean to the judicial process:

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[92] *See, e.g.*, Faigman, *supra* note 4, Greenawalt, *supra* note 4, and Paul Brest, *Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986).

[93] Brest, *supra* note 92.

[94] *Id.* at 57. He even concedes a large role to Congress to make "legislative determinations [that] are typically intertwined with value judgments having a constitutional dimension." *Id.* at 105.

> The very structure of adjudication tends to assure that each judge focuses attention on every case and hears the arguments on both sides . . . . Although judges sometimes have strong preconceptions about the proper outcome of a case, which may be reinforced by the positions they have taken in previous cases, it is a tenet of their office that judges do not publicly commit themselves to a decision before hearing argument. This facilitates a degree of open-mindedness to the arguments presented to the court.[95]

The article naturally emphasizes the Judiciary's independence: "Federal judges are immune from reprisal for their decisions."[96]

In contrast, "[f]or all the criticisms of the federal judiciary or of particular Supreme Court decisions, Congress is not playing in the same league," because "Congress' traditions and practices of considering constitutional questions are so weak and untrustworthy that it is not ready to enter into a dialogue. It needs a tutorial first."[97] Professor Brest contrasts his picture of a reflective, objective, independent judicial process with a very different legislative process:

> The legislative environment is not conducive to reflection . . . . The legislators who are most intimately involved in the decisionmaking process often have publicly committed themselves to a particular position . . . . [A] legislator's vote on a constitutional matter may be politically salient, and a pattern of "wrong" votes can be costly . . . . [C]onstitutional decisionmaking is not supposed to reflect raw preferences, and such intense activity by [lobbying] groups concerned with the outcomes of constitutional decisions may distort the decisionmaking process.[98]

Even Professor Brest recognizes limits to his analysis. "Lest this seem to romanticize the judiciary, it is worth making the obvious point that judges are perfectly capable of being closed-minded, disingenuous, manipulative, willful, and injudicious."[99] Still, this focus on which process works better at resolving constitutional issues on their merits seems largely to deny Congress a valid role. Those less sympathetic to Congress than Professor Brest, particularly ideological supporters of Executive prerogatives, might well assail the legislative process in even rougher terms, using the language of "lack of integrity" and

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[95] *Id.* at 99 (footnotes omitted).
[96] *Id.* at 100.
[97] *Id.* at 103.
[98] *Id.* at 100.
[99] *Id.* at 100–01.

"cowardice" employed against Congress' enactment of the 1989 Act.

2. Agenda-Setting in the Supreme Court

An alternative line of analysis begins with how the nation's premier institutions set their, and the nation's, agenda. Examining the Court's and Congress' agenda-setting functions on constitutional matters puts the traditional comparative analysis of their respective processes in a different light.

The Supreme Court's agenda-setting function has two major aspects. First, the Court selects which cases to consider. Each year, litigants in the courts of appeals and high state courts file thousands of petitions in the Supreme Court for certiorari.[100] The Justices (or their clerks) sift these thousands of petitions for the few hundreds of serious potential interest. Ultimately, the Justices meet in conference and vote on the particular few for which they decide to grant certiorari or to note probable jurisdiction.[101]

In choosing the cases, the Justices use certain rules of thumb, such as taking issues of national importance or issues upon which lower courts have given conflicting rulings.[102] However, these rules of thumb do not bind the Court. Not only is there no other institutional body that asks whether the Court has followed these rules, but on issue selection, the Court has not even set for itself any fixed or firm self-governing principles, as it attempts to set for itself on constitutional substantive questions. It holds no public proceedings such as oral arguments on whether to accept cases. Generally, it offers no discussion of reasoning like the published opinions on cases. Occasionally Justices dissent from a denial of certiorari, but usually none even do this, nor do they offer even an occasional explanation for granting certiorari, apart from offhand remarks in opinions that the case was taken to "resolve the question of . . . ."

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[100] *See* PAUL M. BATOR ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 57–58 (1988).

[101] In screening the petitions and deciding which ones to take, the Court follows the "Rule of Four." That is, in contrast to decisions on case outcomes, which the Court makes by a majority vote typically of five or more (assuming all nine Justices participate), it takes the lesser vote of only four Justices to decide to grant a petition for the Court to take up a case. *Id.* at 1864–72 (1988).

[102] *See* SUP. CT. R. 10.1 ("Considerations Governing Review on Writ of Certiorari").

Accordingly, as the Justices exercise their agenda-setting discretion, they do so with a degree of personal power and unaccountability that is breathtaking when contemplating the consequences of that exercise. To give one classic illustration, throughout the late 1960s and early 1970s, the Court received numerous petitions for certiorari in cases challenging the legality of the continuation and extension of the war in Indochina. The Court never granted any of these, and while there were a few dissenting opinions from the denial of certiorari, they shed only the most limited light on the decision-making process.[103] This deafening silence represented a stunning contrast to the enormous debates on the legality of the war which swirled around the President and Congress during that era—a debate with tremendous significance for war powers decision-making. Perhaps the Court was right to stay away from the issue, but what is pertinent is how unaccountable it was in taking that course, having no fixed principles, no open proceedings, and almost no written opinions.

Political scientists and legal scholars have long recognized and attempted to analyze this great and unaccountable power. As a leading commentator on the process concluded, "[t]he Supreme Court's nearly unfettered discretion to set its own agenda, we have seen, is part of the foundation of its institutional strength. Court-controlled case selection permits the Court to sidestep or postpone politically damaging disputes."[104] Similarly, another observer concluded that "[t]he current Court's power to pick the cases it wants from a very large docket enables it to assume the role of a super-legislature . . . . The Court thus functions like a roving commission, selecting and deciding only issues of national importance for the governmental process."[105]

Within the context of the First Amendment, if there is a limit to the Court's power, it is that some First Amendment issues so clearly require a Supreme Court decision that they force themselves inexorably onto the agenda at a particular moment.

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[103] Some of the more prominent examples include Atlee v. Richardson, 411 U.S. 911 (1973) (mem.), *aff'g* Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972); Holtzman v. Schlesinger, 414 U.S. 1304, 1313, 1321 (1973); Mora v. McNamara, 389 U.S. 934 (1967), *denying cert. to* 387 F.2d 862 (D.C. Cir. 1967).

[104] DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 72 (1980).

[105] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 204 (1986).

For example, the prosecutions of the leaders of the Communist Party in the 1950s all but required the Court to confront the First Amendment issues implicated in criminalizing the leadership of that political party.[106] In such situations, the Court does not really have free agenda-setting discretion. Similarly, the Court had little choice but to deal with some of the First Amendment cases connected with the civil rights movement in the 1960s,[107] or with regulation of campaign financing in the 1970s.[108]

By contrast, this kind of constraint on discretion did not operate when the Court decided to address the flag issue in the term it heard *Texas v. Johnson*.[109] While there had been extensive draft card burning in the 1960s, perhaps ultimately necessitating the Court's taking a case like *United States v. O'Brien*,[110] there were few such burning protest cases in the 1980s. The isolated 1980s cases involved no national movements or recurring practices, received limited attention, and created no particularly sharp disagreements among lower courts. Prior Supreme Court decisions, as described above, instructed lower courts to be sensitive to protesters' rights and to look closely at the particular statute and the facts of each case in shaping outcomes. *Texas v. Johnson*, taken in itself, concerned a Texas provision of idiosyncratic wording without necessarily broad national significance, and thus did not create an absolute necessity for a new Supreme Court decision. Neither the Solicitor General, often an important "assistant gatekeeper" for the Court, nor any significant body of *amici* urged the Court to choose the case.

After choosing what cases to take, the Court's second agenda-setting aspect consists of deciding whether to reach a broad decision on the issues in those cases. Legal scholars have often emphasized the Court's capacity to avoid decisions on jurisdictional or prudential grounds,[111] or to write opinions in narrow terms without addressing broader issues. The distinguished Professor Bickel devoted most of his classic book on the Court to its options in this regard.[112] In particular, he noted the Court's

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[106] *See, e.g.*, Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951).

[107] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation suit by segregationist official); Bouie v. Columbia, 378 U.S. 347 (1964) (sit-in).

[108] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[109] 491 U.S. 397 (1989).

[110] 391 U.S. 367 (1968).

[111] PROVINE, *supra* note 104, at 163–74.

[112] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

ability to decide a case in such a way as to address an individual's rights, while still leaving open whether differently drafted legislation would survive testing. As he concludes, "[t]he various devices, methods, concepts, doctrines, and techniques that I have discussed—and I have tended to use the terms rather interchangeably—all serve the same end, of course. They are all techniques of 'not doing,' devices for disposing of a case while avoiding judgment on the constitutional issue it raises."[113]

The decision on whether to rule broadly on an issue occurs under greater constraint than the free choice of whether to take the case at all. Once the Court chooses to take a case, it hears oral arguments in public, writes opinions, and applies known principles. Moreover, some cases, presenting unavoidably broad questions, do not lend themselves to avoidance or narrowing devices. *Texas v. Johnson*, however, hardly fell within the group requiring broad rulings. The Court had repeatedly invalidated other flag-related criminal convictions without ruling broadly. The non-neutral drafting of the Texas provision provided a ready-made basis for a narrow ruling. Just as the Court did not explain why it chose to take the Texas case, it also failed to explain why it chose to rule broadly. It simply put aside Professor Bickel's avoidance and narrowing devices.

In sum, when the Court picked the flag issue from relative quiescence, raised it to national attention, and—by a broad ruling—pushed the matter forcefully onto the national agenda, it exercised a type of power hardly distinguishable from the Congress' similar agenda-control. In the words of the political scientists discussed above, it exercised the "nearly unfettered discretion" of a "super-legislature." In contrast to merit-based decisions, the Court basically exercised raw power—not bounded by fixed principles, and not accountable even in the limited sense of having to provide a published opinion.

When the Supreme Court exercises its discretionary power to insert an issue onto the national agenda, the Court's performance depends largely, as political scientists have noted, on the reactions of the public and political institutions.[114] If the Court

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[113] *Id.* at 169. In some cases, he wrote, the Court "engaged in a sort of colloquy with the political institutions, begun by way of questions and answers at the argument, stylized and brought to a Socratic conclusion in the prevailing opinion. The upshot was the framing of conditions to invite a responsible legislative decision." *Id.* at 156. For a riposte, see Gunther, *supra* note 9.

[114] *See, e.g.*, GLENDON SCHUBERT, JUDICIAL POLICY MAKING: THE POLITICAL ROLE OF THE COURTS 205 (rev. ed. 1974).

times its agenda-setting well, it preserves or advances its institutional standing and the underlying premises of constitutionalism. If it times its action poorly, it threatens its own institutional standing and, more importantly, harms the very principles for which it was created and has been nurtured to advance.

Often the Court exhibits soundness and skill in such decisions. Observers have favorably evaluated the Court's decision, for example, not to take up the issue of reapportionment of state legislatures in 1946, but to take it up in 1960.[115] As one political scientist wrote, this was a situation in which "judicial procrastination [from 1946 to 1960] appears to have had instrumental value for the realization of greater social justice":[116]

> By 1961 it was politically feasible for the Court to consider raising another major issue of national policy: there was majority support among the justices to support a policy of fair representation, and such a policy might conceivably attract the acquiescence of a national plurality—after all, the object of the policy was to deemphasize the political influence of small minorities and to expand the influence of larger ones.[117]

However, the Court does not always show this degree of skill and sense. In a speech in 1990 to the American Bar Association, Justice Stevens expressed regret at the Court's decision to take the *Texas v. Johnson* case. "Had we allowed the state [Texas] court judgment to stand," he said, "an awful lot of ink . . . and a lot of heartache would have been saved."[118]

Justice Stevens's address was a rare public acknowledgment by a sitting Justice of a flawed aspect of the Court's agenda-setting. By thrusting the flag issue onto the national agenda as it did, the Court brought the nation close to a step widely decried in the legal community: the presentation in blunt, inflammatory terms of a problematic gap between national convictions regarding the First Amendment and the flag, both of which have histories as old as the government. By eliciting a national backlash, the Court almost undid the two-century-long tradition of maintaining the Bill of Rights intact and unamended, a development which would have wounded the Court's own institu-

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[115] *See* Colegrove v. Green, 328 U.S. 549 (1946); Baker v. Carr, 369 U.S. 186 (1962) (*prob. juris. noted*, 364 U.S. 898 (1960)).

[116] SCHUBERT, *supra* note 114, at 205.

[117] *Id.* at 208.

[118] Saundra Torry, *Justice Doubts Nominee's Vote is Foreseeable: Stevens Cites Opinions by Brennan as Example*, WASH. POST, Aug. 8, 1990, at A7.

tional standing. Had the Congress not deferred the issue for a year, allowing enthusiasm for amending the Constitution to cool, the decision to push the flag issue onto the national agenda by writing *Texas v. Johnson* broadly might well have been seen, in retrospect, as one of the most unnecessary wounds the Court ever inflicted on itself.

In process terms, the Justices' independence, which the critics of Congress tout so highly, combines with what Professor Brest sadly admits is their "perfect[] capab[ility] of being close-minded, disingenuous, manipulative, willful, and injudicious,"[119] to undermine the soundness of their agenda timing. They are comparatively isolated from popular interactions. Their work does not take them throughout the country or allow them to mingle with the populace and its elected or media communicators.[120]

In short, the Justices do not actively participate in the mechanisms by which the national government keeps in touch with the public. The Court receives *amicus* briefs, and these often provide valuable feedback, but they have many limitations and inadequacies. Some of the Justices themselves have a governmental or political background, or continue to take part in interactions with the bar and academia. This background and professional feedback help, but political scientists outside the

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[119] Brest, *supra* note 92, at 100–01.

[120] In the last century the Justices traveled the federal circuits, conducting original (non-appellate) proceedings throughout the states. "[E]arly Supreme Court justices spent most of their time serving as trial judges." RUSSELL WHEELER & CYNTHIA HARRISON, FEDERAL JUDICIAL CENTER, CREATING THE FEDERAL JUDICIAL SYSTEM 9 (1989). Circuit riding provided a broader and more open range of experiences than the Justices had in appellate proceedings in Washington. "[C]ircuit riding exposed the justices . . . to legal practices around the country—it let them 'mingle in the strife of jury trials,' as a defender of circuit riding said in 1864." *Id.* at 9 (footnote omitted).

Moreover, circuit riding not only allowed the country to communicate directly with government figures, but involved those figures in building public support for the institutions of government:

> [I]t contributed to what today we call "nation building." It would, so went the argument, "impress the citizens of the United States favorably toward the general government, should the most distinguished judges visit every state." (In fact, they did more than visit. The justices' grand jury charges explained the new regime to prominent citizens all over the country . . . .)

Id. at 9–10.

The Circuit Court of Appeals Act of 1891 (often called the Evarts Act), did not "abolish the justices' circuit riding, but rather made it optional, thus quietly burying this anachronism . . . ." *Id.* at 25.

This Article is not intended to urge the revival of circuit riding. Merely, it is to note the disengagement of the Justices from some of the processes that they took part in during an earlier era, democratic in spirit and fully within the confines of Article III.

legal profession probably would not consider such channels comparable to the world of members of Congress.

Thus, through independence, predisposition, and comparatively limited channels of communication, Justices can readily misjudge or underrate the popular reaction to their agenda-setting decisions. The judicial procedures of public arguments and formal opinions applying fixed principles, which provide some limited constraint to ideological preferences on the merits, provide little or none on agenda-setting. Hence, mistakes occur.

3. Agenda-Setting in Congress

While the Congress' procedures and public accountability deny it the form of independence and the appearance of non-predisposition so vital for judicial decisions in constitutional cases, Congress' characteristics contrast rather favorably for the sound conduct of the agenda-setting function. Members of Congress stay in active touch with the country. They conduct constant state and district trips, constituent casework, field hearings, inspection trips, and local meetings and ceremonies.[121] They conduct major press conferences and brief press exchanges, immersing themselves in every type of mass media communication and feedback.[122] They meet with delegations either in Washington or elsewhere. Members of Congress with secure districts or states still vigorously engage in these interactions.

Hence, a senior member of the House or Senate Judiciary Committee with a secure seat would still differ from a Justice who might have the same basic views on constitutional issues and similar legal training. The member would develop an awareness and understanding of the likely response to issues by the public and by electoral and communicative institutions not available to the Supreme Court Justice. Such a member derives greater sensitivity to the impact of decisions simply from superior information—not, as some critics of Congress imply, only from cowardice or a lack of integrity.

Moreover, while the Supreme Court sets its agenda at closed conferences, Members of Congress extensively debate the

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[121] *See* RICHARD F. FENNO, HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

[122] *See* ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 143–51 (1981).

agenda in the open, both on the congressional floor and in the press. They decide what to consider through elaborate rules which themselves have evolved through extensive debate, from the discharge petition to the often-amended cloture rule.[123] The rules allow the participants to present views and to resolve disputes over polarized ideologies in an open way—a way which satisfies the public's desire and right to be heard.

At the same time, the Congress' agenda-setting mechanisms can involve indirection, subtlety, and tactical maneuvering. The chambers do not function as structureless mobs; rather, party, committee, and floor leaderships can take responsibility for a limited temporary thwarting of raw preferences, without slight to the political accountability of the process as a whole. Congress' institutional procedures provide a wealth of mechanisms for discussion with the public. In effect, Congress can say "let's wait on choosing A" or "let's choose between A and B," rather than "you can never have A." Coupled with Congress' vastly greater public interaction, as compared to the Court, this dialogue allows the public to make decisions seemingly against its strongest preferences in a way that still has democratic legitimacy. Where the Court's decisions, for lack of accountability, can seem to pit the public's desires against nine aloof, unelected Olympians, the Congress' decisions can bring forth the public's own strong commitment to constitutional government, and thus allow the public to make its decisions in a way that preserves and strengthens that system.

The flag issue illustrates well the workings of the congressional agenda-setting apparatus, as compared with the Supreme Court's. The decision whether to respond to *Texas v. Johnson* through a constitutional amendment or through a statute became an agenda-setting question of the highest order in Congress. The Senate and House, faithful to their traditions, resolved it through different mechanisms. In the House, the strong constraints on floor consideration put the key decision at the committee level.[124] Since the 1989 Flag Act received sufficient scholarly, political, and media support during public hearings to sustain its legitimacy, the House Judiciary Committee reported the bill; only that bill, not a constitutional amendment, received a House

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[123] *See* TIEFER, *supra* note 35, at 314–26 (discharge); *id.* at 691–706 (history of cloture).
[124] *House Hearings*, *supra* note 5, at 1.

floor vote in 1989.[125] In the Senate, there is much less constraint on floor consideration, and much greater right of the minority party to have proposals considered.[126] Hence, a constitutional amendment proposal did receive a floor vote in 1989.[127] However, the Senate considered the amendment only after having previously enacted a statute which addressed the issue.

Even in 1990, after enactment of the Flag Protection Act, Congress' procedures did far more to protect the system of constitutional government than did the Court's. The Supreme Court had no choice, the second time, but to take *United States v. Eichman* and decide it. Moreover, as to the decision itself, the Court had one plain legal question on which the whole year-long exercise was premised—*Texas v. Johnson*'s invocation of Justice Blackmun's prior position favoring content-neutral laws protecting the physical integrity of the flag.[128] The Court chose to throw away the flexibility inherent in that prior Blackmun position. The Court did not even explain its choice, but just patently ducked the issue, by not saying a single word about a point which had been perhaps the main thread of statutory defense in congressional hearings, meetings, reports, and floor discussion, and in the briefs filed in the Court. Even scholarly commentators critical of the 1989 Act saw the Blackmun position as sufficient to predict a sustaining of the statute.[129] No Member of Congress involved in public legitimizing of decisions, and required to engage in debates in political and media forums, could duck the duty to explain that kind of point, involving a highly visible reversal of position underlying a pair of closely divided decisions. The Supreme Court did.

By contrast, once the Supreme Court's *Eichman* decision[130] put the question of a constitutional amendment back before Congress, Congress not only decided the issue, but still reveled in its remaining means of flexibility. On the House side, great debate, individual consideration, and subtlety went into the tim-

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[125] Flag Protection Act of 1989, H.R. REP. No. 231, 101st Cong., 1st Sess. 1 (1989).

[126] TIEFER, *supra* note 35, at 424–25 (describing control in committees which results from House germaneness rule); *id.* at 584–85 (describing lack of constraint on floor in absence of Senate germaneness rule).

[127] 136 CONG. REC. S13,733 (daily ed. Oct. 19, 1989).

[128] *Johnson*, 491 U.S. at 407; *see supra* notes 29–33 and accompanying text (summarizing Justice Blackmun's position on content-neutral statutes).

[129] Greenawalt, *supra* note 4, at 937.

[130] 110 S. Ct. 2404 (1990).

ing and procedural questions for the final vote.[131] On the Senate side, alternative proposals elicited and illustrated nuanced positions, and the Senate even demonstrated its own special procedures for considering constitutional questions.[132]

Critics may disagree with the depiction of procedures as indirect as votes on timing and alternatives as manifestations of a legitimate and vital process. They may call these lack of integrity and cowardice.[133] Without rehearsing these different perspectives, there is a final point. The fact is that after all those preliminary and alternative questions had been resolved, every Representative and every Senator took an ultimate yea-or-nay vote on President Bush's constitutional amendment proposal, enough voting against strong popular sentiment to defeat the proposition.[134] Their protracted efforts to explain the complexities or subtleties in their positions do not detract from their ultimately open and courageous votes.

Congressional agenda-setting furnished a means by which the public's own ambivalences—its support for the flag, and its support for an intact Bill of Rights—could be expressed through an outcome that seemingly opposed popular feeling, but still had popular legitimacy. Just as the proper functioning of the judicial process depends on more than the individual virtue of judges, this result depended on more than just the bravery and integrity of members of Congress. Rather, the constitutional system worked because of the valid institutional role on constitutional issues which only Congress—not the Supreme Court—could flexibly and skillfully perform. Thus, it is no wonder that "[e]ach decision by a court is subject to scrutiny and rejection by private citizens and public officials. What is 'final' at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of court doctrines."[135]

Other proposals in the 1980s for constitutional amendments were closely akin to the flag issue. Far from jumping at chances

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[131] *See supra* notes 74–82 and accompanying text (summarizing House consideration of the flag amendment).

[132] *See supra* notes 83–91 and accompanying text (summarizing Senate consideration of the flag amendment).

[133] Faigman, *supra* note 4, at 353; Greenawalt, *supra* note 4, at 927.

[134] 136 CONG. REC. H4094–95 (daily ed. June 21, 1990); *id.* at S8736–37 (daily ed. June 26, 1990).

[135] LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 275 (1988).

to write popular ideas into the Constitution, Congress resolved or defused these issues through agenda-managing devices. The Senate first deferred, and then later rejected, a constitutional amendment on abortion at a time when it was a popular proposition,[136] while the House rejected a constitutional amendment on balanced budgets.[137] The Senate filibustered to death, for practical purposes, a statutory effort against the remedy of busing for constitutional violations.[138] By a vote on a constitutional point of order, the Senate also disposed of a statutory effort at a line-item veto,[139] just as it later disposed of one of the statutory proposals in the flag context. Countless examples of other constitutional issues, involving either separation of powers or civil liberties, could be cited that were resolved, or defused, in congressional hearings or on the floor of Congress.

Some of these represent ultimate judgments on the merits, such as the constitutional amendments rejected on the floor for lack of a two-thirds vote. Yet many of the others represent Congress' use of its many agenda-setting procedures. Even the matters resolved on the merits reflect the influence of agenda-setting procedures through the timing and the presentation of the issues. The Senate filibuster, the Senate constitutional point of order, and the House Rules Committee's procedures for floor consideration constitute three examples of those agenda-setting procedures in action.

B. *The Example of Court-Stripping Legislation*

A more highly charged issue of congressional-judicial constitutional interaction concerns "court-stripping" laws, to use a label often employed by critics of such laws. Congress has reacted to judicial decisions which it perceived as particularly damaging to national interests by enacting statutes restricting the jurisdiction or remedies of the Supreme Court or lower courts. Classic congressional enactments of this kind occurred after the Civil War, to curb Supreme Court interference with Reconstruction of the former Confederate states;[140] in 1932, to

[136] TIEFER, *supra* note 35, at 757.
[137] *Id.* at 320.
[138] *Id.* at 738–40.
[139] *Id.* at 507.
[140] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

stop district court issuance of labor injunctions;[141] during World War II, to prevent judicial interference with wartime administrative actions;[142] and in the 1950s, to control access by criminal defendants to government investigative files.[143] In the 1980s, Congress vigorously debated court-stripping statutes regarding federal judicial involvement in social issues such as busing, abortion, and school prayer, but ultimately did not enact such statutes.[144]

Congress draws on two powerful grants of power in enacting such legislation. Article III, section 2 of the Constitution gives the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[145] Article III, section 1, provides that "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[146] The Framers included these clauses granting Congress jurisdictional control over the federal courts in order to overcome strong opposition to the establishment of a powerful federal judiciary under Article III.[147] On numerous occasions, the Supreme Court has found these provisions to grant Congress complete control over jurisdiction and remedies of both the Supreme Court and lower courts.[148]

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[141] Norris-LaGuardia Act, §§ 1-15, 47 Stat. 70–73 (1932) (current version at 29 U.S.C. §§ 101–115 (1988)); *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938). BATOR, *supra* note 100, at 370.

[142] Emergency Price Control Act of 1942, 56 Stat. 23 (repealed 1946). *See* Lockerty v. Phillips, 319 U.S. 182 (1943); BATOR, *supra* note 100, at 370–77.

[143] 18 U.S.C. § 3500 (1988) (Jencks Act, responding to Jencks v. United States, 353 U.S. 657 (1957)).

[144] *See, e.g., Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); *Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980).

[145] U.S. CONST. art. III, § 2.

[146] *Id.* § 1.

[147] Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 901–02 (1990) (highlighting how the Constitutional Convention actually defeated a proposal for the establishment of the inferior federal courts, and only then accepted them, giving discretionary authority to Congress).

[148] In the most emphatic demonstration, Congress did not confer federal question jurisdiction on the district courts, today considered their most important type of subject matter jurisdiction, until 1875. 28 U.S.C. § 1331 (1988). *See* Charles Alan Wright, *Federal Question Jurisdiction*, 17 S.C. L. REV. 660, 660–63 (1965). A typical opinion on the subject, Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)), recites:

> Article III left Congress free to establish inferior federal courts or not as it thought appropriate . . . . The congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either

An older generation of commentators—the creators of the modern subject of federal courts—tended to acknowledge the strong basis for congressional regulation of jurisdiction and remedies, while regretting inappropriate use of that power.[149] This generation had a somewhat balanced view of the relative merits of Congress and the courts, having seen both congressional excesses and the judicial excesses of the *Lochner* era[150] and early New Deal.[151] In recent decades, a different generation, typically liberal observers critical of potential conservative use of court-curbing, has taken a much more deprecating view of congressional power.[152]

To embattled civil libertarians of the 1950s and 1960s, and to those opposing the proposed legislation on busing, abortion, and school prayer of the 1970s and 1980s, the error of court-curbing

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> limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

[149] The classic discussion is Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). A later strong statement of Congress' power was:

> Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction . . . . [The counter-theory is] antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power . . . .

Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965). *See also* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); CHARLES L. BLACK, DECISION ACCORDING TO LAW 17–19, 37–39 (1981).

[150] *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down law setting maximum daily and weekly work hours for bakers and initiating rise of substantive due process in Supreme Court jurisprudence). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 at 567–68 (1988).

[151] *See, e.g.*, OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION (1951); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

[152] *See* Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); Lawrence G. Sager, *Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PENN. L. REV. 157 (1960).

For a classification of past commentators, see William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role"*, 100 YALE L.J. 1013 (1991) (classifying past commentators by whether they theorized that Congress could strip the Supreme Court of appellate jurisdiction in general, except over "essential" matters, or of matters it then "distributes" to another Article III court).

on such matters was obvious.[153] Thus, these commentators often took one of the strongest available tools for criticizing congressional interference—the critique of congressional processes by comparison to superior judicial ones—and applied it to court-stripping.[154] According to this rationale, the courts can protect civil liberties and rights only because they are independent, while Congress will not protect them because it is not independent. Thus, when the Framers established a system of civil liberties and rights, they must have intended that the courts could strike down congressional efforts at court-curbing in order to maintain the independence of the Judiciary.

Yet, a broader historical view shows two powerful aspects undercutting the melding of libertarian views and congressional criticism which occurred on this issue in recent decades. First, despite the many court-curbing proposals in Congress from the 1950s through the 1980s, Congress showed great, and perhaps to some, unexpected, restraint before making enactments.[155] Just as congressional processes provided effective protection for constitutionalism in the flag context, they also presented far greater barriers to court-curbing over the last four decades (and, for that matter, during the court-packing fight of 1936–37)[156] than juristic commentators have acknowledged. As consideration of court-curbing bills had failed to confirm the critics' fears, legislative proposals in the flag context showed not congressional timidity and danger, but valid congressional processes and individual courage.

Congressional debates on various legislative solutions have provided forums for interaction, and more importantly, time for the Supreme Court, the public, or both to accommodate the other's predilections. In some instances, the Supreme Court retreated or changed its views, while in other cases, public opinion eventually came to tolerate the Court's views.[157] Either way, legislative action played a key role in preserving constitutionalism, as in the flag case, by reconciling the intervention of an unelected Judiciary in major public issues with the need

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[153] *See, e.g.*, Tribe, *supra* note 152, at 153.

[154] *See* Brest, *supra*, note 92 at 95–97; DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983).

[155] FISHER, *supra* note 135, at 215, 217.

[156] *See* BATOR, *supra* note 100, at 39–42.

[157] *See* 1990 CONG. Q. ALMANAC 528–31 (abortion); 1982 CONG. Q. ALMANAC 385–86 (busing).

for public legitimation of such intervention under a democratic system. To retrace the court-curbing proposals of the recent decades would be a whole separate work in itself, but one point is plain: since the 1940s, despite more than one hundred proposals, Congress has not enacted a court-curbing statute aimed at undermining a particular Supreme Court decision or group of decisions.[158] Congressional self-restraint, not any assertion of power by the Judiciary to strike down court-curbing laws, then, was sufficient to handle the matter.

Second, not only do recent events undercut the fears of Congress' critics, but a broader review of past eras provides additional reasons to question the civil libertarian and constitutional protectionist bases of such criticism. Two of the greatest confrontations generating court-curbing legislation occurred during Reconstruction[159] and in the post-World War I era.[160] During Reconstruction, Congress curbed the Supreme Court's appellate jurisdiction over habeas corpus in order to impede the Court's intrusion into court-martials conducted by military authorities supervising Reconstruction.[161] Modern scholarship has been quite unfriendly to the critics of Congress in that context; it has recognized that for the civil rights of freed slaves and the establishment of democratic governments in the former Confederate states, Congress—not the Supreme Court of that era—was the infinitely more promising hope.[162]

Likewise, in the Norris-LaGuardia Act of 1932,[163] Congress curbed the federal Judiciary's use of union-crippling labor injunctions, by which the courts had used their contempt powers to impose fines and jail terms on union members without holding jury trials. For the protection of the civil liberties of union members, Congress, not the Supreme Court, was the more promising hope. It would be difficult to maintain today that the Congress' trimming of judicial protections of states' rights in

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[158] BATOR, *supra* note 100, at 377.

[159] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

[160] *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938).

[161] Act of Mar. 27, 1868, ch. 34, 15 Stat. 44 (1868) (repealed).

[162] The best study of *McCardle*, the key case in the era, is Van Alstyne, *supra* note 152. Critics of court-curbing have sought to side-step the historical lessons of Reconstruction. Typically, a leading commentator says of *McCardle* simply that "the Court acted in a highly unusual historical context," under which their "dicta . . . cannot be given much weight." Sager, *supra* note 152, at 78 n.187.

[163] Norris-LaGuardia Act, §§ 1-15, 47 Stat. 70–73 (1932) (current version at 29 U.S.C. §§ 101–115 (1988)).

Reconstruction or liberty of contract in the 1930s represented a loss.

This is not to suggest that the proper separation of powers criterion is that whichever branch of government is more libertarian, or for that matter whichever is least so, should predominate. That was not the basis on which the older generation of scholars justified congressional power to regulate jurisdiction and remedies, and it should not be the basis today. Rather, the balance which must occur cannot be struck, as juristic critics imagine, by the courts themselves through some superior process they possess, but must be achieved by the courts and Congress together, recognizing a role for each. Judicial independence has not been the sole historic guarantee of civil rights and liberties, and congressional accountability has not been a uniform threat to them. As in the flag issue of 1989–90, Congress has historically contributed more than its critics acknowledge.

Moreover, as both Reconstruction and the Norris-LaGuardia Act illustrate, Congress has legislative means available to it—a limited restraint on Supreme Court jurisdiction, or a limited adjustment of district court remedies—which do not pose a disastrous threat to the institution of the Judiciary. Congressional self-restraint, even in periods in which Congress enacted court-curbing legislation, provides a safeguard for constitutionalism, obviating the need for the Judiciary to strike down court-curbing as unconstitutional. Legislative debates and solutions demonstrated Congress' superior responsiveness to the public and its superior flexibility in procedures, acting as correctives to the Judiciary's unaccountable and isolated implementation of ideological preconceptions in the 1860s and 1930s.

Predicting the future course of judicial review is hazardous. Presidential appointments of judges in the 1980s and 1990s have reflected a conscious effort to mold the Judiciary by filling it with judges of known ideological views, often relatively young in age, suggesting a future in which, as in the 1930s, the courts will have fixed ideological predilections in conflict with evolving public views.[164] That is the type of era in which the inadequacies

[164] The political scientists who have studied the interaction of courts and Congress have stressed the crucial role of the lengths of judicial tenures and ideological consistency of judicial appointments as determining whether the courts will fall out of harmony. Professor Robert A. Dahl, in his classic study, attributed "[t]he judicial agonies of the New Deal" to President Franklin Roosevelt's "unusually bad luck: he had to wait four years for his first appointment." Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

of the juristic analysis will appear at their starkest, and legislative solutions will seem necessary to protect constitutionalism. If that should happen, the legislative solution of the flag issue may be remembered as a harbinger of a vital congressional role in constitutional issues.

ARTICLE

THE ADJUDICATORY ARM OF CONGRESS—THE GAO'S SIXTY-YEAR ROLE IN DECIDING GOVERNMENT CONTRACT BID PROTESTS COMES UNDER RENEWED ATTACK BY THE DEPARTMENT OF JUSTICE

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The General Accounting Office ("GAO") has for most of this century exercised adjudicatory authority over the awarding of federal government contracts. In this capacity, the GAO has functioned as a check on executive branch conduct under federal procurement laws that arguably saves money for the federal government in the long run by fostering competition and efficiency in the government contract bidding process. The constitutionality of the GAO's authority to adjudicate bid protests, however, is a matter of controversy under the separation of powers doctrine, and the Executive Branch has twice rebelled against this congressional exercise of power.

In this Article the authors describe the evolution and formalization of the GAO's adjudicatory function, and the nature of the Executive Branch's increasing resistance to it. The authors then examine in detail the constitutional and procedural posture of the Justice Department's latest attack. The authors conclude with some speculations on the motivations fueling this inter-branch clash and the future of the GAO's unusual adjudicatory role in the federal government.

For more than sixty years, the General Accounting Office ("GAO"), an arm of the Congress operating under the supervision of the Comptroller General, has performed a vital role in adjudicating protests filed by private parties concerning federal procurements and contract awards. Although this aspect of the GAO's watchdog portfolio gets relatively little publicity outside the government contracts community of Washington, D.C., adjudicating bid protests is a significant function that annually requires the review of billions of dollars in federal contract awards. In reviewing the propriety and legality of federal con-

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tract awards, the GAO provides a final, largely impartial check on the disbursement of appropriated funds by executive branch agencies.

The GAO's authority and power to adjudicate such bid protests has recently come under renewed attack by the U.S. Department of Justice ("Justice") in a lawsuit filed in the U.S. District Court for the District of Columbia, in which Justice maintains that the GAO's statutory authority to award protest costs and attorney's fees to successful protesters is unconstitutional.[1] This lawsuit, in turn, has triggered a firestorm of protest from members of Congress, representatives of private industry, and government contracts attorneys, and over the past few months has led to several new legislative initiatives directed toward retaining the GAO's potent role in reviewing and resolving protests against federal contract awards. The GAO has in essence become the battleground in a rather unique struggle between the Executive and Legislative Branches of our government over who has the power to monitor the billions of dollars of federal contracts awarded each fiscal year.

The recent judicial and legislative activities regarding the GAO's bid protest authority raise a number of interesting policy issues. A threshold question is whether federal contract awards should be subject to third-party review at all. Such awards are already mired in a sea of delay, complex regulations, and perceived inefficiency. Major federal contract awards now often take years, not months, to accomplish.[2] The amount of paperwork generated by such procurements can be staggering, often filling whole rooms in government procurement offices. When the bid protest process is added to the equation, the time and effort associated with a major federal contract award can be truly overwhelming.[3]

Given the increased time, effort, and expense required to win and retain government business, some companies have decided simply to give up doing business with the federal government

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[1] United States v. Instruments, S.A., No. 91-1574 (D.D.C. filed June 26, 1991).

[2] *See, e.g., Goliaths Squeeze Tiny Falls Church Firm Out of Contract*, WASH. POST, Jan. 9, 1992, at B11, B15 (describing cancellation of recent Air Force contract award for desktop computers and noting that "[u]nder conventional bidding rules, computers are often outdated by the time they arrive").

[3] The GAO is just one of several bid protest fora available to a disappointed bidder. Others include federal district court, the U.S. Claims Court (protest jurisdiction limited to pre-contract award proceedings), agency-level review, and for certain procurements involving automatic data processing and telecommunications, the General Services Administration Board of Contract Appeals.

and instead now focus their business efforts exclusively on the private sector.[4] For these companies, the costs of obtaining government business outweigh the benefits they would have derived from such business. This result, although understandable, is not desirable from the standpoint of the government or its taxpayers for one basic reason: greater competition for federal contract awards leads to lower prices and better contract terms for the government.

Fortunately, notwithstanding the problems associated with government procurement, many companies have continued to pursue government business vigorously. For these companies, both filing and defending against bid protests have become routine features of doing business with the government, particularly when bidding on procurements with a substantial dollar value. The ability to recover attorney's fees and other protest costs in successful bid protest cases provides these companies with incentives to continue to pursue government business aggressively, and to protest an award to a competitor when a law or regulation has been violated or other irregularities in the procurement process appear. Viewed in this light, the availability of meaningful bid protest procedures arguably benefits the government by ensuring that a pool of qualified companies is willing and able to compete for the government's business. Apart from this economic consideration, there are political and social gains inherent in a procurement system that operates in a fair and equitable manner, and in which violations of procurement rules can be remedied in the best interests of the government.

If the government's overall interest in promoting competition is served by the availability of functional bid protest procedures, the next policy question is which forum or fora are best suited to hear and resolve such protests. The GAO traditionally has been the primary protest forum available to disappointed bidders on federal procurements. Part I of this Article therefore briefly examines the GAO's historical role as an adjudicator of federal contract awards and describes how that role evolved over time. In Parts II and III, respectively, we consider the formal codification and expansion of the GAO's bid protest powers contained

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[4] *See* Ralph C. Nash & John Cibinic, NASH & CIBINIC REP. (Keiser Publications, Washington, D.C.), Oct. 1991, at 1 (describing experiences of firm that claimed it had "'no further interest in ever placing a bid to the Federal Government'" and concluded that "its experiences with bidding and the protest system were 'only a waste of time and money'").

in the Competition in Contracting Act of 1984 ("CICA"),[5] and the Executive Branch's opposition to that expansion. We then turn in Part IV to an examination of the Justice Department's novel lawsuit challenging the GAO's powers (which as of April 1, 1992, remains pending), and review how the Congress has responded to Justice's legal attack on the GAO's performance of its bid protest function. Finally, in Part V we consider how, if at all, this judicial and legislative wrangling will affect the federal procurement system generally and the GAO's role as the primary adjudicator of protests involving federal contract awards.

I. Historical Summary

The historical roots of the GAO can be traced to the establishment of the Department of the Treasury in 1789.[6] Six offices were created within the Department of the Treasury, one of which was the Comptroller of the Treasury, whose powers were transferred to the GAO when it was created in 1921.[7] Since the beginnings of our nation, the Comptroller of the Treasury and later the GAO have borne a responsibility for the supervision of the expenditure of public funds.

Almost since the GAO's creation, one mechanism by which the GAO has executed such responsibility has been adjudicating bid protests—controversies concerning the award of federal contracts.[8] Yet prior to the enactment of CICA in 1984, there was no clear statutory authority of the GAO to adjudicate bid protests. Such authority arguably derived from the GAO's so-called "settlement powers."[9] These powers are based on a number of statutes that (1) state that the GAO shall settle and adjust all claims, demands, and accounts that concern the government;[10] (2) provide the GAO with the authority to certify and

[5] Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 494, 1175–1203 (1984) (bid protest provisions, § 2741(a) of the Act, codified at 31 U.S.C. §§ 3551–3556).

[6] Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (1789). For a detailed discussion of the historical origins of the GAO, see John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 Geo. Wash. L. Rev. 349, 352–62 (1970).

[7] Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, 23 (current version as amended at 31 U.S.C. § 702 (1988)).

[8] *See, e.g.*, 5 Comp. Gen. 712 (1926) (protest of potential contractor forwarded by the Governor of the Panama Canal to the GAO, which held that contract specifications that named a particular make of truck improperly limited competition).

[9] *See* Cibinic & Lasken, *supra* note 6, at 352.

[10] 31 U.S.C. §§ 3526, 3702 (1988).

revise public accounts;[11] and (3) require the GAO to render a decision on any question submitted by a disbursing or certifying official[12] or agency head regarding any payment they will make.[13] These statutes concerning the appropriate disbursement of government funds arguably provided the basis upon which the GAO, through most of its history, entertained and ruled upon questions—submitted by both government officials and, particularly in more recent years, bidders for government contracts—concerning the propriety of certain awards of government contracts.

These statutes, however, do not on their face grant the GAO the authority to decide bid protests. For example, rendering an advance decision on the propriety of a contemplated disbursement of government funds to a contractor, based on a question submitted by a disbursing or certifying official or an agency head (which is expressly authorized), seems a task quite different from deciding a protest filed by a dissappointed bidder or resolving the questions of a government "contracting officer"[14] concerning an agency's handling of a procurement.[15] No court explicitly recognized the GAO's statutory authority, prior to CICA, to adjudge the conduct of the Executive Branch in its procurement of contracts. In fact the GAO itself noted the dubious statutory authority for its rendering of bid protest decisions.[16]

The GAO's bid protest function, however, has satisfied two needs in the procurement process: it has offered bidders a forum in which to seek relief concerning the contracts they seek to obtain, and it has offered contracting officers and other officials an opportunity to obtain advance decisions on the propriety of their contemplated actions.[17] The first function is important because the GAO has proven to be the most economical means of obtaining an independent review of a federal procurement and because, prior to 1970, disappointed bidders had no standing to

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[11] 31 U.S.C. §§ 3526, 3529 (1988).

[12] As explained by Cibinic & Lasken, *supra* note 6, at 361, "certifying officers attest to the legality and propriety of the contract, performance thereunder and the correctness of the voucher presented for payment," while "disbursing officers make the actual payment to the contractor."

[13] 31 U.S.C. § 3529 (1988).

[14] "Contracting officers" are those duly authorized government officials who award and administer the government's contracts. *See* Cibinic & Lasken, *supra* note 6, at 361.

[15] *See* Cibinic & Lasken, *supra* note 6, at 376.

[16] *See* 36 Comp. Gen. 513, 514 (1957).

[17] 36 Comp. Gen. 513 (1957). *See generally* 4 Comp. Gen. 880 (1925).

seek redress in federal court.[18] The second function is important in part because federal officials can be held personally liable for disbursements made in violation of law.[19] Further, the GAO has stated that it considers the rendering of advance decisions on contract award controversies to play an important role in preventing illegal awards and vindicating the rights of bidders.[20]

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[18] *Compare* Perkins v. Lukens Steel Co., 310 U.S. 113, 127–28 (1940) *with* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970). In *Perkins* the Court denied the bidders standing:

> [T]he Public Contracts Act . . . does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain. . . . Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law." Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.

310 U.S. at 127–28 (footnotes omitted). In 1970, in *Scanwell*, the Court of Appeals for the D.C. Circuit found that the bidder had standing to sue for abuse of discretion:

> It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties. It is also incontestable that that discretion may not be abused. Surely there are criteria to be taken into consideration other than price; contracting officers may properly evaluate those criteria and base their final decisions upon the result of their analysis. They may not base decisions on arbitrary or capricious abuses of discretion, however, and our holding here is that one who makes a prima facie showing alleging such action on the part of an agency or contracting officer has standing to sue under section 10 of the Administrative Procedure Act.

424 F.2d at 869.

[19] *See* 44 Comp. Gen. 221, 223 (1964):

> The sanction for any decision by this Office holding that an accepted bid did not result in a valid contract is our authority under the Budget and Accounting Act, 1921, 31 U.S.C. 1 *et seq.*, to disallow credit in the accounts of the Government's fiscal officers for any payments out of appropriated funds made pursuant to an illegal contract.

See also 31 U.S.C. § 3541 (1988) ("When . . . a disbursing or certifying official of the United States Government does not submit an account or pay the money as prescribed by law, the Comptroller General shall make the account for the official and certify to the Secretary of the Treasury the amount due the Government."); *id.* § 3545 ("The Attorney General shall bring a civil action to recover an amount due to the United States Government on settlement of the account of a person accountable for public money when the person neglects or refuses to pay the amount to the Treasury.")

For a discussion of the personal liability of certifying and disbursing officers, see Cibinić & Laskén, *supra* note 6, at 358–62.

[20] It has become increasingly apparent that the necessity for prompt action in connection with the award of contracts, and the delays involved in processing submissions of legal questions involved therein through established administrative channels for signature by the department heads, has in too many instances resulted in awards which we probably would not have approved, but which we feel to be not so clearly illegal as to justify their cancellation. We

What has made the phenomenon of the GAO's bid protest function more remarkable is that its decisions regarding an agency's handling of a procurement are merely recommendations, and thus do not have a legally binding effect.[21] Procuring agencies, however, generally have followed such recommendations. There are several possible explanations for the general acquiescence of the agencies in this regard. Part of the answer may be that the Executive Branch has acknowledged the need for some bid protest forum in the procurement system and, at least historically, has not considered the GAO—which, as discussed below, traditionally used informal procedures and accorded significant deference to the government—to be a solution that intrudes excessively on the procurement process. Another part of the answer may be that the GAO wields the ultimate authority to settle public accounts and could, accordingly, disallow any payment made to a contractor pursuant to a contract that the GAO considered illegal. The GAO in fact has noted this possibility.[22]

Although the GAO has established its role as a judge of procuring agencies' compliance with federal procurement laws, the GAO was not, prior to the implementation of CICA in 1984, charged with vindicating the rights of bidders. The GAO's interest in the bid protest function was founded instead primarily upon its responsibility as the comptroller of the public fisc. Consequently, it is not surprising that, at least initially, disappointed bidders had available only limited procedural rights in pursuing protests at the GAO.

The GAO initially used simple and informal procedures to elicit the facts relevant to a bid protest. For example, once a potential contractor filed a protest at the GAO, the protesting bidder, other interested bidders, and the government were per-

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> also have observed a tendency in some procuring activities to make awards of contracts in the face of allegations of error without resolving the questions involved, but leaving them to be determined during or after performance of the contract as claims for additional compensation. This practice not only is prejudicial to the rights of other bidders, but also in some cases results in payments of amounts in excess of those which would properly have been payable had proper awards been made in the first instance.

36 Comp. Gen. 513, 514 (1957).

[21] *See, e.g.*, John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963) ("Because of [the Comptroller General's] general concern with the proper operation of competitive bidding in government procurement, he can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn." (footnote omitted)).

[22] 44 Comp. Gen. 221, 223 (1964) (quoted *supra* note 19).

mitted simply to submit written comments to the GAO and to request an informal conference (which the GAO would almost always grant) at which the parties would present their positions. As a result of these streamlined procedures, critical facts were often disputed, and where facts were disputed the GAO routinely would find them in favor of the government.[23] The GAO adopted in 1967 its first formal bid protest regulations, which largely codified the procedures in use at the time. Changes to the regulations in 1972 added timeliness requirements for filing protests and formally gave all interested parties the right to receive all relevant information concerning the protest and the right to attend the informal conferences.

Over time the contracting community increasingly looked to the GAO as an economical, neutral forum in which to obtain a review of the conduct of procuring agencies. In fiscal year 1979, 1577 protests were filed at the GAO, and the GAO decided 454 protests on the merits.[24] In fiscal year 1983, the number of protests filed at the GAO had increased to 2639, and the GAO decided 627 protests on the merits.[25]

Yet there were serious weaknesses in the GAO's system of deciding bid protests. The GAO had no authority to demand that the agency provide comments on the protest in a timely fashion, and was itself under no obligation to render a timely decision. During this often extended process, moreover, the procuring agency was free to proceed with the very procurement whose legality was in question. Thus, a successful protester could often claim only a Pyrrhic victory. For example, where a protester challenged the proposed award of a contract, the agency was free to award and direct performance of the contract; thus, the protester might obtain no relief even if the GAO ultimately concluded that the award was improper. These were the shortcomings of an increasingly important bid protest forum that Congress addressed in enacting CICA in 1984.

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[23] *See* 42 Comp. Gen. 124, 134 (1962) ("We have consistently held that where there are disputed questions of fact, in the absence of evidence sufficiently convincing to overcome the presumption of the correctness of the administrative report, this Office will accept the administrative report as accurately reflecting the disputed facts.").

[24] 41 Fed. Cont. Rep. (BNA) 239–40 (Feb. 13, 1984).

[25] *Id.* From 1979 to 1983, approximately 14.5% of protests decided on the merits were sustained. *Id.*

II. GAO's New Powers under CICA

In 1984 Congress passed sweeping procurement reform legislation known as the Competition in Contracting Act of 1984, or CICA,[26] and in so doing dramatically changed the face of federal procurement law.[27] CICA was Congress' response to more than a decade of studies of waste and inefficiency in government procurement.[28] CICA's primary purpose was "to increase the use of competition in government contracting and to impose more stringent restrictions on the awarding of non-competitive-sole-source contracts."[29]

CICA reformed the bid protest process by formally authorizing the GAO to resolve bid protests and by greatly enhancing the opportunity for a protester at the GAO to obtain meaningful relief.[30] The legislation's intent in this regard was to create a statutory system "which codifies and strengthens the bid protest function currently in operation at the General Accounting Office."[31] CICA's new bid protest provisions became effective with respect to any protest filed after January 14, 1985.[32]

Perhaps CICA's most significant enhancement of the GAO's bid protest authority was through the statute's "automatic stay" provision that enjoins the government, in certain circumstances, from proceeding with the award or performance of a contract if there is a bid protest pending at the GAO. This provision automatically suspends (1) an agency's proposed award of a contract if the agency receives notice of a protest from the GAO prior to award[33] or (2) the continued performance of an awarded contract if the agency receives notice of a protest from the GAO

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[26] Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 495, 1175–1203 (1984).

[27] For a discussion of CICA and its genesis, see Eldon H. Crowell & David T. Ralston, *The New Government Contracts Bid Protest Law*, 15 Pub. Cont. L.J. 177 (1984).

[28] *See, e.g.*, Commission on Government Procurement, Report of the Commission on Government Procurement, 93d Cong., 2d Sess. (1972); H.R. Rep. No. 1157, 98th Cong., 2d Sess. 10–17 (1984).

[29] H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1421 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2109.

[30] Pub. L. No. 98-369, § 2741, 98 Stat. 494, 1199–1203 (1984) (codified at 31 U.S.C. §§ 3551–3556 (1988)). CICA also expanded the jurisdiction of the General Services Administration Board of Contract Appeals in order to create an alternative forum for protesting federal agency procurements of automatic data processing equipment. Pub. L. No. 98-369, § 2713, 98 Stat. 494, 1182–84 (1984) (codified at 40 U.S.C. § 759 (1988)).

[31] H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1435 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2123.

[32] Pub. L. No. 98-369, § 2751 (codified at 41 U.S.C. § 251 (1988)).

[33] *Id.* § 2741 (codified as amended at 31 U.S.C. § 3553(c)(1) (1988)).

within ten days after award,[34] except in certain circumstances. Thus, with the advent of CICA, for the first time in the history of the GAO bid protest function, the Executive Branch was required to halt certain protested procurements pending the GAO's resolution of the protest.

A procuring agency subject to the automatic stay provision of CICA can, however, "override" the stay under certain circumstances and thus allow the work to commence or proceed under the contract notwithstanding the pending protest.[35] In order to override a stay that has been imposed *prior to* award of a contract, the head of the procuring activity responsible for a contract award must make a written finding that "urgent and compelling circumstances which significantly affect interests of the United States" will not permit waiting for the GAO's decision.[36] In order to override a stay imposed *after* award (i.e., as a result of an agency's receipt of notice of protest within 10 days after award), the head of the procuring activity must make either a written finding that "performance of the contract is in the best interests of the United States" or a written finding of "urgent and compelling circumstances," as indicated above.[37] Further, when overriding the automatic stay, the agency must advise the GAO of the finding that it has made.[38]

In addition to the automatic stay provision, CICA established deadlines within which the procuring agency must respond to a protest and within which the GAO should render its decision.[39] Generally, the agency must submit a complete report, including all relevant documents, to the GAO within twenty-five working days after the agency's receipt of notice of the protest from the GAO.[40] The protester and all other interested parties may request a copy of this report, although a party is not entitled to any document that would give it a competitive advantage or that it is otherwise not authorized by law to receive.[41] Examples of such privileged material would be confidential business in-

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[34] *Id.* (codified as amended at 31 U.S.C. § 3553(d)(1) (1988)).

[35] 31 U.S.C. § 3553(c)(2) (1988).

[36] *Id.* § 3553(c)(2)(A). There is, however, a limitation on an agency's ability to make this finding: CICA further provides that "[a] finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days thereafter." *Id.* § 3553(c)(3).

[37] *Id.* § 3553(d)(2)(A).

[38] *Id.* § 3553(c)(2)(B), (d)(2)(B).

[39] *Id.* § 3553(b)(2).

[40] *Id.* § 3553(b)(2)(A).

[41] *Id.* § 3553(f).

formation of a competitor or certain agency documents reflecting the government's rationale for selecting the successful proposals submitted in the procurement.

CICA further envisioned that most bid protests would be resolved within ninety working days. The Act initially provided that "the Comptroller General shall issue a final decision concerning a protest within 90 working days from the date the protest is submitted to the Comptroller General unless the Comptroller General determines and states in writing the reasons that the specific circumstances of the protest require a longer period."[42] CICA also empowers the GAO to resolve suitable protests pursuant to "express option" procedures which would resolve a protest within forty-five calendar days.[43]

Under CICA, the GAO is also clearly authorized to recommend that a federal agency whose procurement is found to be in violation of the law implement a specified remedy. CICA empowers the GAO to issue any recommendations "as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations," including any combination of certain listed actions, such as terminating an awarded contract, refraining from exercising options under a contract, recompeting the contract, issuing a new solicitation, or properly awarding the contract.[44] In formulating its recommendation the GAO is not to consider the cost or disruption of terminating or recompeting a contract if the agency has elected to proceed with the contract in spite of the protest by having overridden an automatic stay of the procurement.[45]

Although the foregoing provisions authorize the GAO to issue only recommendations, the Executive Branch has as a practical matter almost always followed those recommendations.[46] To monitor executive branch compliance with GAO recommendations, Congress included notification provisions in CICA that require procuring agencies to report to the GAO if the agency "has not fully implemented those recommendations within 60

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[42] *Id.* § 3554(a)(1) (1984) (amended 1988). This provision was changed in 1988 to *require* the Comptroller General to render its decision within 90 working days. *See infra* notes 93–95 and accompanying text.

[43] *Id.* § 3554(a)(2); *see also id.* § 3553(b)(2)(C) (imposing a shorter time limit for agency report submission in express option cases).

[44] *See id.* § 3554(b)(1).

[45] *See id.* § 3554(b)(2).

[46] *See supra* notes 21–22 and accompanying text.

days of receipt of the Comptroller General's recommendations."[47] The GAO in turn must "transmit to Congress a report describing each instance in which a federal agency did not fully implement the Comptroller General's recommendations during the preceding fiscal year."[48] Thus, a formal procedure notifies Congress of any refusal by an executive agency to correct a violation identified by the GAO. A GAO report to Congress on this matter indicated that all federal agencies accepted the GAO's recommendations issued in fiscal year 1991.[49] Thus, the available data certainly suggest that the Executive Branch typically honors and implements the GAO's recommendations in bid protest proceedings.

The final significant feature of CICA's new GAO bid protest provisions is the authority granted to the GAO to declare in appropriate cases that a successful protester is entitled to be reimbursed for litigation costs in pursuing the protest and for the costs of preparing the bid or proposal that it submitted in the procurement. CICA states, in this regard, as follows:

> (1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of—
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> (A) filing and pursuing the protest, including reasonable attorneys' fees; and
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> (B) bid and proposal preparation.
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> (2) Monetary awards to which a party is declared to be entitled under paragraph (1) of this subsection shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services.[50]

Pursuant to this provision, the GAO will typically declare that a protester who prevails on the merits of its case is entitled to be paid its protest costs, including attorney's fees, by the procuring agency. Additionally, the GAO will declare the protester entitled to bid or proposal preparation costs in an appropriate

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[47] 31 U.S.C. § 3554(e)(1) (1988).

[48] *Id.* § 3554(e)(2).

[49] Letter from the Comptroller General to The Honorable Dan Quayle (R-Ind.), President of the Senate, B-158766 (Jan. 31, 1992).

[50] 31 U.S.C. § 3554(c) (1988).

case, such as where a successful protester is not given an opportunity to continue to compete for the contract.[51]

In summary, CICA added teeth to the GAO's bid protest function. It gave the GAO clear statutory authority to adjudicate bid protests, and, with the automatic stay provision, the ninety-day decision deadline, and the power to award protest and bid and proposal costs, CICA gave protesters a much better prospect of obtaining meaningful relief at the GAO.

Subsequent to CICA's enactment in 1984, the GAO twice changed its bid protest regulations to provide a more effective bid protest forum, consistent with CICA's statutory mandate. Changes adopted in 1987, which took effect January 15, 1988, gave interested parties the right to request and obtain specific documents from the agency, provided that they were relevant and not privileged in nature.[52] While the original language in CICA arguably gave interested parties the right to request specific documents,[53] the 1987 changes clearly articulated this right and established procedures for requesting such documents.

The 1987 regulatory changes also established a more formal fact-finding conference as an alternative to the traditional informal conference.[54] On paper at least, this change seemed to provide protesters with a powerful procedural device to overcome the presumption that disputed facts should be resolved in favor of the procuring agency. For example, fact-finding conferences would allow for the first time at the GAO the production of witnesses, whose testimony would be under oath and transcribed.[55] Moreover, the new regulations facially established a modest threshold for the GAO's granting of a fact-finding conference: "The fact-finding conference may be held in order

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[51] *See, e.g.*, TFA Inc., B-243875, 91-2 CPD ¶ 239 (Sept. 11, 1991).

> Subsequent to the filing of this protest by TFA, the Forest Service determined in accordance with 31 U.S.C. [§] 3553(d)(2)(A)(ii) (1988) that urgent circumstances required the agency to proceed with [the surveys that were the subject of the contract] . . . . Since the surveys are now mostly completed, termination of the awards and reevaluation is not feasible. However, a portion of the line items contain options for additional performance during the 1992 surveying season. We recommend that the Forest Service refrain from exercising these options, and instead conduct a new procurement for the 1992 effort. In addition, we find that TFA is entitled to recover its proposal preparation costs and the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d) (1991). TFA should submit its claim for such costs directly to the agency.

Id.

[52] 49 Fed. Reg. 49,417, 49,419 (1987) (codified as amended at 4 C.F.R. § 21.3 (1991)).

[53] 31 U.S.C. § 3553(f) (1988).

[54] 4 C.F.R. § 21.5 (1991).

[55] 4 C.F.R. § 21.5(b)(2) (1991).

to resolve a specific factual dispute essential to the resolution of the protest which cannot be otherwise resolved on the written record."[56] In practice, however, the GAO apparently concluded that few cases met this test because the GAO rarely granted the new fact-finding conferences created by the 1987 amendments to its regulations.

In contrast to the minimal impact of the 1987 amendments, changes to the GAO bid protest regulations adopted in 1991 radically transformed bid protest procedures at the GAO for the first time since CICA. The new procedures, effective April 1, 1991, feature the use of "protective orders,"[57] more adversial "hearings" in lieu of informal or fact-finding conferences,[58] and the selective award of protest costs even in certain cases where the agency takes corrective action before the GAO renders a decision.[59]

The introduction of protective orders allows counsel and expert consultants for bidders participating in the protest to have access to privileged material that the procuring agency traditionally would not have released.[60] Armed with such additional documentary information, bidders' counsel can now more effectively advocate their clients' positions before the GAO.

Also unlike the previous rules, under which fact-finding conferences were rarely granted (even while informal conferences were granted as a matter of form, whether necessary to the resolution of the protest or not), the new rules envision hearings to be granted more frequently, on an as-needed basis.[61] The hearings contemplated by the new rules, furthermore, allow for a more thorough presentation of the relevant facts than under the old informal conferences. A fuller development of the record will in the whole benefit protesters in light of the GAO's traditional position that the protester must overcome a presumption of correctness accorded the agency's statement of the facts. The procedures used in the hearing will vary based on the need for the development of the factual record, but the examination of witnesses at such bid protest hearings is expected to be common.[62]

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[56] 4 C.F.R. § 21.5(b) (1991).
[57] 56 Fed. Reg. 3762, 3763 (1991) (to be codified at 4 C.F.R. § 21.3).
[58] 56 Fed. Reg. 3762, 3764 (1991) (to be codified at 4 C.F.R. § 21.5).
[59] 56 Fed. Reg. 3762, 3764 (1991) (to be codified at 4 C.F.R. § 21.6)
[60] 56 Fed. Reg. 3762, 3763 (1991) (to be codified at 4 C.F.R. § 21.3(d)).
[61] 56 Fed. Reg. 3762, 3764 (1991) (to be codified at 4 C.F.R. § 21.5).
[62] For an early report on the success of the 1991 changes to the GAO bid protest

Finally, the new rules state that the GAO can declare protesters to be entitled to the award of protest costs in certain situations where the agency has mooted the protest by taking corrective action.[63] This new rule (which arguably goes beyond the GAO's mandate under CICA)[64] is intended to reward protesters who bring and litigate seemingly meritorious protests that cause the agency to acknowledge its error and take corrective action in lieu of waiting for the GAO to decide the case. In adopting this new rule, the GAO also apparently intends to encourage the procuring agency to evaluate the merits of its legal position and take corrective action promptly. Accordingly, one of the factors that the GAO will consider in determining whether a protester is entitled to such recovery will be whether the agency took an unreasonable length of time to decide to take corrective action.[65]

These most recent changes to the bid protest procedures and powers of the GAO have transformed it into a quasi-judicial tribunal. Protective orders—violable only upon threat of sanction—now routinely permit access by counsel and designated experts to material that heretofore has never been available to private litigants at the GAO. Furthermore, the GAO now appears prepared, pursuant to its new regulations, to conduct full-blown adversarial hearings, at which attorneys may call wit-

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regulations, see Robert P. Murphy & Michael R. Golden, *New Procedures for Bid Protests at GAO*, PUB. CONT. NEWSL., Fall 1991, at 3.

[63] 56 Fed. Reg. 3762, 3764 (1991) (to be codified at 4 C.F.R. § 21.6(e)).

[64] This more aggressive policy on awarding bid and proposal costs arguably lacks a statutory basis—and perhaps conflicts with GAO's bid protest authority—because CICA allows for the award of bid protest costs only "[i]f the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation." 31 U.S.C. § 3554(c)(1) (1988). It is debatable whether the award of bid protest costs without the GAO's rendering of a traditional bid protest decision based on a fully developed record satisfies this statutory standard.

[65] *See, e.g.*, Oklahoma Indian Corp.—Claim for Costs, B-243785.2, 91-1 CPD ¶ 558 (June 10, 1991).

> Obviously, it was not our intention in adopting the revised provision to award protest costs in every case in which the agency takes corrective action in response to a protest. Since our concern was that some agencies were not taking corrective action in a reasonably prompt fashion, our intent was to award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Here, the agency took corrective action within two weeks of the filing of the protest. Such action, taken early in the protest process, is precisely the kind of prompt reaction to a protest that our regulation is designed to encourage. It provides no basis for a determination that the payment of protest costs is warranted. Accordingly, the protester's claim for costs is denied.

Id.

nesses, conduct direct and cross-examination, and proffer oral argument. The GAO may also now award bid protest costs where the agency fails to take corrective action promptly. With these changes in place, the GAO seems to be launching a new effort to become a more activist and effective adjudicator of disputed procurement activity by federal agencies.

III. The Initial Constitutional Attack on GAO's New Powers under CICA

Even prior to the enactment of CICA in 1984, the Justice Department had expressed concerns as to the constitutionality of CICA's proposed GAO bid protest provisions.[66] In a letter dated April 20, 1984, addressed to Representative Jack Brooks (D-Tex.), the then-Chairman of the House Government Operations Committee,[67] Justice maintained that these provisions of CICA were unconstitutional, as the Comptroller General "is properly considered to be an officer of the Legislative Branch . . . who cannot exercise executive or judicial authority without violating the doctrine of separation of powers."[68] Regarding the section of CICA that purported to give the GAO authority to award protest costs, Justice asserted the following position:

> Whether this authority is analyzed as GAO's performing a judicial function which is binding on an executive agency, or as GAO's rendering an administrative decision for the Executive Branch, it is clearly unconstitutional. *Buckley v. Valeo*, 424 U.S. 1 (1976). The doctrine of separation of powers does not, except in certain very limited circumstances, permit the legislature or any of its parts to bind the Executive Branch except by passage of a law. Nor does it permit the Legislative Branch to execute the law by determining how contracts should be awarded or to adjudicate claims against the Executive Branch. Accordingly, section 204(c)(4) must be deleted in order to remove this substantial concern.

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[66] *See* Crowell & Ralston, *supra* note 27.

[67] Representative Brooks was instrumental in the enactment of CICA. He was an initial co-sponsor of H.R. 5184, 98th Cong., 2d Sess. (1984), which was enacted largely through his efforts. *See* Crowell & Ralston, *supra* note 27, at 180.

[68] *See* Letter from Robert A. McConnell, Assistant Attorney General, and C. Marshall Cain, Acting Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, Department of Justice, to Representative Jack Brooks (Apr. 20, 1984), *reprinted in* 15 Pub. Cont. L.J. 198 (1984).

> Furthermore, in our view, awarding attorney fees in every case in which the protester prevails is unwise. First, it is contrary to the American rule that attorney fees are not shifted to the losing party, but are borne by each party. While the American rule envisions a shifting of fees in the event of bad faith, no such requirement is made by this proposed legislation. Even the Equal Access to Justice Act, legislation which abrogates the American rule and makes attorney fees against the Government available, requires that the private party demonstrate that the Government's position was not "substantially justified." At a minimum, the legislation should require such a showing.
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> In addition, the availability of attorney fees in proceedings before the General Accounting Office will undoubtedly encourage litigation which would not otherwise be instituted. The courts have long recognized the wisdom of allowing executive agencies wide latitude in exercising their discretion in procurement situations. The provision for attorney fees seems destined to encourage baseless attacks on the exercise of this discretion.[69]

While Justice's position did not prevail before the Congress, it did signal the beginning of a constitutional fight between the Executive and Legislative Branches that continues to the present day. Justice's views as to the unconstitutionality of CICA's GAO bid protest provisions have, with few exceptions, firmly held sway in the Executive Branch. For example, at the signing ceremony for the Deficit Reduction Act of 1984 (of which CICA was a part), President Reagan stated, "I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the Executive Branch."[70] President Reagan went on to note, "I am instructing the Attorney General to inform all Executive Branch agencies as soon as possible with respect to how they may comply with the provisions of the bill in a manner consistent with the Constitution."[71]

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[69] *Id.* at 200 (footnote omitted). In its letter of April 20, 1984, Justice also attacked the constitutionality of CICA's stay provisions as impermissibly delaying executive action for an uncertain period, outside the formal legislative process. According to Justice's letter, such legislation is "foreclosed" by the Supreme Court's decision in Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). 15 PUB. CONT. L.J. at 199.

[70] *Id.*

[71] *Id.*

This presidential directive was implemented a short time later when the Justice Department's Office of Legal Counsel issued a memorandum on October 17, 1984, asserting that the CICA stay provisions were unconstitutional.[72] This memorandum was followed by a letter from then-Attorney General Edwin Meese informing the President of the Senate and the Speaker of the House that Justice had instructed federal agencies in the Executive Branch not to comply with CICA's GAO bid protest provision.[73] On December 17, 1984 the Office of Management and Budget ("OMB") formally directed federal agencies to disregard CICA's stay provisions and to refuse to comply with the GAO's award of protest costs.[74]

A short time after its issuance, this OMB directive was put to the test in *Ameron, Inc. v. United States Army Corps of Engineers*.[75] In face of a bid protest filed at the GAO by Ameron, Inc. ("Ameron"), the Army Corps of Engineers—acting under the guidance and instruction of Justice and OMB—refused to suspend performance of a contract for pipe-cleaning services (or to make and send to the Comptroller General the written finding required by CICA to override the automatic stay)[76] pending the GAO's resolution of Ameron's protest.[77] In response, Ameron filed suit in the U.S. District Court for the District of New Jersey seeking a preliminary injunction directing the Army to comply with CICA's stay provisions pending resolution of the protest by the GAO.

Through the Justice Department, the Army defended against Ameron's injunction action by asserting, *inter alia*, that the CICA stay provisions were unconstitutional. The House of Representatives and Senate both intervened in the action arguing in favor of the constitutionality of CICA's stay provisions and supporting Ameron's action for injunctive relief. The Comptroller General also filed a brief in the matter as *amicus curiae*.[78]

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[72] *See* Ameron, Inc. v. United States Army Corps of Engineers, 607 F. Supp. 962, 968 (D.N.J. 1985), *aff'd*, 787 F.2d 875 (3d Cir.), *aff'd on reh'g*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1987), *cert. dismissed*, 488 U.S. 809 (1988). The Justice Department's memorandum did not contest *per se* the enactment of the stay provisions, but rather was limited to challenging the Comptroller General's authority to vary the length of the stay. *Id.*

[73] *Id.*

[74] OMB Bull. No. 85-8 (Dec. 17, 1984).

[75] 607 F. Supp. 962 (D.N.J. 1985).

[76] *See supra* notes 36–38 and accompanying text.

[77] *See* 31 U.S.C. § 3553(c), (d).

[78] 607 F. Supp. at 963.

After oral argument and briefing by all the parties, the district court concluded that the stay provisions were constitutional and granted the injunction sought by Ameron. In reaching its decision, the district court in *Ameron* specifically found that "the Comptroller General is appointed by the Executive and therefore may exercise law enforcement functions."[79] The Army promptly appealed.

The Third Circuit described the Army's appeal as presenting, "in a rather prosaic setting, a problem of profound constitutional significance concerning the division of power among the three branches of our federal government."[80] One factor that contributed to this "prosaic" setting was that Ameron's bid protest by this time had been denied by the Comptroller General and the stay provided by CICA had been lifted by operation of CICA's terms. The Third Circuit readily resolved this mootness issue, however, by concluding that the case was one "capable of repetition yet evading review."[81] Turning to the merits, the Third Circuit reviewed the constitutional terrain plowed by the district court, and reached a similar conclusion. The Third Circuit rejected the government's arguments as to unconstitutionality, affirmed the trial court's holding, and concluded that the CICA suspension provisions did not violate the separation of powers doctrine. This holding was based in large part on the view that the Comptroller General was *not* an agent of the Legislative Branch and therefore properly could be delegated the law enforcement authority to decide when the CICA suspension provisions should be lifted.[82]

Shortly after the Third Circuit's decision in *Ameron*, the Supreme Court announced its important decision in *Bowsher v.*

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[79] *Id.* at 972. In its opinion, the federal district court carefully distinguished the two cases primarily relied upon by Justice in its constitutional attack, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), and Buckley v. Valeo, 424 U.S. 1, 139 (1976). These were the same two cases cited in Justice's letter of April 20, 1984, addressed to Representative Jack Brooks. *See supra* notes 68–69 and accompanying text. According to the district court's opinion in *Ameron*, both *Chadha* and *Buckley* involved actions by the House of Representatives in which agency operations were subject to direct political control. "In *Chadha*, they did so by a resolution ordering that Mr. Chadha be deported; in *Buckley*, by appointing Commissioners of the Federal Election Commission. No such political control exists here." 607 F. Supp. at 973.

[80] Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875, 878 (3d Cir. 1986).

[81] *Id.* at 881 (citing *In re* Kulp Foundry, 691 F.2d 1125, 1128–29 (3d Cir. 1982)).

[82] *Id.* at 885–87. The Third Circuit also modified the injunction issued by the trial court by limiting its scope to Ameron's previously pending bid protest.

Synar.[83] At issue in *Bowsher* were the automatic deficit reduction procedures of the Balanced Budget and Emergency Deficit Control Act of 1985,[84] known more popularly as the Gramm-Rudman-Hollings Act. The Court concluded that the role of the Comptroller General in the deficit reduction process violated the separation of powers doctrine. It specifically noted that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[85] The Court reaffirmed the broad proposition, set forth three years earlier in *INS v. Chadha*,[86] that "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."[87] Based on its finding that the Comptroller General is subject to removal by Congress and therefore subservient to it, the Court concluded that the Comptroller General "may not be entrusted with executive powers."[88]

By implication, the *Bowsher* Court cast substantial doubt on the constitutionality of the GAO's bid protest procedures under CICA, and on the validity of the Third Circuit's decision in *Ameron*. At a minimum, *Bowsher v. Synar* permanently laid to rest any argument that the GAO was not to be considered an arm or agent of the Congress. As noted above, the federal district and appellate court decisions in *Ameron* were largely based on the finding that the Comptroller General constitutionally may exercise executive functions because he is appointed by the President and performs executive duties.[89]

The Supreme Court's ruling in *Bowsher v. Synar* essentially forced the Third Circuit to rehear *Ameron*.[90] On rehearing, the Army narrowed its attack on CICA by challenging only the Comptroller General's authority, under 31 U.S.C. §§ 3553–3554, to shorten or prolong the stay during the bid protest investigation. Faced with this narrowed argument, the Third Circuit again

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[83] 478 U.S. 714 (1986).

[84] Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. §§ 901–922 (1988)).

[85] 478 U.S. at 722.

[86] 462 U.S. 919 (1983) (striking down one-House legislative veto provision that reserved to each House of Congress the power to reverse the Attorney General on immigration decisions).

[87] 478 U.S. at 726.

[88] *Id.* at 732.

[89] *See, e.g.*, Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875, 886 (3d Cir. 1986).

[90] 809 F.2d 979 (3d Cir. 1986).

concluded that the CICA suspension provisions were constitutional.[91] This time, the Third Circuit's decision hinged largely upon two findings: (1) that CICA "does not authorize the Comptroller General to execute the procurement laws"; and (2) that "CICA effectuates, rather than disrupts, the 'proper balance' of power between the executive and legislative branches."[92]

Following the Third Circuit's decision on rehearing, Justice successfully petitioned for a writ of certiorari to the U.S. Supreme Court.[93] Before the case could be heard by the Supreme Court, however, an accommodation was reached between Congress and the Executive Branch which resulted in some narrowing of the GAO's suspension powers under CICA. In essence, instead of giving the GAO unlimited authority to extend the suspension provisions by delaying its decision on the merits of a protest, CICA was amended to require the Comptroller General to decide protests within ninety working days without any extension authority.[94] As part of this compromise between the Executive and Legislative Branches, Justice withdrew its certiorari petition and the writ of certiorari was dismissed.[95]

In summary, by 1988 CICA had largely passed the constitutional tests Justice had thrust upon it. On two separate occasions, the Third Circuit affirmed the constitutionality of CICA, as did the Ninth Circuit in a case similar to *Ameron*.[96] While the Supreme Court's decision in *Bowsher v. Synar*[97] cast some doubt on the constitutionality of the GAO's bid protest authority, the lower court rulings upholding CICA's constitutionality remained good law. These decisions evaded Supreme Court review because of the compromise reached between the Executive Branch and the Congress as to CICA's stay provisions. The constitutionality of the Comptroller General's authority un-

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[91] As noted above, by this time the GAO had denied Ameron's protest and request for protest costs. Accordingly, the Third Circuit specifically found on rehearing that the protest costs provision of CICA was not ripe for review. *Id.* at 988.

[92] *Id.* at 995, 998.

[93] 485 U.S. 958 (1987).

[94] Act of Oct. 1, 1988, Pub. L. No. 100-463, § 8139, 102 Stat. 2270 (codified at 31 U.S.C. § 3554(a)(1) (1988)).

[95] 488 U.S. 809 (1988).

[96] Lear Siegler, Inc., Energy Products Division v. Lehman, 842 F.2d 1102 (9th Cir. 1988). Like *Ameron*, *Lear Siegler* upheld the constitutionality of the Comptroller General's authority to stay contract performance pending the resolution of GAO bid protest proceedings. It did not address the Comptroller General's authority to award protest costs because, as in *Ameron*, the underlying protest had been denied by the GAO. *Id.* at 1105, 1111.

[97] 478 U.S. 714 (1986).

der CICA to award protest costs, including attorney's fees, to successful protesters, however, remained untested for several more years. In the interim, the GAO continued to hear and decide bid protests pursuant to its authority under CICA and its implementing regulations. Where appropriate, the GAO awarded attorney's fees and protest costs to successful protesters. All was not yet well, however, as far as Justice was concerned. Its attack on the GAO's bid protest authority under CICA was not yet complete.

IV. The Renewed Assault on GAO's Bid Protest Authority

A. *The* Instruments, S.A. *Litigation*

More than six years after CICA's enactment, the Department of Justice launched a new assault on the Comptroller General's authority under CICA to award bid protest costs. The first salvo in this engagement was fired on June 20, 1991, when then-Attorney General Richard Thornburgh sent a letter to the President of the Senate and the Speaker of the House advising that the protest costs provision of CICA violated the separation of powers doctrine and therefore was unconstitutional. The next day, in a *Federal Register* notice, the operative executive branch agencies proposed amending section 33.104 of the Federal Acquisition Regulation ("FAR"),[98] to provide that "pending a judicial resolution of the constitutionality of 31 U.S.C. § 3554(c), the General Accounting Office's awards of protest costs will be treated as advisory recommendations."[99]

Five days later, on June 26, 1991, Justice filed the lawsuit it had threatened in Mr. Thornburgh's letter to the Senate and House. In *United States v. Instruments, S.A.*,[100] a declaratory judgment action filed in the U.S. District Court for the District of Columbia, Justice asserted that the provision of CICA that

[98] The FAR establishes uniform policies and procedures for the acquisition by contract of supplies, services, and construction by all executive agencies. 48 C.F.R. §§ 1.101, 2.101 (1991). The FAR is promulgated jointly by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration. *Id.* § 1.102(b).

[99] 56 Fed. Reg. 28,652 (1991) (to be codified at 48 C.F.R. pt. 33) (proposed June 21, 1991).

[100] No. 91-1574 (D.D.C. filed June 26, 1991).

authorizes the GAO to award bid protest costs, including reasonable attorney's fees,[101] was unconstitutional. The complaint filed by Justice alleges in pertinent part that

> [i]n ordering the Executive Branch agencies to pay such monetary awards, the Comptroller General infringes on both the Judicial Branch and the Executive Branch. Congress cannot grant to one of its own agencies, the General Accounting Office (GAO) (which is headed by the Comptroller General), the authority to interpret a law and implement a legislative mandate, with the purpose and effect of altering the legal rights, duties and relations of persons outside the Legislative Branch.[102]

The nominal defendants in the action are two private corporations that filed bid protests with the GAO challenging the award of a contract, valued at approximately $1.1 million by the Department of Commerce, to a third firm. After considering the protests pursuant to CICA and its implementing bid protest regulations, the GAO had sustained both protests and determined that both companies were entitled to recover protest costs and attorney's fees (totalling approximately $75,000 in the aggregate) from the Department of Commerce.[103]

The Justice Department's complaint is based on the factual allegation that, in 1989 alone, the Comptroller General declared on over fifty occasions that a protester was entitled to recover bid protest costs from an executive agency. In 1990, according to Justice, this number increased to over sixty such instances. The complaint goes on to assert that "[s]ince May 1990, the Comptroller General has ordered the Department of Commerce to pay attorney fees and protest costs in at least five disappointed bidder cases."[104] In its prayer for relief, Justice has asked the district court (1) to declare that 31 U.S.C. § 3554(c) violates the U.S. Constitution and is therefore null and void, and (2) to declare that the Commerce Department is under no legal duty to make payment to the defendants on their claims for protest costs and attorney's fees.[105]

Both defendant-contractors subsequently filed motions to dismiss Justice's complaint. By motion dated July 16, 1991, defendant Instruments S.A., Inc. asserted that the executive branch

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[101] 31 U.S.C. § 3554(c) (1988).
[102] Complaint for Declaratory Relief at 2, *Instruments, S.A.* (No. 91-1574).
[103] *Id.* at 8.
[104] *Id.* at 5.
[105] *Id.* at 12.

agencies voluntarily accepted the GAO's authority to make awards of protest costs when they adopted FAR section 33.104, and that there is no case or controversy which requires a judicial ruling on the matter.[106] By separate motion dated July 23, 1991, defendant VG Instruments made similar arguments and additionally asserted that "[t]he proper means available to the plaintiff to attack the constitutionality of a statute is the Presidential veto."[107]

The government sought and was granted an extension of time to respond to the motions to dismiss. In support of its motion to extend time, Justice explained that the issue could be resolved legislatively, and therefore asked for an extension to November 1, 1991, to file its response—thus giving Congress time to address the matter.[108]

Several months later, after no definitive action by the Congress, Justice filed its opposition to the defendants' motion to dismiss and its own motion for summary judgment. In its motion for summary judgment, Justice relied primarily upon the separation of powers arguments[109] it had made in the *Ameron* and *Lear Siegler* cases.

By motion dated December 17, 1991, the Comptroller General subsequently sought leave to intervene in the action as a defendant. In his memorandum in support of his intervention motion, the Comptroller General asserted, "[T]his case presents the exceptional circumstances of an executive branch agency challenging the constitutionality of a duly enacted statute. Deciding such a challenge involves the 'gravest and most delicate duty' that a federal court must perform."[110] Upon being granted leave to intervene by the court, the GAO promptly opposed Justice's motion for summary judgment.[111] In its opposition papers dated February 20, 1992, the GAO asserted that its award of costs to

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[106] Memorandum of Points and Authorities in Support of Instruments, S.A., Inc.'s Motion to Dismiss at 14, *Instruments, S.A.* (No. 91-1574).

[107] Defendant Fisons Instruments/VG Instrument's Motion to Dismiss for Lack of Jurisdiction at 10, *Instruments, S.A.* (No. 91-1574).

[108] Memorandum in Support of Motion of the United States for an Extension of Time in Which to Respond to Motions to Dismiss at 1, *Instruments, S.A.* (No. 91-1574).

[109] Opposition of the United States to Defendants' Motion to Dismiss and Motion of the United States for Summary Judgment at 2, *Instruments, S.A.* (No. 91-1574).

[110] Memorandum of Points and Authorities in Support of Motion of Charles A. Bowsher, the Comptroller General of the United States, for Leave to Intervene as a Party-Defendant at 5, *Instruments, S.A.* (No. 91-1574) (citing Rostler v. Goldberg, 453 U.S. 57, 64 (1981), quoting Blogett v. Holden, 275 U.S. 142, 148 (1927)).

[111] Memorandum of the Comptroller General in Opposition to Motion of the United States for Summary Judgment, *Instruments, S.A.* (No. 91-1574).

successful protesters does not violate the separation of powers doctrine because it is simply an exercise of Congress' "long-standing power to gather information in aid of, and ancillary to its express constitutional powers of, lawmaking and appropriations."[112] The filing of the GAO's opposition memorandum once again pits—in a rather unique litigation context—an arm of the Congress against the Executive Branch, acting through the Justice Department.

As of April 1, 1992, no ruling had been made on the various dispositive motions by Judge Louis Oberdorfer, to whom the case was assigned. As the case involves purely legal issues, summary judgment appears appropriate unless the case is rendered moot through legislative enactments, a prospect examined below.

B. *Congress' Response to Justice's Declaratory Judgment Action*

Congress has not, of course, been quiescent in the face of Justice's lawsuit challenging the GAO's authority to award protest costs. Indeed, the reaction to Justice's suit by various members of Congress has been swift and largely negative. In a *Washington Post* story dealing with the Justice Department lawsuit, Representative John Conyers, Jr. (D-Mich.), the Chairman of the House Government Operations Committee (which has jurisdiction over federal procurement matters) was quoted as reacting with alarm to the precedent created by the Justice Department's action, noting, "It is frightening to think that other statutes that are unpopular with the administration could be next on the Justice Department hit list."[113]

Representative Conyers' reaction to the *Instruments, S.A.* action was echoed in various proceedings before the Committee on the Judiciary of the House of Representatives. That committee, chaired by Representative Jack Brooks,[114] first reacted to the Justice Department lawsuit during a routine oversight and authorization hearing on the Department of Justice held on July

[112] *Id.* at 34.

[113] Brent Mitchell, *Justice Department Takes on the GAO; Suit Against Contractors Appears Aimed at Agency's Review Powers*, WASH. POST, July 4, 1991, at A13.

[114] On Representative Brooks' involvement with CICA, see *supra* note 67.

11, 1991. In his opening statement at the hearing, Chairman Brooks noted his concern:

> In another important matter, I am concerned about the Department's recent attacks on the GAO bid protest provisions of the Competition in Contracting Act. Once again, we have an Attorney General claiming that the Department has the authority unilaterally to declare acts of Congress unconstitutional and just refuse to abide by the law. Former Attorney General Meese took the same radical position with respect to the act in 1985. He suffered embarrassing losses in court on this issue before giving up.
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> Why the Department feels compelled to attack a statute that is designed to stop Government bid rigging and sweetheart contracts remains a mystery to me. The GAO bid protest process gives Government contractors an honest forum in which to seek equitable relief when they believe agency officials have improperly prevented them from competing for Government business. It is a good law and the Department should be using its limited resources to go after drug lords and savings and loan crooks, not the GAO.[115]

At the same hearing, Representative Conyers severely criticized Justice for filing suit and reiterated the concerns he had articulated the previous week in the *Washington Post*:

> This lawsuit is an unprecedented assault by the Executive Branch on Congress' constitutional authority to pass legislation. In the two hundred years of United States law, this appears to be the first time the Department of Justice has ever initiated a lawsuit challenging the constitutionality of an act of Congress. While the President has been unsuccessful in getting a line item veto, this lawsuit is the next best thing.[116]

A week later, the second day of the Judiciary Committee's hearings was set to begin, with then-Attorney General Richard Thornburgh as the key witness. However, Thornburgh, apparently acting with the knowledge and advice of House Republicans, refused to appear at the scheduled hearing.[117] This refusal to appear, in turn, triggered a harsh statement by Representative

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[115] *Department of Justice Authorization for Appropriations, Fiscal Year 1992: Hearings Before the Committee on the Judiciary, House of Representatives*, 102d Cong., 1st Sess. 2 (1991) (opening statement of Chairman Brooks).

[116] *Id.* at 9 (statement of Rep. Conyers).

[117] *Id.* at 140 (statement of Rep. Fish (R-N.Y.)) (advising that "I had recommended to the Attorney General—and did so last night—that under the present circumstances he decline to appear at this hearing today").

Brooks criticizing the Justice Department for being "bent on expanding the accepted boundaries of executive branch power and prerogatives."[118] In his statement, Representative Brooks indicated his intent ultimately to question the Attorney General about Justice's "radical notion . . . that the executive branch can choose to ignore duly enacted laws passed by Congress and signed by the President if, in the wisdom, the independent, individual, clairvoyant wisdom of the Attorney General such laws are deemed by him to be unconstitutional."[119]

Against this contentious background, later in July and August 1991, separate bills were introduced in the Senate[120] and House[121] clarifying GAO's authority to award bid protest costs. As an amendment to the 1992-93 defense authorization bill,[122] the Senate on July 31 approved a provision sponsored by Senator Carl Levin (D-Mich.) which would render merely advisory the GAO's award of bid protest costs under CICA. According to the text of Senator Levin's sponsoring statement, "Under the amendment, the Comptroller General's decision on protest costs would be changed from an 'award' to a 'recommendation.'"[123] This statement went on to explain the basis for the amendment as follows:

> The decision of the Department of Justice to initiate a court challenge to the constitutionality of an act of Congress has been the subject of critical commentary in the House. We share the concern that the executive branch has failed to pursue a solution within the political process and instead has filed a questionable action in the courts. Notwithstanding the Senate's willingness to find a legislative resolution for this issue, as demonstrated by our previous effort to amend the provision at issue in 1988, we have heard no expression of interest by officials of the executive branch in the three years since then, that we renew our effort to amend the law. Nevertheless, amending the law is warranted now, as it was when the Senate passed the same amendment in 1988, to assure stability in the system created by Congress to promote lawfulness in the Government procurement process.[124]

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[118] *Id.* at 137 (statement of Rep. Brooks).
[119] *Id.* at 138–39.
[120] S. 1507, 102d Cong., 1st Sess. (1991).
[121] H.R. 3161, 102d Cong., 1st Sess. (1991).
[122] S. 1507, *supra* note 120.
[123] 37 CONG. REC. S11,509 (daily ed. July 31, 1991) (statement of Sen. Levin).
[124] *Id.*

From the standpoint of the various government contractors with pending claims for bid protest costs, the Levin amendment was considered welcome news because, if adopted, the change in the GAO's authority to award protest costs would clearly have prospective effect only. For such contractors, one of the worrisome aspects of Justice's lawsuit is that the relief sought therein, if granted, would apparently apply retroactively to all awards of protest costs that had not yet been paid.[125]

Meanwhile, on the House side, Representative Conyers on August 1 introduced his own procurement reform bill[126] to address, *inter alia*, the GAO's authority to award bid protest costs. Similar to the Levin amendment discussed above, the Conyers bill also proposed to make advisory, rather than binding, the GAO's authority to award bid protest costs.

In November 1991, the House Government Operations Committee reported to the floor of the House a substitute procurement reform bill which, like the original version of the Conyers bill, would treat as advisory rather than binding the GAO's awards of bid protest costs.[127] This substitute bill, however, also contained a new provision authorizing successful protesters whose recommended protest costs awards had not been paid to bring an action in federal district court for treble damages against the recalcitrant agency. On the same day, Senator John Glenn (D-Ohio) of the Governmental Affairs Committee of the Senate introduced a similar measure.[128] Senator Glenn's proposed bill would, like Representative Conyers' substitute bill, create a substantive right for successful protesters to sue the government in federal district court to recover any award of protest costs by the GAO that had not been paid by the procuring agency.[129] Senator Glenn's bill, however, did not contain the treble damages provision proposed by Representative Conyers.

Neither of these bills was enacted prior to Congress' recess for the term. They are almost certain to be reconsidered, however, as the 102d Congress convenes its second session, partic-

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[125] In this regard, see 56 Fed. Reg. 37,260 (1991) (to be codified at 48 C.F.R. pt. 33). FAR § 33.104 was amended to reflect clearly not only that GAO awards of protest costs are to be treated as recommendations, but also that amended FAR § 33.104 applies to any such award "which has not yet been paid."

[126] H.R. 3161, *supra* note 121.

[127] 56 Fed. Cont. Rep. (BNA) 664 (1991).

[128] S. 1958, 102d Cong., 1st Sess. (1991).

[129] 56 Fed. Cont. Rep. (BNA) 721 (1991).

ularly if the *Instruments, S.A.* case remains pending or is decided in the government's favor.

V. Will the GAO's Historical Role in Bid Protests Be Diminished as a Result of the *Instruments, S.A.* Litigation and Resultant Legislation?

In considering whether the GAO's role in resolving bid protests will be diminished in the future, a reasonable starting point is to gauge the vehemence of the Justice Department's opposition to the GAO's role under CICA. In that regard, it is worth briefly considering why the Justice Department waited until 1991 to challenge the Comptroller General's authority to award protest costs. As reflected in the statements of Representatives Brooks and Conyers quoted above, this Justice Department challenge may prove politically costly to the Administration in its future legislative initiatives before the House Judiciary and Government Operations Committees.

One of the factors that may have triggered Justice's latest attack on the GAO's authority to award protest costs is the GAO's implementation of its new bid protest regulations, which became effective April 1, 1991. As discussed above,[130] these new regulations transform the GAO into a more aggressive and effective quasi-judicial bid protest forum. The GAO's implementation of protective orders and fact-finding hearings are particularly helpful to protesting parties and their counsel, who now have access to critical agency procurement documents and a vehicle for meaningfully resolving factual disputes. The implementation of these procedures, however, may not be viewed with equal appreciation by the executive branch agencies that must defend the protests. The new procedures will in all likelihood increase the success rate experienced by protesters at the GAO, and therefore make the GAO a more threatening forum for executive branch agencies.

This executive branch perception of the GAO as a less favorable forum may have been one factor that caused Justice to file the *Instruments, S.A.* suit. Although Justice's complaint does not discuss the GAO's new bid protest regulations, it seems at least plausible that the new regulations raised the stakes for the

[130] *See supra* text accompanying notes 57–65.

government in GAO proceedings, prompting Justice to tackle once again the constitutionality of the CICA's bid protest procedures, at least as regards the GAO's authority to award protest costs.

Given the current overlay of pending litigation and proposed legislation, predicting the future of the GAO's role in bid protest litigation is problematic. If the Justice Department's long-standing opposition to the GAO's bid protest role under CICA continues unabated, it seems likely that the GAO's authority under CICA to make direct awards of bid protest costs and attorney's fees will at least be restricted in some way, if not completely eliminated. This result could be effected by the courts in the *Instruments, S.A.* litigation, or voluntarily by Congress through an amendment to CICA.

In view of the bills proposed in the last Congress, the Legislative Branch now appears willing to meet the Justice Department halfway in resolving Justice's constitutional concerns. However, it seems unlikely that Congress will completely vitiate the GAO's bid protest authority as part of a compromise with Justice. Indeed, Congress appears determined to give successful protesters at the GAO a procedural avenue for recovering their bid protest costs—if not before the GAO, then in federal court. Congress, in short, appears committed one way or the other to maintaining the GAO's watchdog role over federal agency procurements.

The Justice Department, on the other hand, likely will not withdraw its objections to any protest scheme imposed by the Congress that, in Justice's view, violates the separation of powers doctrine. Accordingly, the tension between the Executive Branch's efforts to restrict the GAO's authority and the efforts of Congress and the GAO to expand that authority will probably continue to raise new and difficult constitutional questions for the forseeable future. The answers to those questions may well determine whether the GAO's role as bid protest adjudicator continues into the twenty-first century, or will lapse into our legal history as a constitutionally impermissible exercise of authority by the Congress.

ARTICLE

DEFICIT BUDGETING: THE FEDERAL BUDGET PROCESS AND BUDGET REFORM

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Since 1974, there have been three major budget process reforms—the 1974 Congressional Budget Act, the 1985 Gramm-Rudman-Hollings Act, and the 1990 Budget Enforcement Act. In this Article, Robert D. Reischauer and Philip G. Joyce view the budget process and budget problems facing Congress today against the background of these three major procedural reforms. The authors examine the various proposals for reform which are likely to be considered in the future and argue that, alone, these procedural reforms have not and will not reduce the budget deficit.

In fiscal year 1985, before the first Gramm-Rudman-Hollings deficit reduction law was passed, the federal budget deficit reached $212 billion and was headed higher.[1] Alarmed by this trend and their inability to bring the budget under control, policy-makers turned to procedural reforms. Over the course of the next seven years, they put their faith in the notion that fundamental changes in the budget process could substantially reduce or even eliminate the deficit. Although large spending cuts and tax increases were enacted along with the various procedural reforms, the federal budget deficit was not tamed; in fact, according to Congressional Budget Office ("CBO")

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[1] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 315 (1991).

projections[2] it will hit an all-time record of $352 billion in fiscal year 1992.[3] Despite this lack of success, policy-makers are likely to fashion further fundamental changes in the budget process during the course of the next year as they search for more effective and less politically painful ways to reduce the deficit.

This Article examines the various proposals for both incremental and major reforms that are likely to be considered when further revisions are made to the budget process. As background, it reviews the history of congressional budgeting since 1974, and focuses on each of the three major budget process changes—the 1974 Congressional Budget Act,[4] the 1985 Gramm-Rudman-Hollings Act (including the 1987 revisions to the Act),[5] and the 1990 Budget Enforcement Act.[6] This Article also discusses some of the reasons why coming to grips with the federal deficit has been so difficult, despite the general consensus that it is important to do so.

I. CONGRESSIONAL BUDGETING, 1974–1990

Before 1974, the congressional budget process was fundamentally different from what it is today. In fact, it is not clear that the procedures of the pre-1974 era should be dignified with the label "process." Early each calendar year, the President proposed a budget. This comprehensive plan was then fragmented among the various committees of Congress, each of which considered both the President's proposals and any congressional initiatives falling within its jurisdiction. At a minimum, Congress had to enact appropriation legislation which

[2] The Congressional Budget Office was established by the Congressional Budget Act of 1974 (codified as amended at 2 U.S.C. §§ 601–688 (1988)). The CBO "provides Congress with basic budget data, and with analyses of alternative fiscal, budgetary, and programmatic policy issues." OFFICE OF THE FEDERAL REGISTER & NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, THE UNITED STATES GOVERNMENT MANUAL 63 (1991/92) [hereinafter U.S. GOV'T MANUAL].

[3] CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1993–1997, at xv (1992) [hereinafter CBO BUDGET OUTLOOK: 1993–1997].

[4] The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601–688 (1988)).

[5] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037, 1038 (1985), *amended by* the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, tit. I–II, 101 Stat. 754 (1987), and *amended by* the Budget Enforcement Act of 1990, Pub. L. 101-508, tit. XIII, 104 Stat. 1388 (1990) (codified as amended at 2 U.S.C. §§ 901–922 (Supp. II 1990)) [hereinafter Gramm-Rudman-Hollings Act].

[6] The Budget Enforcement Act of 1990, Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388 (1990) (codified as amended at 2 U.S.C. §§ 901–922 (Supp. II 1990)).

provided the necessary budget or contract authority to sustain discretionary spending programs. During the year, Congress could also affect the budget by altering the tax code or by writing direct-spending legislation. These mandatory or entitlement programs placed a claim on resources even when Congress took no action affecting them. In short, the congressional budget was the cumulative, and somewhat accidental, result of legislation affecting annual discretionary appropriations, mandatory programs, and revenues.

Congress, therefore, never examined or voted on overall levels of expenditure or revenues, or on appropriate fiscal policy. This piecemeal approach to the budget constrained their ability to make comprehensive policy. Since Congress routinely enacted budget legislation throughout the course of the legislative session, they were rarely forced to make trade-offs among conflicting priorities.[7] Since they lacked a systematic and encompassing process for figuring the budget, Congress felt distinctly disadvantaged when dealing with the Executive Branch.

Another factor that contributed to the impetus for congressional budgetary reform was the presidential impoundment of funds.[8] President Nixon, in particular, responded to perceived congressional overspending by withholding spending for certain items that Congress had already approved. This raised concerns among many members of Congress that the power of the purse was shifting from Congress to the Executive Branch.

A. *The Congressional Budget Act of 1974*

In response both to the frustration generated by the fragmented nature of the congressional budget process, and the perceived encroachment of the Executive onto their budgetary turf, Congress passed the Congressional Budget and Impoundment Control Act of 1974.[9] The major purposes of this Act were to reassert the congressional role in budgeting, to add some

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[7] *See* Alice Rivlin, *The Need for a Better Budget Process*, THE BROOKINGS REV., Summer 1986, at 3.

[8] An impoundment is "any action or inaction by an officer or employee of the United States Government that precludes the obligation or expenditure of budget authority provided by Congress." UNITED STATES GENERAL ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 63 (3d ed. 1981).

[9] Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601–688 (1988)).

centralizing influence to the federal budget process, and to constrain the use of impoundments.[10]

The Act attempted to strengthen the congressional role in budget making by strengthening and centralizing its budgetary capacity. The Act provided for additional committees and staff. Among those created were the House and Senate Budget Committees, which coordinate congressional budget consideration, and the Congressional Budget Office, which Congress intended to be a source of non-partisan analysis and information relating to the budget and the economy. Indeed, perhaps the most important early role for the CBO was providing alternative economic forecasts to Congress.

In an effort to impose order, the Act laid out a specific timetable for budgetary action. The instrument created to coordinate various portions of the budget was the "concurrent budget resolution," a form of congressional decision that can bind congressional action without a presidential signature. This resolution was seen as an opportunity for Congress to act on the budget as a unified whole, and to provide a general budget blueprint for both the authorizing and appropriations committees. Although Congress reverted to its old procedures once it passed the resolution, its committees were still largely forced to live within the newly set parameters.

To curb the President's ability to circumvent Congress' allocative powers, the Act also included a procedure for dealing with impoundments. Two forms of presidential cutbacks were permitted: rescissions (removal of budget authority) and deferrals (delay of budget authority). The President could propose both, but to be effective the former needed explicit congressional approval and the latter tacit acquiescence.

There is general agreement that the Congressional Budget Act of 1974 led to a reassertion of the congressional role in budgeting, increased the attention of Congress to the *whole* budget (as well as to its disparate details), and resulted in the control of impoundments. In other respects, however, it is not considered an overwhelming success. First, it did not bring the desired order and timeliness to congressional budget action. Congress routinely misses deadlines for enacting budget resolutions and passing appropriation bills. Second, establishing the Budget

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[10] ROBERT D. LEE, JR. & RONALD W. JOHNSON, PUBLIC BUDGETING SYSTEMS 161 (4th ed. 1989).

Committees and a centralized decision-making process may actually have increased the level of budgetary conflict in Congress.[11] Instead of redistributing authority and power among committees and leadership, Congress added new layers of responsibilities and procedures to those that already existed. This has resulted in a good deal of repetition in deciding each budgetary issue.[12]

Third, the attention to budget totals did not—nor was it intended to—result in achieving budgetary balance. Further, the budget decisions made in 1981 ushered in an era of large deficits resulting from tax cuts, the failure to identify future spending decreases, and unrealistic economic assumptions.[13] By the mid-1980s, deficits had reached such alarming levels that it was clear that the process created in 1974 did not provide a workable solution to the budget problem.

B. *The Gramm-Rudman-Hollings Era*

The process created by the Congressional Budget Act of 1974 could not force the elimination of large-scale deficits. In fact, the incentives present in the system may have worked against fiscal discipline. Ultimately, the 1974 process was not structured in a way that made deficit reduction easier because it did not force Congress to engage in acts such as raising taxes or enacting spending reductions which might constitute political suicide.

By October 1, 1985 (the start of fiscal year 1986),[14] not a single appropriation bill had passed Congress. The budget resolution (required on May 15) had not been adopted until August 1. This breakdown in the process, coupled with two other factors—the mindboggling size of the estimated fiscal year 1986 deficit (projected in August 1985 to be $212 billion),[15] and the need to raise

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[11] John Ellwood, *The Great Exception: The Congressional Budget Process in an Age of Decentralization, in* CONGRESS RECONSIDERED 315–42 (Lawrence C. Dodd & Bruce L. Oppenheimer eds., 3d ed. 1985).

[12] For example, an issue such as the fate of the B-2 bomber can be debated three times: during consideration of the budget resolution, the authorization bill, and the appropriation bill.

[13] Rivlin, *supra* note 7, at 6.

[14] The fiscal year begins October 1 and ends September 30. 31 U.S.C. § 1102 (1988 & Supp. II 1990).

[15] CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE, at xxi (1985).

the ceiling on the national debt to more than $2 trillion[16]—led to the passage of the Balanced Budget and Emergency Deficit Control Act of 1985, or Gramm-Rudman-Hollings ("GRH").[17]

This legislation had a simple goal—to reduce the size of the deficit by specified amounts each year until expenditures and revenues were balanced. If previously set target figures were not met by enacting the appropriate amount of spending restraint or tax increases, then automatic across-the-board spending cuts (sequestration) took effect. According to the targets specified in the legislation, the budget should have been balanced by fiscal year 1991. Senator Rudman (R-NH), in discussing the legislation that he had sponsored, called GRH "a bad idea whose time has come."[18]

The first GRH law was replaced in September, 1987. The change was brought on by two events. First, in 1986, the Supreme Court ruled that the automatic enforcement procedures of the original GRH were unconstitutional, which forced a revision of the Act to ensure its efficacy and constitutionality.[19] Second, the 1988 deficit targets proved impossible to meet without spending cuts or tax increases of a size that Congress found unacceptable. The revised GRH process increased the annual deficit targets, delayed the ultimate balanced-budget deadline from fiscal year 1991 to fiscal year 1993, and closed a number of loopholes in the original version that had allowed the President and Congress to avoid difficult decisions.[20] For example, under the revised procedures, the proceeds from the sale of government assets could no longer be used to meet the deficit targets. Moreover, accelerations or delays in spending and tax collections were no longer acceptable.

The deficit did not decrease as the GRH legislation promised. In an effort to live within the short-term budget constraints, the President and Congress engaged in questionable budgeting by relying on overly optimistic economic assumptions and outright

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[16] The current debt ceiling is $4.145 trillion. 31 U.S.C.S. § 3101 (Law. Co-op. 1983 & Supp. 1991).

[17] Gramm-Rudman-Hollings Act, *supra* note 5.

[18] 132 CONG. REC. S9958 (daily ed. July 31, 1986) (statement of Sen. Warren Rudman).

[19] Bowsher v. Synar, 478 U.S. 714 (1986) (holding that the Comptroller General's role in exercising executive functions under the Gramm-Rudman-Hollings Act violated the constitutionally-imposed doctrine of separation of powers). *See also* Lance T. LeLoup et al., *Deficit Politics and Constitutional Government: The Impact of Gramm-Rudman-Hollings*, 7 PUB. BUDGETING & FIN., Spring 1987, at 83, 95–98.

[20] Raphael Thelwell, *Gramm-Rudman-Hollings Four Years Later: A Dangerous Illusion*, 50 PUB. ADMIN. REV. 190, 192 (1990).

budget gimmickry.[21] Even after the process was tightened-up in 1987, Congress still relied upon gimmicks such as shifting military pay dates between fiscal years and moving costly spending off-budget.[22]

One analyst has suggested that GRH created the illusion of controlling the deficit, while forcing no real long-term solutions. This semblance of control diminished public concern and political action, since those not immersed in the budget battle on a daily basis assumed that as long as the short-term targets were met, nothing else needed to be done.[23] A comparison of the average amount of permanent deficit reductions in the pre-GRH era to that since the enactment of GRH suggests little difference between the two periods.[24] It is impossible to know, however, whether circumstances would have been even worse without GRH or some other form of specific discipline.[25]

At any rate, GRH clearly did not result in the level of deficit reduction it had envisioned. It may, however, have prevented a further hemorrhaging of the deficit. Gramm-Rudman-Hollings did, however, put a premium on year-by-year budgeting, since all that mattered was the single year for which the projections were being made.[26] The successor to GRH, the Budget Enforcement Act, was designed in part to address this problem.

II. The Budget Enforcement Act—The Move to Multi-Year Budgeting

The prospect of a huge Gramm-Rudman-Hollings sequestration for fiscal year 1991, coupled with the recognition that one-year deficit targets could not bring about meaningful deficit reduction, led to executive-congressional negotiations in 1990 to develop yet another new budget plan. The five-year budget agreement that resulted was enacted into law in November 1990 and has two major components. First, the agreement includes

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[21] Robert D. Reischauer, *Taxes and Spending Under Gramm-Rudman-Hollings*, 43 Nat'l Tax J. 223, 223 (1990).

[22] For additional details, see Thelwell, *supra* note 20, at 193.

[23] *Id.* at 194.

[24] Congressional Budget Office figures for the three years before GRH was enacted (1983–1986) show an average deficit reduction of $25 billion. During the first five years after its enactment (1987–1991), the CBO measured an average deficit reduction of $24 billion. Reischauer, *supra* note 21, at 226.

[25] *Id.* at 228.

[26] Allen Schick, The Capacity to Budget 205 (1990).

measures that are designed to reduce the deficit by roughly $500 billion over a five-year period. Included in the package are $158 billion in revenue increases, $75 billion in entitlement reductions, $46 billion in discretionary savings for fiscal year 1991, $59 billion in debt service savings, and $144 billion in discretionary savings for fiscal years 1992 through 1995.[27]

Second, the agreement calls for a substantial change in process. This agreement was formalized in the 1990 Budget Enforcement Act ("BEA"). The primary purpose of the BEA is not to require that more deficit reduction measures be adopted in the future, but rather to ensure that the savings agreed to in the deficit reduction accord will be realized.[28] After all, according to the estimates available at the time of enactment, if the tax increases and spending cuts in the agreement are met, the deficit will dwindle to an insignificant level.[29]

Two major enforcement techniques are included in the BEA to ensure that deficit reduction occurs. Discretionary spending caps are the mainstay of the first technique. For fiscal years 1991 through 1995, the Act replaces fixed deficit targets with spending limits. For fiscal years 1991 through 1993, separate appropriation and outlay ceilings are established for the three categories of discretionary spending: defense, domestic, and international. Congress may not shift resources from one category in order to get more spending for another. After 1993, budget authority and outlay caps exist only for the total of discretionary spending.[30] In other words, defense, international, and domestic discretionary programs compete with each other for scarce resources.

Congress and the President are effectively prohibited from exceeding the budget authority and outlay limits as estimated by the Office of Management and Budget ("OMB").[31] Upon

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[27] CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1992–1996, at 66 (1991) [hereinafter CBO BUDGET OUTLOOK: 1992–1996].

[28] For additional discussion, see Richard Doyle & Jerry McCaffrey, *The Budget Enforcement Act of 1990: The Path to No Fault Budgeting*, PUB. BUDGETING & FIN., Spring 1991, at 25; James E. Kee & Scott V. Nystrom, *The 1990 Budget Package: Redefining the Debate*, PUB. BUDGETING & FIN., Spring 1991, at 3.

[29] *See* CBO BUDGET OUTLOOK: 1992–1996, *supra* note 27, at xiii.

[30] *Id.* at 45.

[31] The OMB "evaluates, formulates, and coordinates management procedures and program objectives within and among federal departments and agencies. It also controls the administration of the federal budget, while routinely providing the President with recommendations regarding budget proposals and relevant legislative enactments." U.S. GOV'T MANUAL, *supra* note 2, at 93.

breach of any cap during fiscal years 1991 through 1993, a sequestration will take place affecting only the programs in the offending category. After 1993, the sequestration will apply to all discretionary programs. Much of the discretionary savings which the BEA requires will occur in fiscal years 1994 and 1995 when overall real discretionary spending will have to be pared back by another five percent and an additional three percent, respectively.[32] The biggest challenge to the survival of the 1990 budget agreement will come at that time.

The second major enforcement technique included in the BEA is the pay-as-you-go ("PAYGO") process. This process affects revenue actions and mandatory (mostly entitlement) spending. Simply put, the PAYGO process requires that legislative actions affecting mandatory spending and revenues must not increase the deficit in any year. If Congress cuts certain taxes or increases specific mandatory spending, reciprocal action must be taken elsewhere to pay for the liberalization. If this condition is not met, PAYGO mandates a separate sequestration of the resources available to a prescribed and limited number of mandatory programs. Through this combination of discretionary and PAYGO sequestrations, the deficit savings assumed in the summit agreement will be realized despite congressional noncompliance with the discretionary spending caps or PAYGO limits.[33]

The BEA eliminates fixed deficit targets. Although deficit targets still exist, through fiscal year 1993 they must be adjusted for changes in economic and technical assumptions, as well as conceptual revisions.[34] Therefore, if a revenue estimation error causes the deficit estimate to increase substantially, no offsetting action will be required to correct for the deterioration in the outlook. Gramm-Rudman-Hollings, on the other hand, required such action.[35]

The BEA has several advantages over the previously existing process. First, its intent, as opposed to GRH, is to force Congress and the President to control those things that they can control, such as appropriations and other laws affecting revenues and direct spending, while not being held hostage to those

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[32] CBO BUDGET OUTLOOK: 1993–1997, *supra* note 3, at 52.

[33] *See* Kee & Nystrom, *supra* note 28, at 11.

[34] *Id.* at 12. The President has the option, but is not required, to make similar adjustments in 1994 and 1995.

[35] For example, an estimating change that raised the deficit by $100 billion would have required $100 billion in additional deficit reduction.

that they cannot, such as the short-run performance of the economy.[36] Second, the combination of spending caps, pay-as-you-go, mini-sequesters, and rolling deficit targets will mean that budgetary peace is relatively assured through 1993 (after the 1992 election) unless the weakness of the economy causes a reassessment of the desirability of deficit reduction. Among other things, an old-fashioned across-the-board sequestration has virtually no chance of occurring before that time. Third, the BEA eliminates many of the incentives present in GRH to shift expenditures among years in order to fulfill annual deficit targets, as well as the incentive to make unrealistic revenue and economic assumptions to comply with a fixed deficit figure.[37] Fourth, the measures adopted in the fall of 1990 are, by most accounts, genuine deficit reduction, which was often not the case with the "savings" achieved during the GRH-era.

Although assessment of the impact of the BEA must be preliminary, several things can be said about the process after its first year. The discretionary spending caps are holding, as demonstrated by the fact that the appropriation committees and Congress lived within their fiscal year 1992 limits.[38] The PAYGO process seems to have discouraged major efforts to increase entitlement spending or cut taxes or both.

Nevertheless, in adjusting to the new budget regime, the President and Congress have resorted to several "loopholes," or elastic aspects, of the new process to reduce the pressure that inevitably arises from deficit reduction. First, the BEA emergency provision exempts from the newly established discretionary and PAYGO limits certain spending and revenue legislation that the President, in conjunction with Congress, designates for emergency purposes.[39] This provision has already allowed the allocation of resources to Operation Desert Storm, Kurdish refugees, Bangladesh flood victims, domestic disaster assistance, agricultural crop damage, and administrative costs for unemployment assistance. Aside from the additional appropriations for the Gulf conflict, virtually all of which were offset by foreign contribution, these emergency appropriations for 1992 were

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[36] *See* CBO BUDGET OUTLOOK: 1992–1996, *supra* note 27, at 55.
[37] *Id.*
[38] CBO BUDGET OUTLOOK: 1993–1997, *supra* note 3, at 40.
[39] 2 U.S.C. § 901(b)(2)(D)(i) (Supp. II 1990).

small—amounting to less than $2 billion.[40] There have also been unsuccessful attempts to use the emergency process to provide resources for other purposes, such as extended unemployment benefits and supplements for certain programs in the fiscal year 1992 appropriation bills.[41]

Second, there has been a tendency to defer budgetary pain, thus making future decisions even more difficult. For example, since the limit on domestic discretionary outlays for 1992 is more constraining than that for budget authority, the Congress in some cases appropriated up to the budget authority cap, but wrote language in appropriations bills requiring the delay of obligations until late in the fiscal year.[42] This situation has the effect of pushing the spending into the next fiscal year, which makes that year's outlay caps all the more difficult to meet. These kinds of actions may be repeated in future years. Ultimately, the discipline of caps could be undermined if more future spending is precommitted than the political system can bear.

Despite adherence to the discretionary spending caps and the PAYGO discipline, the deficit outlook has become worse since the BEA was enacted. The Congresssional Budget Office's analysis of the deficit outlook which was done immediately after the agreement, suggested that the deficit would decline to a mere $29 billion by 1995.[43] A more recent estimate projects deficits in excess of almost $200 billion by mid-decade.[44] Since even larger deficits are projected in the short run, patience with the agreement may run short. But the deterioration in the outlook is not a measure of the failure of the BEA.[45] The deficit situation would be even worse without the discipline of the new process.

The relative success of the process in it first full year does not ensure continued success in the future. The 1993 budget, especially in the case of discretionary spending, will be tighter than the 1992 budget for two reasons. First, the obligation delays mentioned above will come to fruition. Second, the caps will be lowered in accord with an automatic adjustment the BEA re-

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[40] Internal Memorandum of the Congressional Budget Office 1 (Jan. 17, 1992) (on file with the *Harvard Journal on Legislation*).

[41] CBO BUDGET OUTLOOK: 1993–1997, *supra* note 3, at 40.

[42] *Id.*

[43] CONGRESSIONAL BUDGET OFFICE, THE 1990 BUDGET AGREEMENT: AN INTERIM ASSESSMENT 6 (1990) (on file with the *Harvard Journal on Legislation*).

[44] CBO BUDGET OUTLOOK: 1993–1997, *supra* note 3, at xv.

[45] Robert D. Reischauer, The Budget Agreement One Year Later, Paper presented at the Eighty-Fourth Annual Conference of the National Tax Association, Williamsburg, Va. (Nov. 11, 1991) (on file with the *Harvard Journal on Legislation*).

quires for differences between actual inflation and that assumed at the time the agreement was reached. Relative to baseline—or inflation adjusted—levels, defense spending will have to be reduced by five percent and domestic spending by four percent to adhere to the adjusted caps for fiscal year 1993.[46]

By 1994 and 1995, the spending caps get even tighter. Defense, international, and domestic discretionary spending must compete for their share of a discretionary total in 1994 that is slightly smaller than the 1993 dollar level and that grows only marginally for 1995. This will necessitate substantial cuts in real terms. These cuts might concentrate on either the defense or nondefense parts of the budget. If the President's fiscal year 1992 defense spending plan were enacted (which assumed three percent real reductions in the defense budget in both 1994 and 1995), real cuts of close to ten percent would also be necessary in nondefense programs by 1995.[47] If the nondefense portion of the budget were allowed to remain at the real 1993 level, the required 1994 and 1995 defense cuts would be more than double those proposed by the President in his 1992 budget.

This kind of budget discipline will create strong pressures to reopen the BEA in order to make the caps less strict. Many groups—supporting both defense and nondefense activities—fear that their favorite programs will be savaged when open competition between a single, very tight cap is confronted in fiscal year 1994. Already there is substantial interest in modifying, if not dismantling, the agreement for the fiscal year 1993 cycle. Some argue that the changes in Eastern Europe and the former Soviet Union have made the caps for defense spending excessive; others feel that more flexibility is needed to respond to the lingering recession.

III. Why Do We Have Large Deficits in Spite of Efforts to Reduce Them?

The major focus of federal budgeting since 1985 has been deficit reduction. In fact, public policy has been dominated by explicit or implicit efforts to reduce the deficit. Budget considerations have even constrained legislation that has little to do

[46] CBO Budget Outlook: 1993–1997, *supra* note 3.

[47] *Hearings on the Budget Enforcement Act of 1990 Before the Senate Comm. on Budget*, 102d Cong., 1st Sess. (1991) (testimony of Robert D. Reischauer).

with the economy or the budget.[48] In spite of all this effort, however, the deficit has not only persisted but grown. In fact, there is a historical gap of some size between intent and reality in deficit reduction.[49] Most striking is the contrast between the expectation under the original Gramm-Rudman-Hollings Act that the budget would be balanced by fiscal year 1991 and the reality that the actual deficit for fiscal year 1991 was $269 billion.[50] Why has deficit reduction proved so elusive?

First, both immediately before GRH and in the GRH-era, little of the deficit reduction was *really* deficit reduction for reasons that were reviewed above.[51] There were no incentives to bring the deficit down over the long run, although plenty of incentives were around to claim progress in the short run. Policy-makers routinely continued to enact budgets based on optimistic revenue and spending assumptions. In fact, between fiscal year 1980 and fiscal year 1987, actual revenues averaged $20 billion less, outlays $22.4 billion more and, consequently, the deficit $42.4 billion more than that included in the budget resolution.[52]

Under the Budget Enforcement Act, deficit reduction is an explicitly multi-year process, one that focuses on things that the participants can control. A corollary of this, however, is that no one is to blame for the deficit. We have reached the era of no-fault deficits. Neither party nor branch of government is responsible for the deficit, and no one has to do anything about it when changed economic or technical conditions cause it to grow.[53] The successful elusion of responsibility on the part of all parties is aided by a divided government, with the Presidency and Congress controlled by different political parties, and the fragmentation of authority within Congress.

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[48] *See, e.g., Hearing on H.R. 2501, The National Forest Timber Sales Cost Recovery Act, and H.R. 3414, The Timber Economics Act Before the Subcomm. on Forests, Family Farms, and Energy of the House Comm. on Agriculture*, 102d Cong., 1st Sess. (1991) (statement of Harold Volkmer (D-Mo.)).

[49] *See* Table *infra*.

[50] CBO BUDGET OUTLOOK: 1993–1997, *supra* note 3, at xv.

[51] *See supra* text accompanying notes 21–26.

[52] Lance T. LeLoup & John Hancock, *Congress and the Reagan Budgets: An Assessment*, PUB. BUDGETING AND FIN., Autumn 1988, at 30, 51 (citing CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1989 - 1993, at 94 (1988)).

[53] For more extensive discussions, see Doyle & McCaffrey, *supra* note 28, at 25–40; *see also The Budget Enforcement Act: Hearing Before Task Force on Budget Process, Reconciliation, and Enforcement of the House Comm. on Budget*, 102d Cong., 1st Sess. (1991) (testimony of Allen Schick) [hereinafter *Budget Enforcement Act Hearing*].

Neither GRH nor the BEA has changed in any fundamental way the proclivity of the budget to grow incrementally, and the tendency of the budget to be unresponsive to change. These procedural reforms did little to curtail entitlement spending, which accounts for sixty-two percent of non-interest outlays and some seventy percent of the growth in non-interest spending since 1980.[54] Nor did they do much to boost the growth of revenues that was curbed by the advent of indexation of the personal income tax. Since the mid-1980s when that indexation began, the budget could no longer count on legislative inaction to surreptitiously raise tax rates through what was known as "bracket creep."

It has become an established fact of federal budgeting that old programs never die. The discretionary spending caps are targeted to control budgetary growth, but they may do more to freeze out new initiatives (which have no established constituencies) in favor of old ones (which do have established constituencies) than to kill low priority programs. Furthermore, while the pay-as-you-go discipline limits the impact of new or expanded entitlements on the deficit, it makes no effort to curtail the built-in growth of existing entitlements, which is the major force driving spending skyward.

Finally, although public opinion polls report that Americans regard the deficit as a matter of serious national concern, policymakers feel no hard pressure to take the painful steps needed to get a handle on the problem.[55] In fact, having survived a decade of large structural deficits without having the sky fall in, the deficit has ceased to be a particularly interesting issue for most people.[56] Politicians feel that they will get blamed for the solutions (raising taxes or cutting spending) that will affect voters now and will not be credited with the small, distant, and diffuse benefits brought about by lower deficits. The benefits of deficit reduction cannot be held out as a carrot to motivate any constituency.

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[54] CBO BUDGET OUTLOOK 1993–1997, *supra* note 3.

[55] GALLUP ORGANIZATION (October 1991).

[56] A good illustration of this is the coverage by *The New York Times* of the Treasury Department's announcement that the 1991 deficit was the largest in U.S. history. The story was given 1.75 column inches as a filler at the bottom of the seventh page of the business section under the headline "Deficit Gets Even Bigger." Over 20 column inches at the top of the page was devoted to a continuation of a story dealing with the Salomon Brothers decision to reduce executive bonuses by $110 million. N.Y. TIMES, Oct. 30, 1991, at D7.

Unfortunately, future generations have no Political Action Committees. In short, it is not in anyone's political interest to take painful actions to reduce the deficit. The public's opinion of Congress may be lower because of the deficit, but it is unlikely that they hold their own representatives responsible. The deficit is a performance measure for the whole Congress, but the performance measure for an individual member is tied-up in bringing benefits home to the district, which often means resisting deficit reduction.

IV. OPTIONS FOR THE FUTURE

While the Budget Enforcement Act has made the deficit outlook brighter than it otherwise would have been, more deficit reduction is clearly necessary if the long-term prospects for economic growth are to improve. Although some have argued that time and a period of economic growth will cure the nation's deficit problem, the Congressional Budget Office's long-run projections suggest otherwise. These projections, which assume an extension of current policies through the year 2002, reveal a decline in the deficit measured as a percentage of Gross Domestic Product ("GDP") from its current level of five percent to three percent in fiscal year 1995. After that, the deficit is expected to creep up again as mandatory spending programs—driven by increases in health cost—continue their inexorable expansion. By 2002, the deficit, under a continuation of current policies, will exceed four percent of GDP.[57]

Improvements in future living standards depend crucially on reducing the federal budget deficit. Large budget deficits absorb funds that would otherwise be channeled largely into productive private investment. Therefore, deficits curb the growth in productivity, wages, and ultimately standards of living. Although this argument can seem distant and abstract, recent research suggests that the economy is already paying a high price for the deficits of the 1980s. Analysts at the Federal Reserve Bank of New York estimated that the drop in saving during the 1980s

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[57] CBO BUDGET OUTLOOK: 1993–1997, *supra* note 3, at 30.

has already reduced the productive capacity of the U.S. economy by about five percent.[58]

The outlook for continued unacceptably large deficits, the sluggish performance of the U.S. economy, and changing world conditions combine to make it likely that the budget process will undergo further changes—and perhaps soon. In particular, by early 1993, Congress will have to vote once again to raise the debt ceiling. The three most recent votes to increase the debt ceiling (in 1985, 1987, and 1990) have been combined with decisions to make fundamental changes in the budget process.

Given this prospect, it is useful to consider what these changes in the process might look like. They can generally be divided into three categories: (1) incremental measures that would make marginal adjustments to fine-tune or update the current process; (2) moderate options that would make more fundamental changes to current procedures usually building off of the foundation laid by the BEA; and (3) more radical changes that would fundamentally alter the process, leaving behind the processes that have been developed over the last seven years.

A. *Incremental Options*

Several proposals have been made to keep the current process in place, but to modify it at the margins. These primarily include options that would expand the flexibility of the Budget Enforcement Act in light of changing world conditions and new demands for domestic spending. For example, at least five different proposals are currently under consideration in Congress that would allow discretionary funds to be transferred between defense and domestic discretionary programs during 1993, as well as in 1994 and 1995 as provided for in the BEA.[59]

Another proposal would allow limited amounts of additional (above-the-caps) discretionary spending if they were offset by tax increases or reductions in mandatory spending. Such trade-

[58] For information on how the federal budget deficit crowds out funds for private saving, see Ethan S. Harris & Charles Steindel, *The Decline in U.S. Saving and Its Implications for Economic Growth*, 15 FED. RESERVE BANK OF N.Y. Q. REV., Winter 1991, at 1, 1–19.

[59] H.R. 3530, 102d Cong., 1st Sess. (1991), H.R. 3732, 102d Cong., 1st Sess. (1991), and S. 2250, 102d Cong., 2d Sess. (1992) (attempting to amend the BEA to accelerate the merger of the discretionary categories); S. 644, 102d Cong., 1st Sess. (1991) and H.R. 2374, 102d Cong., 1st Sess. (1991) (attempting to permit offsetting transfers between discretionary categories).

offs are currently prohibited under the BEA. Unlimited flexibility of this sort could be provided by expanding the pay-as-you-go process to encompass discretionary programs. None of these modifications would increase or decrease the deficit.

Another group of incremental changes would close the perceived loopholes in the current process. Some would tighten up the wide latitude that now exists with the emergency designations. Under this classification, virtually any spending increase or tax-cut can be exempted from the discipline of the BEA if the President and Congress agree to label the action an emergency.[60] The temptation to dip into this potentially bottomless well has been held in check by fundamental policy differences between the Republican President and the Democrat-controlled Congress. Such restraint might be difficult to maintain if the White House and Congress were controlled by the same party. A more explicit definition of what is an emergency might be advisable. For example, the Office of Management and Budget Director Richard Darman has suggested that eligible spending must be required to meet a "true emergency," defined as "a sudden, urgent and unforeseen situation, and not a permanent condition."[61]

An additional incremental change would eliminate the spending caps for outlays, while leaving them in place for budget authority. The argument in favor of this simplification is that Congress only votes on and controls budget authority. Having to meet budget authority and outlay caps at the same time might be viewed as excessive constraint. When national priorities are shifting rapidly between programs with radically different outlay rates (the fraction of budget authority that is spent out each year), the existence of budget authority and outlay caps can bias budgetary decisions or encourage gimmickry. Alternatively, such a change would limit the ability of the President and Congress to focus on achieving annual deficit targets.

Similarly, minor changes could be made in the BEA to reduce the temptation to engage in short-sighted budgetary actions such as obligation delays. For example, outlays could be measured

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[60] *See* Gramm-Rudman-Hollings Act, *supra* note 5, 2 U.S.C. § 901(b)(2)(D)(i) (Supp. II 1990).

[61] Letter from Richard Darman, OMB Director, to Jim Sasser (D-Tenn.), Senate Budget Committee Chairman (Feb. 5, 1991) (on file with the *Harvard Journal on Legislation*).

on a full-year obligation basis when determining compliance with the discretionary spending caps.

Finally, there is some interest in extending the discipline beyond fiscal year 1995. This change would remove the incentives that now exist to push spending or tax cuts forward past the scope of the BEA. As the end of the enforcement period approaches, the temptation to give away the hard-won gains of the past few years could prove to be irresistible.

B. *Moderate Options*

More substantial options that might be considered generally involve strengthening the deficit-reduction impact of the Budget Enforcement Act. One possibility on this front would be to require Congress to enact a fixed amount of further deficit reduction each year (for example, $30 billion) through the reconciliation process. Reconciliation, as provided for in the Congressional Budget Act of 1974, is a set of instructions contained in the Congressional Budget Resolution that directs specific committees to determine and recommend changes to legislation to conform with the budget resolution totals for budget authority, revenues, and the public debt.[62]

Reconciliation can be an important tool to assist in setting broad budget policy. In 1981, President Reagan successfully used the reconciliation process to enact many of his desired tax and budget reforms. The use of reconciliation for deficit reduction might remain in force until the deficit were eliminated or reached some acceptable level. This could be enforced through the use of sequestration or the threat of an automatic income tax surcharge if the deficit were not decreased by a set amount.

A second possibility would be to institutionalize the summit process as a substitute for, or an addition to, the budget-resolution process. This proposal recognizes that there might be a need to involve the President more in the ongoing process. Currently, the President can present his budget, withdraw from the fray, and then blame Congress for not acting on his proposals. If he were included more formally in the congressional process, it might lead to agreement between the two branches of government at an earlier stage of the process.

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[62] 2 U.S.C. § 641 (1988).

The most common proposal for increasing the President's involvement would require a joint (which would require the President's signature), rather than a concurrent, budget resolution. While this kind of a change would attempt to compel agreement, it could promote increased conflict and stalemate, making it even more difficult to reach agreement on a budget.

It is important to realize that there is no way to involve the President more fully without making subtle changes in the distribution of power between the President and Congress and even within Congress. An institutionalized summit procedure, for example, might engender considerable resentment because summit procedures centralize decision-making in a few congressional leaders. Similarly, a joint budget resolution would increase the importance of the budget resolution relative to later committee action, which would shift the balance of power within Congress.

A third modest change would involve extending the scope of sequestration, so that many of the programs that are currently exempt would be subject to at least a limited sequestration. Much of the budget is currently exempt from sequestration, including most of the larger entitlement programs.[63] If the scope of sequestration were expanded, each program would take less of a reduction. Also, the pressure to resolve differences in a more sensible way than across-the-board cuts would increase. For example, beneficiaries of entitlements who are currently exempted might pressure for thoughtful deficit-reduction measures. Alternatively, the scope of the sequestration process could be expanded to include automatic tax surcharges designed to generate a set fraction—for example, one-third or one-half—of the necessary deficit reduction.

Finally, an explicit process could be established through which funding for new programs must come through the elimination of existing ones. One example might be a special fund established for the purpose of funding new programs, using money from new taxes or from cuts in existing programs.[64] A

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[63] Under the Balanced Budget Act, approximately 80% of all federal spending is not currently subject to across-the-board sequestration. This includes Social Security, net interest, certain low-income programs, and spending for military personnel. Certain programs not subject to across-the-board reductions—including primarily Medicare and other health programs—are nonetheless eligible for some reduction under specified rules. *See* CONGRESSIONAL BUDGET OFFICE, INITIAL SEQUESTRATION REPORT FOR FISCAL YEAR 1991, 55 Fed. Reg. 34,158 (1990).

[64] *Budget Enforcement Act Hearing*, *supra* note 53.

second means of accomplishing this purpose might be to tie it to sunset legislation, in which existing programs are scheduled to expire at a particular time, and funds freed by expiring programs could be used to fund new ones. Those who wanted to extend an existing program scheduled to expire would have to compete in order to recapture the money.

These approaches have two problems. First, recent history offers very few examples of federal programs that have been terminated. Second, committee jurisdiction problems are bound to arise. The process of reprioritizing inevitably would lead to money flowing from one appropriation subcommittee or authorizing committee to another. Thus, there would be understandable resistance to such a change.

The proposal to shift funds between programs has renewed interest in considering agency performance during the budget process. The goal would be to identify which federal programs work well and which do not in what is increasingly a zero-sum manipulation. Several bills have been introduced in the 102d Congress that would institutionalize performance measurement.[65]

C. *More Radical Options*

Many more fundamental changes have been proposed over the years. The most prominent of these are amendments to the Constitution that would grant line-item veto authority to the President and would require the federal budget to be balanced. A number of other proposals have been considered as well, including biennial budgeting and capital budgeting. Each of these proposals has both supporters and detractors, and each would fundamentally change federal budgeting.

1. Balanced Budget Amendment

Amending the Constitution to require a balanced budget would immediately eliminate any action which would cause spending to outpace revenue. Numerous such balanced-budget proposals have been introduced in the 102d Congress, including

[65] These include S. 20, 102d Cong., 1st Sess. (1991), S. 1449, 102d Cong., 1st Sess. (1991), H. R. 1800, 102d Cong., 1st Sess. (1991), and H. R. 3684, 102d Cong., 1st Sess. (1991).

a House proposal that has 254 co-sponsors.[66] On the one hand, a balanced-budget amendment would almost certainly prove a more restrictive limit than Gramm-Rudman-Hollings or the Budget Enforcement Act. Such an amendment, however, would have to be implemented through legislation that established the necessary procedures and enforcement mechanisms. One has no particular reason to expect that these processes would not fall prey to the same sorts of political maneuvering to which GRH was subject, including short-term fixes and movements to off-budget financing. The fixed-deficit targets of GRH have illustrated how such subterfuges can be induced by a rigid standard.[67]

Further, a balanced budget rule could constrain the ability of the federal government to use fiscal policy to manage the economy. The traditional tools of fiscal policy—tax cuts and increases in expenditures—would be limited by a balanced-budget requirement, thereby increasing reliance on the Federal Reserve to stabilize the economy. Denied the ability to pursue their objectives through spending policies, policy-makers may resort to legislating mandates on states, localities, and businesses, expanding regulatory efforts, and adding tax incentives that distort economic decisions. Such a response could undercut economic efficiency and reduce the viability and controllability of federal policy.

2. Line-Item Veto for President

The line-item veto has been sought by Presidents since Ulysses S. Grant, but never has gained much favor in the halls of Congress.[68] At the state level, forty-three of the fifty governors currently have such authority to reduce or eliminate specific

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[66] H.J. Res. 290, 102d Cong., 1st Sess. (1991).

[67] *See Proposed Balanced Budget Constitutional Amendments: Hearings before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, H.R. 321, 100th Cong., 1st Sess. (1987). In addition, many commentators have considered the constitutional and budgetary implications of such an amendment. *See, e.g.*, Strom Thurmond et al., *Pros and Cons: Should Congress Approve a Proposed Constitutional Amendment to Require a Balanced Federal Budget?*, CONG. DIG., October 1982, at 227, 227–50; CITIZENS FOR A SOUND ECONOMY, FEDERAL SPENDING IN CRISIS (1987); Note, *The Balanced Budget Amendment: An Inquiry Into Appropriateness*, 96 HARV. L. REV. 1600, 1600–20 (1983).

[68] *See* LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 209–10 (2d ed. 1987).

items in an appropriation bill.[69] The President has only two options—either to sign or to veto a bill in its entirety. Proponents argue that the line-item veto would empower the President to reduce pork-barrel projects, thus leading to a reduction in the deficit. They claim that the President, as a representative of the general interest, should have the power to strike provisions that focus only on a narrow interest.

The line-item veto, however, could involve a significant shift of power between the branches, since the President could use the threat of a line-item veto to keep Congress in line with his wishes. Moreover, research on state experiences with the line-item veto suggests little impact on the level of state spending. Many governors, however, have used the line-item veto for partisan political purposes.[70]

3. Capital Budgeting at the National Level

Much of the federal budget consists of expenditures that are long-term in nature. Some people have argued, therefore, for separating the budget into capital and current operation, and removing the capital component from calculation of the deficit.[71] An argument in favor of this change in budgetary treatment is that it might promote more spending on capital investment activities. These types of spending may currently be disadvantaged because, relative to the benefits that flow from such projects, their costs are front-loaded.[72]

Alternatively, the creation of two categories of spending may increase budgetary maneuvering. There is no clear definition of a capital expenditure. The content of the capital budget, then, depends upon subjective assumptions concerning what capital is and how it is to be measured. The tendency may be for proponents to seek protected status for their favorite "invest-

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[69] Calvin Bellamy, *Line Item Veto: Dangerous Constitutional Tinkering*, 49 PUB. ADMIN. REV. 46 (1989).

[70] Glenn Abney & Thomas P. Lauth, *The Line Item Veto in the States: An Instrument for Fiscal Restraint or an Instrument for Partisanship?*, 45 PUB. ADMIN. REV. 372 (1985). *See also*, Robert J. Spitzer, *The Item Veto Reconsidered*, 15 PRESIDENTIAL STUD. Q. 611, 611–17 (1985).

[71] GENERAL ACCOUNTING OFFICE, RESTRUCTURING THE FEDERAL BUDGET—THE CAPITAL COMPONENT (1989) (on file with the *Harvard Journal on Legislation*).

[72] *Capital Budgeting: Hearings Before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation*, 100th Cong., 1st Sess. (1987) (statement of Frederick Wolf, General Accounting Office).

ment" activities. There is no reason to expect that a separate capital budget will help bring the deficit down.

4. Biennial Budgeting

Some commentators have proposed a shift to biennial budgeting—enacting the budget (budget resolution, appropriation bills, and other legislation) every two years, instead of annually. The federal government already has experienced multi-year budgeting in a haphazard way; the 1987 summit agreement formulated a two-year budget and the 1990 agreement set budget parameters for three years.[73] Twenty-one states have biennial budgets.[74] A more systematic approach would have two-year budget agreements which could be reached in the first year of each Congress—that is, in odd-numbered years. Proponents argue that biennial budgeting would free up Congress to concentrate on non-budgetary issues during the even-numbered year. Biennial budgeting, however, also might make agreements more difficult to achieve, since the stakes would be higher. Although some might argue that biennial budgeting would add stability to agency and program planning, uncertainty would increase as well; the ability to forecast budgets for future years is notoriously weak in biennial states. As an alternative, activities that are technically predictable and politically stable could be budgeted on a biennial basis, without embracing biennial budgeting for all federal activities.[75]

V. Conclusion

While Americans expect a great deal from the budget process, the process is limited in its ability to force outcomes. The process can provide structure, political accountability, and shape public expectations, but cannot force behavior that is perceived as politically untenable. External conditions can either

[73] *See* Doyle & McCaffery, *supra* note 28, at 25–40.

[74] 1 United States Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 4–5 (1990).

[75] Roy T. Meyers, *Biennial Budgeting by the U.S. Congress*, 8 Pub. Budgeting and Fin., Summer 1988, at 30.

Table *Deficit Targets: Actual Experience and Projections, 1986–1995 (In billions of dollars)*

Fiscal Year	*1985 GRH Targets*	*1987 GRH Targets*	*Actual (through 1991) and CBO Projections (1992–1995)*
1986	172	n.a.	221
1987	136	n.a.	150
1988	100	144	155
1989	64	136	152
1990	28	100	220
1991	0	64	269
1992	n.a.	28	352
1993	n.a.	0	327
1994	n.a.	n.a.	260
1995	n.a.	n.a.	194

Source: Congressional Budget Office. Projections are from *The Economic and Budget Outlook: Fiscal years 1993–1997*, at 28 (1992), p. 28.

Note: n.a. = Not applicable

strengthen or debilitate a given process. The Budget Enforcement Act, for example, may succeed or fail depending on the performance of the economy in 1992. Although a rigid and highly structured budget process may be necessary to force action (such as with fixed-deficit targets, the BEA spending caps, or the pay-as-you-go regime), the process also needs flexibility if it is to survive.

Thus, an important tension arises between the survival of budget processes and progress in deficit reduction or meeting other established budget outcomes. Rigidity may coincide with fiscal discipline, while flexibility coincides with larger deficits. It is difficult to have a flexible process that still leads to deficit reduction. Gramm-Rudman-Hollings came about because the existing congressional budget process was not rigid enough to force action to reduce the deficit. The BEA may have come about because GRH did not provide enough flexibility. That is, in 1991, GRH would have forced actions that were politically unsuitable. The same fate may await the BEA; it may be viewed as a process that is acceptable until the point at which it causes too much pain—a point that may come very soon. Then, in turn, the BEA may be scrapped in favor of yet another process—one that would result in less deficit reduction, but more flexibility.

Rudolph Penner, a former Director of the Congressional Budget Office, is fond of saying that the process is not the problem—

the problem is the problem.[76] No process can substitute for the fact that further deficit reduction will necessitate cutting spending, raising taxes, or both. A process—whether it is GRH, the BEA, or a new alternative—can make it marginally easier or more difficult to explain these decisions, but mere process alone will not make the decisions significantly easier to achieve.

[76] For an expansion of this argument, see RUDOLPH G. PENNER & ALAN ABRAMSON, BROKEN PURSE STRINGS: CONGRESSIONAL BUDGETING, 1974–1988, at 109–29 (1988).

ARTICLE

INSTITUTIONAL REFORMS THAT DON'T MATTER: *CHADHA* AND THE LEGISLATIVE VETO IN JACKSON-VANIK

JESSICA KORN*

In Immigration and Naturalization Service v. Chadha, *the Supreme Court declared the legislative veto unconstitutional. The Jackson-Vanik Amendment, which links most-favored-nation trading status to freedom of emigration, included several legislative veto provisions that were invalidated by* Chadha.

In this Article, Ms. Korn analyzes the impact of the Chadha *decision on the balance of power between the Executive and Legislative Branches under Jackson-Vanik. She explains that, when the statute was enacted, its legislative veto provisions were viewed as an important institutional reform that enhanced Congress' capacity to engage in international trade policy-making. She argues, however, that the* Chadha *decision had only a minimal impact on the balance of power between the branches under Jackson-Vanik. The author demonstrates that, while* Chadha *did affect the disapproval resolution procedure in Jackson-Vanik, it did not affect conditions bills—a more important tool for allocating power between the Executive and Legislative Branches under the statute. She also argues that the Executive could not fully take advantage of its legal victory in* Chadha *for political reasons, and thus a different legislative veto provision in Jackson-Vanik—the approval requirement over bilateral trade agreements—remains in force. Finally, the author suggests how her analysis of the impact of* Chadha *on the various legislative veto provisions in Jackson-Vanik might be extended to other statutes containing legislative vetoes.*

In declaring the legislative veto unconstitutional, the Supreme Court created something of a curiosity for students of American politics.[1] By the time it was struck down in 1983, the legislative veto had been the focus of widespread and extensive attention for over a decade.[2] An invention that provided a short cut of constitutionally mandated procedures for legislative action, the

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[1] In Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), the Court declared a legislative veto provision of the Immigration and Nationality Act unconstitutional and tainted the constitutionality of over 100 statutes containing similar provisions.

[2] The legislative veto is a statutory mechanism by which one or both Houses of Congress, or sometimes one or two congressional committees, retain the authority to disapprove proposed administrative or presidential actions.

"veto was the most forceful continuing expression of the congressional resurgence" of the 1970s.[3] The legislative veto had become an integral part of this resurgence as it was used in statutes governing foreign affairs and budget impoundment control and as part of the congressional attempt to gain control over the greatly enhanced regulatory authorities of the bureaucracy. Today, a seemingly permanent state of divided government, where the two political branches are controlled by different parties, has led students of American politics to focus on the changing balance of power between the branches as a way of exploring the determinants of policy outcomes. *Chadha* represents an interesting little puzzle because the impact it has had on the balance of power between the branches is not entirely clear.

On one hand, *Chadha* is seen as a case in which the Supreme Court did alter the balance of policy-making power between the branches. Those who describe *Chadha* as undermining congressional power believe it "portend[ed] the judiciary's emergence as a conservative bastion in alliance with the presidency,"[4] because it invalidated a mechanism "by which Congress for decades has sought to limit the powers of executive-branch officials."[5] Those who describe it as undermining executive power argue that precisely by shifting policy-making power away from Congress, *Chadha* "stimulated Congress to take a far more comprehensive and 'hands on' approach to . . . policymaking," that would result in "an expansion, rather than a contraction, of congressional involvement."[6]

On the other hand, *Chadha* has also been used as an example of how the Court's actions can be irrelevant to interbranch power struggles. Some scholars have concluded that the decision "had relatively little effect on congressional practice as [Congress] continued to rely on veto provisions in its legislation."[7] From this point of view, *Chadha* has not altered the balance of power between the branches because "Congress has ignored the Court's preaching, as it should."[8]

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[3] JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 354 (1981).

[4] BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA 155 (1990).

[5] Jim Mann, *Court Increasingly Favors President*, L.A. TIMES, June 24, 1983, at 2.

[6] Harold H. Koh, *Congressional Controls on Presidential Trade Policymaking After* INS v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191, 1192, 1210 (1986).

[7] JOHN BRIGHAM, THE CULT OF THE COURT 27 (1987) (citation omitted).

[8] Louis Fisher, *Micromanagement by Congress: Reality and Mythology*, *in* THE FETTERED PRESIDENCY 139, 142 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989).

An overview of the history and development of the legislative veto and a survey of *Chadha*'s impact on the large body of legislative veto provisions suggests that the Court's reasoning has neither been ignored by the political branches, nor has it altered the balance of power between them.[9] One good test of this argument is to look at the effect of *Chadha* on the Jackson-Vanik Amendment ("Jackson-Vanik" or "Amendment") to the Trade Act of 1974[10] because that Amendment's legislative veto provisions were hailed, both at the time of their enactment in 1974 and soon after *Chadha* was decided in 1983, as examples of legislative vetoes that were central to protecting the policy-making role of Congress vis-a-vis the Executive Branch.

The methodological claim on which this test rests is that the impact of *Chadha* can be measured only by tracing the political uses of the tainted provisions in the context of the interbranch policy debates that surrounded the statute's implementation. Doing so reveals that the constitutional short cut offered by the legislative vetoes did not enhance the ability of members of Congress ("Members") to achieve their objectives as much as the rhetoric surrounding these provisions might suggest. In other words, just because this procedure made it easier for Members to terminate Most-Favored-Nation status ("MFN") to Non-Market-Economy ("NME") countries does not mean that termination of MFN was an important objective that Members hoped to achieve. Members have many goals apart from achieving specific policy outcomes.[11] And in the case of the Jackson-Vanik statute, Members were, in fact, better able to achieve their objectives by attempting to fulfill the constitutionally mandated procedures for legislative action than by attempting to circumvent them. This analysis suggests that *Chadha* did not alter the balance of policy-making power between the branches because the provisions tainted by the decision had never played a significant role in enhancing congressional policy-making power. While this conclusion rests on a study of a very small fraction of the legislative veto provisions affected by *Chadha*, the fact that it grows out of a general logic of congressional behavior

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[9] *See* Jessica Korn, The Political Effects of Separation of Powers Jurisprudence: The Case of *Chadha* and the Legislative Veto (Aug. 1991) (unpublished manuscript, on file with the *Harvard Journal on Legislation*).

[10] 19 U.S.C. §§ 2193, 2431–2434 (1988).

[11] For the classic exposition of this general point, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

suggests that it might very well hold true for legislative veto provisions outside of the Jackson-Vanik case.

This Article analyzes the Jackson-Vanik case in three sections. Part I explains why the legislative vetoes in Jackson-Vanik were considered profoundly important as an institutional reform that could enhance Congress' capacity to engage in international trade policy-making. In light of these views, Part II explains how it is possible that *Chadha* actually had a minimal impact on Congress' capacity to control policy-making. This involves exploration of the central interbranch controversies that took place under the statute as well as the politics surrounding the specific provisions affected by *Chadha*. Part III concludes with an attempt to understand how *Chadha* might have affected Congress' internal politics given the decision's lack of impact on Congress' control over Executive Branch policy-making.

I. WHY IT SEEMS THAT CONGRESS LOSES AS A RESULT OF *CHADHA*

A. *Enactment (1974)*

Title IV of the Trade Act of 1974, "Trade Relations with Countries Not Currently Receiving Nondiscriminatory Treatment,"[12] represents the "exclusive manner in which a [NME] country, not eligible for nondiscriminatory or [MFN] treatment . . . may be granted MFN treatment and become eligible for other trade benefits from the United States."[13] The interbranch struggle surrounding the enactment of this statute sprang from debates over the Nixon administration's policy of detente. The Nixon administration viewed the trade bill, which authorized the extension of MFN status to communist countries, "primarily as a vehicle to advance its detente objectives."[14] A variety of forces within Congress, however, intended to prevent the Nixon administration from unilaterally implementing detente through trade policy. Pro-labor groups, for example, who "opposed trade

[12] 19 U.S.C. §§ 2431–2441 (1988 & Supp. 1991).

[13] JEANNE J. GRIMMETT, CONG. RESEARCH SERV., REPORT FOR CONG. NO. 90-197A, TRADE AGREEMENTS WITH NONMARKET COUNTRIES: CHADHA, THE TRADE ACT, AND CONSTITUTIONAL AUTHORITY OVER FOREIGN COMMERCE 1–2 (1990) [hereinafter GRIMMETT, TRADE AGREEMENTS WITH NONMARKET COUNTRIES].

[14] Walter F. Mondale, *Beyond Detente: Toward International Economic Security*, FOREIGN AFF., Oct. 1974, at 1, 15.

legislation in general on the grounds that it perpetuated American workers' vulnerability to foreign trade competition," allied themselves with those in Congress, like Senator Henry Jackson (D-Wash.), who intended to place statutory restrictions on the Nixon administration's authority to bestow trade benefits on communist countries.[15] Similarly, many in Congress wanted to restrain the Administration from granting credit guarantees to the Soviets because they believed that "America should not assist in the economic development of a country whose political system was antagonistic to the United States. Rather than invest in Soviet resources . . . the prudent path to follow would be to allocate comparable funds to the development of American self-sufficiency in energy."[16]

By 1974 these objections had translated into powerful support for enhancing congressional control, even though by mid-1972 the United States and the Soviet Union had already signed several commercial and economic agreements, including a reciprocal extension of MFN status.[17] The catalyst for the unification of these anti-Administration forces was the Soviet Union's decision to levy, in addition to a one thousand ruble ($1,220) exit visa fee, high education repayment fees running into tens of thousands of dollars on any Soviet citizen emigrating to a non-communist country.[18] In response, Senator Jackson and Representative Charles Vanik (D-Ohio) introduced legislation prohibiting the extension of trade benefits to any NME country that placed restrictions on its citizens' right to emigrate. Not surprisingly, the Administration vociferously objected to linking emigration rights and international trade policy. Secretary of State Henry Kissinger threatened that the Administration would veto the House-passed bill which contained the Jackson-Vanik Amendment because such linkage would damage the pol-

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[15] PAULA STERN, WATER'S EDGE: DOMESTIC POLITICS AND THE MAKING OF AMERICAN FOREIGN POLICY 59 (1979).

[16] Kenneth Klein, Note, *The Trade Act of 1974: Soviet-American Commercial Relations and the Future*, 5 GA. J. INT'L & COMP. L. 505, 527–28 (1975) (citations omitted).

[17] *See* VLADIMIR N. PREGELJ, CONG. RESEARCH SERV., REPORT FOR CONG. NO. 89-686E, JACKSON-VANIK AMENDMENT AND GRANTING MOST-FAVORED-NATION TREATMENT AND ACCESS TO U.S. FINANCIAL PROGRAMS TO THE SOVIET UNION 2 (1989) [hereinafter PREGELJ, JACKSON-VANIK AND GRANTING MFN TO THE SOVIET UNION].

[18] *See* VLADIMIR N. PREGELJ, CONG. RESEARCH SERV., ISSUE BRIEF NO. IB74139, MOST-FAVORED-NATION POLICY TOWARD COMMUNIST COUNTRIES 4 (1987) [hereinafter PREGELJ, MOST-FAVORED-NATION POLICY TOWARD COMMUNIST COUNTRIES].

icy of detente with the Soviet Union.[19] The statutory restrictions that fueled this interbranch struggle threatened to prevent the President from concluding any commercial agreements or extending MFN treatment, U.S. credit, or investment guarantees to a NME country that did any of the following:

> (1) denie[d] its citizens the right or opportunity to emigrate; (2) impose[d] more than a nominal tax on emigration or on the visas or other documents required for emigration . . . ; or (3) impose[d] more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice . . . .[20]

Senator Jackson successfully prevented the Administration from vetoing these restrictions by including provisions in the final draft of the Amendment that authorized the President to waive the restrictions. The Administration "apparently reconciled itself to the fact that continuing congressional support for this approach made deletion of the provision improbable, if not impossible."[21] The resulting compromise between Jackson and the Administration allowed the President to waive the requirements in § 402 if the President provided assurances that the NME country in question would substantially promote the freedom-of-emigration objectives of the statute.[22]

It was on this waiver authority that Congress placed legislative vetoes that were later invalidated by *Chadha*. If Congress was not satisfied with the President's assurances that the country in question would make progress in emigration rights, Congress could veto the President's waiver by passing a disapproval resolution in either chamber.[23] These one-house vetoes were considered a "key aspect of the delegation of waiver authority to the President" because the waiver authority was clearly a concession that favored the President.[24] Senator Howard Cannon (D-Nev.), for example, noted that Jackson-Vanik would

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[19] *See The Trade Reform Act of 1973: Hearings on H.R. 10710 Before the Senate Comm. on Finance*, 93d Cong., 2d Sess. 457 (1974) [hereinafter *Hearings on Trade Reform Act*] (statement of Henry A. Kissinger, Secretary of State).

[20] These restrictions became § 402(a) of Title IV of the Trade Act and were codified at 19 U.S.C. § 2432(a) (1988).

[21] GRIMMETT, TRADE AGREEMENTS WITH NONMARKET COUNTRIES, *supra* note 13, at 17; *see also Hearings on Trade Reform Act*, *supra* note 19, at 454–57 (statement of Henry A. Kissinger).

[22] *See* 19 U.S.C. § 2432(c) (1988).

[23] *See* 19 U.S.C. § 2432(d)(5) (1988).

[24] JEANNE J. GRIMMETT, CONG. RESEARCH SERV., REPORT FOR CONG. NO. 90-49A, THE EFFECT OF *INS V. CHADHA* ON SECTION 402 (JACKSON-VANIK AMENDMENT) OF THE TRADE ACT OF 1974 12 (1990).

"give the Congress ample authority to review the results of the waiver, and the Congress will definitely use this authority."[25] These vetoes were therefore meant to prevent "presidential abuse of the waiver provision."[26]

Before the President can begin the annual waiver process, however, the statute requires him to negotiate a commercial agreement with the country to which he intends to extend MFN status.[27] This negotiating authority was also made subject to a legislative veto that was later invalidated by *Chadha*. Such an agreement could not go into effect unless Congress approved the agreement by a resolution in both chambers.[28] Just as the vetoes over the President's waiver authority were meant to enhance congressional control, these legislative vetoes were included in the statute to "provide for close and continuing Congressional oversight of international trade negotiations and the implementation and operation of international trade agreements."[29] Thus, unlike the majority of legislative veto provisions tainted by *Chadha*, the Jackson-Vanik vetoes were a conscious statutory solution to a felt need to enhance congressional control. Not surprisingly, then, these particular legislative veto provisions were among those that received the most attention at the time of *Chadha*.

B. Chadha *(1983)*

Because the legislative vetoes in Jackson-Vanik seemed like a necessary and unique way of ensuring a congressional role in foreign policy, many were concerned that *Chadha* would undermine Congress' capacity to participate in decisions affecting trade relations with communist countries. Legal scholars, for example, suggested:

> [P]resumably, the President may now waive the ban on extension of MFN status without fear of a legislative veto. If the President does so, Congress must pass a bill forbidding the waiver in order to bar the extension of MFN status.

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[25] 120 CONG. REC. 39,801 (Dec. 13, 1974) (statement of Sen. Cannon).

[26] Lawyers Committee for Human Rights, Linking Trade and Human Rights: The Jackson-Vanik Amendment 4 (1989) (unpublished manuscript, on file with the *Harvard Journal on Legislation*).

[27] *See* 19 U.S.C. § 2434(a) (1988).

[28] *See* 19 U.S.C. § 2435(c) (1988).

[29] S. REP. No. 1298, 93d Cong., 2d Sess. 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7187.

> Even then, the President may veto the bill. *Chadha* thus works a significant change in the statutory procedures for granting MFN treatment to NME states.[30]

This change meant that *Chadha* would "seriously hinder[ ] congressional supervision of such grants"[31] of MFN status by the President. Thus, Congress would retaliate against this blow to its power by "enact[ing] legislation to restore to itself some control."[32]

In order to prevent the imposition of new congressional controls, the Administration tried to dispel the feeling in Congress that *Chadha* would have crippling effects. Testifying before Congress, Deputy Secretary of State Kenneth Dam argued that *Chadha* would not alter the balance of policy-making power between the Executive and Legislative Branches under Jackson-Vanik because *Chadha* did not affect the statute's "requirements for notifications, certifications, findings or reports to Congress, consultations with Congress, or waiting periods which give Congress an opportunity to act before executive actions take effect."[33]

Many Members were not convinced, however. Senator Charles Grassley (R-Iowa), for example, believed that *Chadha* would substantially change the policy process under Jackson-Vanik. He worried that NME countries would "get more complacent in their human rights efforts since they are aware that we have no disapproval mechanism."[34] While Senator Grassley argued that congressional controls in Jackson-Vanik should be strengthened to compensate for the general weakening effect of *Chadha*, interest groups focused on the same issue because they felt that *Chadha* would undermine their specific policy objectives. Laszlo Hamos of the Committee for Human Rights in Romania, for example, feared that *Chadha* would prevent the Congress from withdrawing MFN, "the only measure truly

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[30] Paul Lansing & Eric C. Rose, *The Granting and Suspension of Most-Favored-Nation Status for Nonmarket Economy States: Policy and Consequences*, 25 HARV. INT'L L.J. 329, 346–47 (1984).

[31] *Id.* at 347.

[32] *Id.*

[33] *The Supreme Court Decision in* INS v. Chadha *and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 125 (1983) (statement of Kenneth Dam, Deputy Secretary of State).

[34] *Continuation of the President's Authority to Waive the Trade Act Freedom of Emigration Provisions: Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 98th Cong., 1st Sess. 5 (1983) [hereinafter *Hearing on President's Waiver Authority*] (statement of Sen. Grassley).

feared by the Romanian government."[35] Unlike Senator Grassley and others who were primarily concerned about *Chadha* because of its theoretical blow to congressional prerogative, Hamos feared that "[w]ith the Congress stripped of its power to act effectively, . . . the Rumanian government would feel little reason to even notice" the human rights concerns of members of Congress sympathetic to his cause.[36]

Because they shared a deep concern for the potential effects of *Chadha*, however, both Hamos and Senator Grassley agreed that the one-house disapproval vetoes should be replaced by positive approval forms of review. The joint resolution of approval would comply with *Chadha* because it would pass both chambers and be presented to the President.[37] It would greatly strengthen Congress' hand, however, since the President could take no action unless Congress approved that action by joint resolution. Thus, while acknowledging that a joint resolution review procedure would be constitutional, those who opposed such a response to *Chadha* argued that a joint resolution review procedure would unacceptably limit the Executive's flexibility in foreign policy.[38] Senator Grassley countered, "Well, I don't know how else in a constitutional way to keep Congress involved in the MFN process."[39]

The fear that *Chadha* would undermine Congress' capacity to participate in policy-making under Jackson-Vanik is also demonstrated by the seriousness with which many argued that the veto provisions were not severable from the statute. If the Court were to decide that the vetoes over the waiver authority were not severable, then the entire authority to grant waivers to NME countries would be invalidated. If the legislative vetoes were deemed severable, on the other hand, the President's authority would be preserved and Congress could overturn a waiver only by passing a law. In *Chadha* the Supreme Court held that the legislative veto at issue in that case was severable, thereby leaving intact Congress' delegation of authority to the Attorney

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[35] *Id.* at 196 (statement of Laszlo Hamos, Chairman, Committee for Human Rights in Romania).

[36] *Id.* at 205.

[37] *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 954–55 (1983).

[38] *See Hearing on President's Waiver Authority, supra* note 34, at 48 (statement of Michael Matheson, Deputy Legal Adviser, U.S. Department of State) (arguing that requiring a joint approval resolution might "reduce the flexibility of the executive branch to respond in a timely fashion to the requirements of foreign policy [because it] would add the additional burden that Congress would have to act affirmatively in each case").

[39] *Id.* at 49 (statement of Sen. Grassley).

General to suspend deportations.[40] The widespread expectation that the loss of the legislative veto would alter the balance of policy-making power between the branches, however, led those who feared this possibility to argue that the Court would not have found the legislative veto in Jackson-Vanik to be severable because "Congress made [that] legislative veto an integral element of its delegation of authority to the President."[41]

C. *Post*-Chadha *(1990)*

Post-*Chadha* politics under Jackson-Vanik suggested that *Chadha* had affected the balance of power between the branches. Though presidential waivers extended MFN status to China continually after Congress approved the U.S.-China Bilateral Trade Agreement in 1980,[42] the Tiananmen Square massacre of 1989 produced a strong congressional coalition that threatened to disapprove any further waivers of Jackson-Vanik restrictions. Some of those who sought to preserve the President's foreign policy agenda in the face of this powerful congressional opposition saw *Chadha* as a welcome factor determining the balance of policy-making power between the branches. One State Department official speculated:

> *Chadha* must have made a difference as an Executive Branch victory somewhere. For example, I bet you that China MFN would have been in real danger this year if Congress had had the capacity, as it did before *Chadha*, to disapprove the President's waiver of Jackson-Vanik restrictions with a one-house veto.[43]

In October 1990, for the first time since Jackson-Vanik was enacted in 1974, the House passed a resolution disapproving the President's waiver of Jackson-Vanik restrictions for China.[44] Had *Chadha* upheld the constitutionality of the legislative veto in 1983, this one-house veto would have carried legal force and

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[40] 462 U.S. at 931–35.

[41] *Hearing on President's Waiver Authority, supra* note 34, at 71 (statement of Robert Herzstein, Esq.).

[42] Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, 31 U.S.T. 4651.

[43] Interview with officer, Bureau of Legislative Affairs, U.S. Department of State, in Washington, D.C. (Oct. 16, 1990). The author conducted a number of interviews while preparing this Article; the names of the interviewees are not mentioned in order to maintain confidentiality.

[44] H.R.J. Res. 647, 101st Cong., 2d Sess. (1990) (the first disapproval resolution pursuant to the Jackson-Vanik Amendment passed by at least one House of Congress).

thus would have resulted in the denial of MFN status to China. The State Department official's feeling that *Chadha* did shift the interbranch balance of power in the Jackson-Vanik context, therefore, seems justified by the facts.

II. WHY *CHADHA* ACTUALLY HAS LITTLE TO DO WITH THE BALANCE OF POWER BETWEEN THE BRANCHES

An analysis of the interbranch struggles that took place under the statute demonstrates that it is misguided to ascribe to *Chadha* any significant effect on Congress' participation in policy-making. Section A focuses on the specific issues under Jackson-Vanik that did, in fact, turn into interbranch power struggles. Section B then traces pre- and post-*Chadha* operation of the legislative veto provisions in Jackson-Vanik in order to explain why these legislative veto provisions never significantly enhanced Members' ability to achieve their policy objectives.

A. *Executive-Legislative Struggles*

Debate over the desirability of linking U.S. foreign trade policy to the human rights practices of potential trading partners has surrounded Jackson-Vanik since its inception. Despite the powerful coalition supporting this linkage, many argued that it could prove counterproductive to American economic interests and inefficient with respect to developing a coherent foreign policy. Although the Trade Act of 1974[45] was intended to take advantage of new Eastern European markets, scholars who disapproved of the Trade Act predicted that Jackson-Vanik would harm trade because Eastern European nations would undoubtedly "forego economic advantages to avoid making changes in their internal domestic policies."[46] Those who opposed linking the extension of trade benefits to emigration rights also argued that it would undermine the President's capacity to engage in quiet diplomacy, that is, private negotiations with NME countries to encourage them to loosen their emigration restrictions. Consequently, it would be "counterproductive in increasing em-

[45] 19 U.S.C. §§ 2101–2487 (1988).

[46] Michael W. Beasley et al., *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade and Human Rights: The Romanian Example*, 8 LAW & POL'Y INT'L REL. 193, 196–97 (1976).

igration from Eastern Europe, because . . . [t]hese countries might refuse to enter into commercial treaties even if they favored a liberal emigration policy, in order not to appear to be bending to the will of the U.S. Congress on a domestic matter."[47]

Opposition to Jackson-Vanik on the grounds that it would hurt American trade interests became central to the debates surrounding the statute because the Soviets refused to accept the agreement once it emerged from the legislative process with unexpected conditions and restrictions. Soon after the Trade Act was enacted (Jan. 3, 1975), Secretary of State Kissinger announced:

> [T]he Soviet Government informed us that if statements were made by the U.S., in the terms required by the trade act, concerning assurances by the Soviet Government regarding matters it considers within its domestic jurisdiction, such statements would be repudiated by the Soviet Government . . . . The Soviet Government states that it does not intend to accept a trade status that is discriminatory and subject to political conditions, and accordingly, that it will not put into force the 1972 Trade Agreement.[48]

Those who opposed statutory linkage of trade policy and human rights issues used the Soviet rejection of the 1972 Trade Agreement to justify their objections to Jackson-Vanik. They claimed that the "conceptually flawed" Jackson-Vanik statute had "poisoned the atmosphere for economic relations with the Soviet Union and other communist countries" while it also "gutted the quiet diplomacy that had begun to yield significant increases in Jewish emigration."[49] They concluded, therefore, that Congress simply was incapable of appropriately addressing the sensitive issue of Soviet emigration practices. One student, for example, described Jackson-Vanik as "a product of partisan squabbling, the longstanding dispute between the Nixon Administration and the Congress over control of foreign policy, and the shrewd calculations of the political windfall that taking a position against Soviet anti-semitism could have for Congress-

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[47] *Id.* at 197.

[48] *Text of Kissinger Statement on Accord Cancellation*, N.Y. TIMES, Jan. 15, 1975, at A4.

[49] Adlai E. Stevenson & Alton Frye, *Trading with the Communists*, FOREIGN AFF., Spring 1989, at 53, 54, 57. "Under the Nixon Administration, the number of emigres leaped from barely 200 in 1968 to almost 35,000 in 1973. After passage of the Jackson-Vanik Amendment, the exodus fell sharply to 13,000 in 1975." *Id.* at 54.

men at the polls."[50] This type of criticism of Jackson-Vanik, a criticism which rests on articulating Congress' institutional shortcomings, continues today. One commentator noted recently, for example, that "[w]henever American politicians try to use trade as a carrot or a stick abroad, the result is almost always a domestic brawl . . . . A fire-breathing anticommunist on Capitol Hill may want to starve America's enemies into submission, but a farm-state legislator would prefer to sell them his constituents' grain."[51] Denying MFN status for political or ideological reasons "never worked well in practice anyway," he concludes, "and should be junked."[52]

Because Jackson-Vanik grew out of a desire to "recover some of the authority which had been ceded to the Executive in the area of foreign affairs,"[53] it became a favorite tool for those who argued that Congress did not have the institutional capacity to be formally involved in the details of foreign policy. Soon after the rejection of the 1972 Trade Agreement, some scholars concluded:

> If the Jackson-Vanik amendment shows that congressional guidance for foreign trade policy is to be based on selective morality and subject to manipulation by well-organized pressure groups, then the results so far achieved do not bode well for future congressional guidance of U.S. foreign trade policy.[54]

A *New York Times* editorial was also critical, arguing that "[t]he Congressional role in overseeing the Administration's foreign policy is that of advice and consent, not taking negotiations into senatorial hands or tying the hands of officially designated negotiators."[55]

While the central interbranch dispute under Jackson-Vanik has been the viability of linkage politics, the implementation of this linkage between emigration rights and trade benefits has produced three different sets of controversies. Analyzing these three cases—the Soviet rejection of the 1972 Trade Agreement and the two related sets of statutory controls on the President's

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[50] Todd Quinn, Linkage Politics: The Jackson-Vanik Amendment to the Trade Act of 1974, at 20 (1991) (unpublished M.A. thesis, American University).

[51] Strobe Talbott, *Least Favored Nations*, TIME, Aug. 26, 1991, at 33, 33.

[52] *Id.*

[53] Michael S. McMahon, *The Jackson-Vanik Amendment to the Trade Act of 1974: An Assessment After Five Years*, 18 COLUM. J. TRANSNAT'L L. 525, 531 (1979).

[54] Beasley et al., *supra* note 46, at 221.

[55] *Soviet Trade Fiasco*, N.Y. TIMES, Jan. 17, 1975, at 32.

negotiating authority—demonstrates why *Chadha* could not have much impact on the central interbranch power struggle under the statute.

1. Soviet Rejection of the 1972 Trade Agreement

The view that the emigration provisions in Jackson-Vanik were solely responsible for destroying the possibility of U.S.-Soviet economic relations is historically inaccurate. For Congress to have approved the 1972 Trade Agreement pursuant to the emigration provisions of Jackson-Vanik, the President would have had to certify that he had received assurances that the Soviets would promote the objective of free emigration. "[T]he available evidence of Soviet conduct during May–December, 1974 indicates that Moscow was prepared to accommodate itself"[56] to Jackson-Vanik. It was the passage of a different amendment to a different bill, however, that led to the Soviet decision to reject the Trade Agreement altogether.

The Stevenson Amendment to the Export-Import Bank (Eximbank) Authorization Act of 1974[57] prohibits the Bank from approving "any loans or financial guarantees, or combination thereof, in connection with exports to the Union of Soviet Socialist Republics in an aggregate amount in excess of $300,000,000."[58] The Soviets would be unable to take full advantage of the trade benefits guaranteed by a waiver of Jackson-Vanik restrictions, therefore, because of the $300 million ceiling on credits imposed by the Stevenson Amendment. The Stevenson Amendment was thus "a direct challenge to Jackson-Vanik. If the latter offered a variety of benefits in return for positive action on emigration, the Stevenson amendment would almost shut the door on a vital part of those benefits—credits."[59]

Access to Eximbank credit and investment guarantees was crucial to the Soviet Union, for it saw the Bank as "the principal means for realizing its economic objectives. Indeed, by October 1973 Eximbank had already extended one-half billion dollars in credits to Moscow, and estimates of credits to be extended in

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[56] William Korey, *Jackson-Vanik and Its Myths*, MIDSTREAM, Aug.–Sept. 1989, at 7, 10 [hereinafter Korey, *Jackson-Vanik and Its Myths*].

[57] 12 U.S.C. § 635e(b) (1988).

[58] *Id.*

[59] William Korey, *The Jackson-Vanik Amendment in Perspective*, SOVIET JEWISH AFF., Spring 1988, at 29, 45 [hereinafter Korey, *The Jackson-Vanik Amendment in Perspective*].

the future ran into billions of dollars."[60] In other words, $300 million would not go very far in satisfying Soviet needs. "[O]f greater economic significance" than MFN status, therefore, was "the withholding of credits and guarantees which the United States has used to help foreign trading partners finance the acquisition of U.S. goods and services."[61] To attribute the economic losses suffered from rejection of the 1972 Trade Agreement solely to the linkage of trade to emigration rights represents a misunderstanding, therefore, of the legislative history of the negotiations.

If it is true that the Stevenson restrictions on credits were much more objectionable to the Soviets than Jackson-Vanik freedom-of-emigration requirements, then it seems fair to ask why the Soviets would not have objected to the Stevenson Amendment earlier in the legislative process rather than waiting, as they did, until it was enacted to express their anger and frustration. The Soviets did not object to the Stevenson Amendment before it was enacted into law because they were not aware of it. The Administration overlooked the explosive potential of the Stevenson Amendment and failed to inform the Soviets of the potential credit limitations that would be enacted along with Jackson-Vanik.[62] The Administration therefore did not actively try to stop the credit limitation as it went through the legislative process. In fact, "Kissinger is reported to have admitted to his aides that he was not focusing on the [Stevenson] amendment when he should have."[63] Only after Congress had completed action on the bill did Secretary of State Kissinger order the State Department spokesman to denounce the credit limitation as "grossly discriminatory."[64] Jackson-Vanik freedom-of-emigration provisions clearly had less to do with the Soviet Union's denunciation of the 1974 statute and rejection of the 1972 Trade Agreement than a first glance at this history might suggest.

Those who cited the Soviet rejection of the 1972 Trade Agreement as evidence that Jackson-Vanik produces bad trade policy

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[60] *Id.* at 39.

[61] Robert H. Bradner, *The Jackson-Vanik Amendment to the Trade Act of 1974: Soviet Progress on Emigration Reform Is Insufficient to Merit a Waiver*, 4 GEO. IMMIGR. L.J. 639, 659 (1990) (citation omitted).

[62] *See* Korey, *Jackson-Vanik and Its Myths*, *supra* note 56, at 10 ("No one at the highest level of the State Department or in various non-governmental human rights organizations appears to have been aware of the Stevenson amendment . . . .").

[63] Korey, *The Jackson-Vanik Amendment in Perspective*, *supra* note 59, at 40.

[64] STERN, *supra* note 15, at 186.

saw *Chadha* as "an auspicious moment" for getting Congress out of the international trade policy business.[65] This reflects an exaggeration of *Chadha*'s impact, however, because if it was the Stevenson Amendment that was more responsible for this policy outcome, then invalidating the legislative vetoes in Jackson-Vanik would do little to prevent this same outcome from recurring.[66]

The Stevenson Amendment has continued to be a much more significant tool of congressional control over U.S.-Soviet relations than Jackson-Vanik. Thus, President Bush called for Congress to repeal the Stevenson ceilings as soon as he waived the Jackson-Vanik restrictions for the Soviet Union[67] because most agreed that a waiver would have little effect on U.S.-USSR trade if the $300 million credit ceilings remained in place.[68] Even the General Accounting Office, a research arm of Congress, recently recommended that Congress consider removing the $300 million statutory ceiling.[69] The Stevenson Amendment's $300 million caps on loans and credit guarantees for the Soviet Union have clearly played a central role in allowing Congress to restrict the President's use of his authority under Title IV of the Trade Act. It is also clear that *Chadha* did not affect the operation of these caps.

2. Freedom-of-Emigration Requirements

Another one of the interbranch controversies that emerged from the implementation of Jackson-Vanik springs from the stat-

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[65] Lansing & Rose, *supra* note 30, at 330.

[66] Although the Stevenson Amendment also included a legislative veto that was tainted by *Chadha*, it was a provision that clearly had no effect on Congress' control over the $300 million credit ceiling. The veto allowed Congress to approve, through a concurrent resolution procedure, the President's requests to raise the credit ceilings. This procedure was invalidated by *Chadha* because it failed to comply with the Presentment Clause. The essence of Congress' power, however, was not that it could approve an increase without the President's signature, but that the President could not raise the ceilings by himself. Requiring Congress to comply with the Presentment Clause obviously had no impact on the statutory requirement for congressional approval.

[67] *See Administration to Seek MFN for Baltics as Officials Urge Approval of Soviet MFN*, 8 Int'l Trade Rep. (BNA) 1371, 1371 (Sept. 18, 1991).

[68] *See* Bradner, *supra* note 61, at 659 (suggesting that MFN status for the Soviet Union may be insignificant because of the small market for Soviet goods); Korey, *The Jackson-Vanik Amendment in Perspective*, *supra* note 59, at 39 (arguing that while credits are crucial to the Soviets, MFN status is "largely a matter of prestige" because MFN tariffs do not cover raw materials, which account for most Soviet exports to the United States, and because few Soviet goods would find a market in the United States).

[69] *See* GENERAL ACCOUNTING OFFICE, GAO/NSIAD 91-214, SOVIET ENERGY: U.S. ATTEMPTS TO AID OIL PRODUCTION ARE HINDERED BY MANY OBSTACLES 5 (1991).

ute's linkage of trade policy to a set of human rights that are very clearly articulated. Objectionable practices that Jackson-Vanik is meant to eliminate include a country's denial of its citizens' "right or opportunity to emigrate," the imposition of a more than "nominal tax on . . . documents required for emigration," and the imposition of a more than "nominal tax . . . on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice."[70] In spite of, or perhaps because of, the specificity of these criteria, "the legislative history of the Jackson-Vanik Amendment reveals that the statutory provisions were not carefully crafted to implement a preconceived set of objectives. In fact, the very objectives of Title IV and the [Jackson-Vanik] Amendment were the subject of intense debate."[71] The central policy objectives of Jackson-Vanik did not rest, in other words, on a clear consensus over the meaning of these objectives. As such, members of the Executive Branch were able to develop different views from those of members of Congress regarding the proper application of Jackson-Vanik restrictions.

The particular statutory ambiguity that gave rise to most of these differences is the disjunction between Jackson-Vanik's stated general purpose and its criteria for evaluating progress toward this general purpose. All of the specific criteria are based exclusively on the "right or opportunity to emigrate."[72] The general purpose of Jackson-Vanik, however, is "to assure the continued dedication of the United States to fundamental human rights."[73] Thus, even though the original debates between Secretary of State Kissinger and Senator Jackson over congressionally imposed restrictions dealt specifically with emigration flows, human rights groups have since argued:

> [Jackson-Vanik] is concerned with the general issue of human rights as well as with the specific and articulated question of freedom of emigration. This interpretation is not only consistent with the language of the Act, but also with the universally accepted standards of human rights. Fundamental human rights cannot be narrowly restricted and confined to the right of emigration.[74]

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[70] 19 U.S.C. § 2432(a)(1)–(3) (1988).
[71] McMahon, *supra* note 53, at 529.
[72] 19 U.S.C. § 2432(a)(1) (1988).
[73] 19 U.S.C. § 2432(a) (1988).
[74] *Hearing on President's Waiver Authority*, *supra* note 34, at 325–26 (statement of Frank Koszorus, Jr., representing the International Human Rights Law Group).

When the legislation linking trade and freedom-of-emigration requirements was first proposed, the Executive Branch position was one of unflinching opposition on the ground that the linkage of any domestic concerns to international trade policy would be counterproductive. The Executive Branch later accepted the Jackson-Vanik linkage, with the Ford administration promising, for example, to "take [its] responsibilities in this regard very seriously."[75] Executive Branch officials did not suddenly begin to believe that linkage was good public policy. They simply realized that Jackson-Vanik was the mildest form of linkage that they would be able to obtain, just as the Nixon administration had concluded during its negotiations in which the President was granted the general waiver authority under § 402. The Executive Branch was therefore poised to fight any desire, whether from within Congress or from outside, to expand the scope of Jackson-Vanik restrictions. At the same time, even though "the express purpose for passage of the Jackson-Vanik Amendment undoubtedly was to pressure the Soviet Union to incorporate a policy of more liberal emigration regarding Soviet Jews,"[76] the scope of Jackson-Vanik proved to be much wider than this express purpose suggested. In the end, "the requirement of increased emigration applied to all communist countries not already receiving MFN treatment, not just to the Soviet Union."[77]

An interbranch controversy over the scope of Jackson-Vanik human rights concerns arose in 1976, the first time that the presidential waiver provisions were implemented. When President Ford recommended the extension of the waiver of Jackson-Vanik requirements with regard to Romania, he addressed the emigration restrictions provisions directly, as required by law. At hearings on the matter, Representative Abner Mikva (D-Ill.) noted approvingly that the President's recommendations "set[ ] forth the reasons for extending the waiver applicable to the Socialist Republic of Romania, as called for in the Trade Act, and [they set forth] the President's determination that extension

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[75] *Extension of Most-Favored-Nation Treatment to Romania: Hearing Before the Subcomm. on Trade of the House Ways and Means Comm.*, 94th Cong., 2d Sess. 19 (1976) [hereinafter *Hearing on MFN Treatment to Romania*] (statement of Arthur Hartman, Assistant Secretary of State for European Affairs).

[76] Stephen P. Heuston, Note, *United States-Romanian Trade Relations: Development and Use of Most-Favored-Nation Trading Status*, 22 GEO. WASH. J. INT'L L. & ECON. 379, 395 (1988) (citation omitted).

[77] McMahon, *supra* note 53, at 531.

of the waiver will substantially promote the Trade Act's freedom of emigration objectives."[78] In his transmittal message, however, President Ford did not address the "denial of human rights to ethnic Hungarians in the Transylvania region of Romania," an issue that many observers felt should be considered before taking any presidential or congressional action on continuing Romania's MFN status.[79] In response to the President's silence on this matter, Representative Larry McDonald (D-Ga.) introduced the first disapproval resolution to take advantage of the legislative veto provisions of § 402.[80]

The essence of the interbranch policy struggle represented by this first disapproval resolution was the degree to which Jackson-Vanik restrictions could be applied to a variety of human rights violations. This has remained the major debate surrounding the operation of the statute. In a 1987 hearing on MFN status for Romania, for example, Representative Thomas Lantos (D-Cal.) complained:

> Jackson-Vanik established a specific linkage between free emigration and the granting of MFN status to Communist countries, but Jackson-Vanik needs to be viewed in a much broader context. . . .
>
> . . . [I]t is my humble view that it is a perversion of Jackson-Vanik if the [State] Department uses emigration figures as an index of how human rights are observed in a country.[81]

Congress has consistently been the institutional forum for arguing that the scope of the Jackson-Vanik restrictions should include fundamental human rights broadly defined, whereas the White House has consistently held that Jackson-Vanik only requires it to address freedom-of-emigration concerns. The obvious reason for this institutional dichotomy is that while the most important force behind Jackson-Vanik might have been concerns about Soviet emigration restrictions, Jackson-Vanik

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[78] *Hearing on MFN Treatment to Romania*, *supra* note 75, at 1 (statement of Rep. Mikva).

[79] HOUSE COMM. ON WAYS AND MEANS, DISAPPROVAL OF EXTENSION OF PRESIDENTIAL AUTHORITY TO WAIVE FREEDOM OF EMIGRATION REQUIREMENTS UNDER SECTION 402 OF THE TRADE ACT OF 1974 WITH RESPECT TO ROMANIA, H.R. REP. NO. 534, 95th Cong., 1st Sess. 3 (1977).

[80] H.R. Res. 1547, 94th Cong., 2d Sess. (1976). The resolution was introduced on September 15, 1976. 122 CONG. REC. 30,557 (1976).

[81] *United States-Romanian Relations and Most-Favored-Nation [MFN] Status for Romania: Hearing Before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 26 (1987) [hereinafter *Hearing on U.S.-Romanian Relations*] (statement of Rep. Lantos).

ultimately applied to a whole set of NME countries that do not necessarily engage in egregious violations of emigration rights. In order for Jackson-Vanik to have any teeth with respect to these other countries, Members must argue that it applies to a wide variety of human rights violations.

Some of the interest groups most intimately involved with this struggle over the scope of Jackson-Vanik understood that *Chadha* was less important substantively than it was symbolically. They argued that *Chadha* "provides Congress with a unique *opportunity* to begin exercising a more effective role in promoting the restoration of human rights."[82] While *Chadha* might not substantively affect the scope of Jackson-Vanik, in other words, these interest groups viewed the uncertainty *Chadha* created as a logical moment to push for a ringing reassertion of Congress' intent to link trade and human rights. As one human rights activist told Congress, "[W]e recommend the introduction of a more realistic definition of human rights by amending the Trade Act to provide for review of the overall human rights situation, not just the right of free emigration."[83] Because these groups were interested in Congress' capacity to exercise control over MFN policy concerning NME states that did not necessarily violate emigration rights, it was clear to them that the invalidation of the legislative vetoes in the Trade Act had little to do with the substance of interbranch controversies under Jackson-Vanik.

Just as enhancing congressional control over U.S. trade policy toward NME countries meant expanding the scope of Jackson-Vanik emigration restrictions to include general human rights concerns, restraining congressional control meant restricting the scope of Jackson-Vanik to emigration issues. Therefore, although the Nixon administration had opposed the statutory emigration restrictions, political experience with the statute taught subsequent Administrations to be very attentive to Congress' concerns on freedom-of-emigration questions. The issue was no longer whether the Executive Branch would remain free of statutory freedom-of-emigration restrictions; once Jackson-Vanik was implemented, the issue for the Executive Branch was whether it could prevent Congress from replacing (or enhancing)

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[82] *Hearing on President's Waiver Authority, supra* note 34, at 196 (statement of Laszlo Hamos, Chairman, Committee for Human Rights in Romania) (emphasis added).

[83] *Id.* at 196–97.

the freedom-of-emigration restrictions with other sorts of human rights concerns. Administrations have fought this battle by demonstrating a visible commitment to upholding the articulated restrictions in Jackson-Vanik. At the May–June 1988 U.S.-Soviet summit meeting, for example, "President Reagan made a major point of raising the human rights issue" of emigration.[84] The Reagan administration also made a major point of noting that "[s]uccessive Administrations have opposed the extension of Jackson-Vanik criteria beyond emigration, and this Administration continues to do so."[85]

Thus, it was the narrowing or expanding of the scope of Jackson-Vanik's freedom-of-emigration provisions that was the crucial issue for those battling over the restriction or enhancement of congressional power. Therefore, the Supreme Court's concern in *Chadha* over violations of the Bicameralism and Presentment Clauses of Article I should not have been expected to have had much effect on the outcome of this battle.

3. Assurances Requirement

The President's waiver authority depends on his ability to report to Congress that "he has received assurances" from the country in question "that the emigration practices of that country will henceforth lead substantially to the achievement of the objectives" of the freedom-of-emigration provisions.[86] The legislative vetoes placed over the President's waiver authority were thus meant to help Members monitor the quality of the President's assurances.

The Soviet rejection of the 1972 Trade Agreement suggests that this assurances requirement was a powerful and practical tool of congressional control. Because the Soviets had repudiated the specific measures of progress agreed to by Senator Jackson and Secretary of State Kissinger, President Ford could not provide Congress with the assurances that were necessary for a waiver of the freedom-of-emigration provisions.[87] Congress seemed committed to retaining a strict reading of the assurances

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[84] W. Gary Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 NW. J. INT'L L. & BUS. 213, 269 n.237 (1988).

[85] *Hearing on U.S.-Romanian Relations*, *supra* note 81, at 24 (prepared statement of Rozanne L. Ridgway, Assistant Secretary of State for European and Canadian Affairs).

[86] 19 U.S.C. § 2432(c)(1)(B) (1988).

[87] *See* STERN, *supra* note 15, at 190.

requirement in the subsequent case of Romania in 1975, in which the President's waiver request simply stated that in "the Declaration of the Presidents of the United States and of the Socialist Republic of Romania signed in Washington in 1973," both countries agreed to "'contribute to the solution of humanitarian problems on the basis of mutual confidence and good will.'"[88] Though the President was successful in obtaining the congressional approval resolution required for implementation of the agreement, both Houses of Congress "were critical of the President's handling of the requirement that he state that he has received assurances that the emigration from the NME (non market economy) country in question would henceforth lead substantially to the achievement of the objectives of the freedom-of-emigration provision."[89] The House Ways and Means Committee complained that this report by the President did "not specifically state that assurances have been received from the Romanian Government regarding its emigration practices."[90] The Senate Finance Committee went further in criticizing the Administration's implementation of the assurances requirement, expressing "dissatisfaction with the text of the waiver . . . [which] merely makes vague reference to language concerning 'the solution of humanitarian problems on the basis of mutual confidence and goodwill' . . . ."[91] In testimony before Congress, Assistant Secretary of State Arthur Hartman explained that this vague presentation of assurances was necessary because of the sensitive nature of the trade negotiations.[92] While Congress proceeded to accept the President's assurances, both the House Ways and Means Committee and the Senate Finance Committee made it clear that this approval should in no way be seen as a precedent for future reports that failed to present assurances in a specific manner.[93]

Neither the President nor Congress, however, heeded this warning in subsequent waiver cases. Congress, in fact, "re-

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[88] GERALD R. FORD, *Message to Congress Reporting on United States Trade with Romania, reprinted in* 1 PUB. PAPERS 211 (1975).

[89] PREGELJ, MOST-FAVORED-NATION POLICY TOWARD COMMUNIST COUNTRIES, *supra* note 18, at 9.

[90] H.R. REP. No. 359, 94th Cong., 1st Sess. 3 (1975).

[91] S. REP. No. 281, 94th Cong., 1st Sess. 3 (1975). *See also* S. Con. Res. 35, 94th Cong., 1st Sess. (1975), *reprinted in* 89 Stat. 1202 (1975).

[92] *U.S.-Romanian Trade Agreement, 1975: Hearings on H.R. Con. Res. 252 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 38 (1975).

[93] *See* H.R. REP. No. 359, *supra* note 90, at 3; S. REP. No. 281, *supra* note 91, at 3.

treated from its initial insistence on specific assurances of compliance with the Amendment's objectives by communist countries."[94] Thus, the original Soviet case, in which Congress held the Executive to a strict reading of the assurances requirement, rather than the 1975 Romania case, in which Congress accepted a unique set of assurances, proved to be the exception: "[t]he USSR case is the only instance in which Congress has attempted to formulate specific standards of review for future emigration performance concurrent with the approval of the MFN commercial agreement."[95] In the subsequent cases involving Hungary, Romania, and China, the assurances requirement was interpreted "somewhat broadly [without insistence] on specific or formal assurances of future liberalization of emigration policy. Instead, general statements, not directly related to the freedom-of-emigration statute, as to a humanitarian manner of resolving emigration matters were accepted as being sufficient."[96] Thus, even though some Members objected to what seemed like another case in which the President "ha[d] failed to meet the [assurances] requirement,"[97] when President Carter submitted a bilateral trade agreement with China to Congress for approval in 1979, the Senate report accompanying the resolution approving the agreement "contained no comments on the adequacy of the President's statements concerning the Chinese assurances."[98] It was clear by the end of the 1970s that "[t]he use of the report of assurances . . . [had become] different from its use as originally contemplated by Senator Jackson."[99]

To say that Congress was not interested in investing the necessary political capital to force the President to adopt a strict understanding of the assurances requirement is not to say that Congress could not satisfy any of its need for control. It means, instead, that other methods of control proved to be more valuable once Congress began to implement Jackson-Vanik. "Although . . . the report of assurances" never amounted to a tool that encouraged Members to force the President to abide by "a specific standard of review," it was nonetheless very important

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[94] McMahon, *supra* note 53, at 555.

[95] *Id.* at 542.

[96] PREGELJ, MOST-FAVORED-NATION POLICY TOWARD COMMUNIST COUNTRIES, *supra* note 18, at 13.

[97] *Id.*

[98] PREGELJ, JACKSON-VANIK AND GRANTING MFN TO THE SOVIET UNION, *supra* note 17, at 13 (citation omitted).

[99] McMahon, *supra* note 53, at 548.

as a tool of congressional control because, by requiring the President to consult with Congress annually, the report of assurances ensured that "the President d[id] not ignore the view of Congress in this area of foreign trade policy."[100] In practice, in other words, the "annual review and report to the Congress that has been conducted by the executive branch"[101] proved to be a much more essential procedural component of Congress' policy-making role than the quality of the assurances themselves. Thus, in light of the Administration's clear commitment to upholding this "process of annual determinations by the President and consultations with the Congress . . . notwithstanding the unconstitutionality of the legislative veto,"[102] Senator Jackson himself concluded that *Chadha* would have a minimal effect on Congress' "vital" policy-making role.[103]

B. *Provisions Legally Tainted by* Chadha*, or, What Did* Chadha *Actually Affect?*

The preceding analysis demonstrates how the issues that gave rise to the central interbranch controversies surrounding the operation of Jackson-Vanik were such that *Chadha* could not have much impact on them. The following section explores the specific ways in which *Chadha* did affect the statute. These effects are then placed within the broader context of executive-legislative relations under the statute to explain why these effects were ultimately inconsequential for the balance of policy-making power between the branches.

1. Section 402

The provision of Jackson-Vanik affected by *Chadha* that has attracted the most attention is § 402(d)(5), which gave the President the authority to extend waivers, for twelve-month periods, of the freedom-of-emigration restrictions.[104] These extensions would be granted if neither House of Congress adopted a disapproval resolution, i.e., a one-house veto, of the President's

[100] *Id.* at 544.
[101] *Hearing on President's Waiver Authority*, *supra* note 34, at 47–48 (statement of Sen. John Danforth (R-Mo.)).
[102] *Id.* at 46 (statement of Mark Palmer, Deputy Secretary of State).
[103] *Id.* at 7 (statement of Sen. Jackson).
[104] Trade Act of 1974 § 402(d)(5), 19 U.S.C. § 2432(d)(5) (1988).

action. This annual waiver provision attracted the most attention because it seemed to have the most immediate practical consequences. The statute mandated that the waiver process be an annual one.

Chadha invalidated § 402(d)(5) by requiring disapproval resolutions to pass both Houses and be presented to the President in order to have legal force.[105] When *Chadha* was decided, discussions about its potential impact revolved around the severability question.[106] If the Court determined, in a future case, that § 402(d)(5) was severable from the statute, then the President would retain his waiver authority even though Congress had lost its legislative veto over the President's authority. If the Court deemed § 402(d)(5) inseverable, the entire waiver authority would fall along with the legislative veto. While it was possible to make legal arguments on either side of the question, most analyses concluded that it was "more likely that a court would decide that the veto is severable . . . ."[107] This meant that Congress would have to pass a law, rather than a one-house resolution, in order to overturn a presidential waiver.

Those who were concerned that *Chadha* could seriously undermine congressional power feared that a court might deem the legislative vetoes in Jackson-Vanik severable from the statute. Thus, their legal analyses stated emphatically that a court would not "find the legislative veto we are discussing to be severable."[108] To calm their fears, Senator John Danforth (R-Mo.) claimed that the issue was very unlikely to find its way into a court fight. He argued that one-house vetoes of presidential waivers would continue to be legitimate if either of the chambers ever chose to pass one. They would continue to be viable congressional tools because no Administration would respond to their use in a confrontational manner. Senator Danforth argued:

> [A]s a practical matter, given the ongoing relationship between the executive branch and the legislative branch in matters of international trade, the fact that mutual cooperation and accommodation has always been part of the system that we have in trade in this country, and the fact that

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[105] 462 U.S. at 944–51.

[106] *See generally*, GRIMMETT, TRADE AGREEMENTS WITH NONMARKET COUNTRIES, *supra* note 13, at 7–10.

[107] *Id.* at 17.

[108] *Hearing on President's Waiver Authority*, *supra* note 34, at 71 (testimony of Robert Herzstein, Esq.).

> Congress has in effect delegated responsibility to the executive branch, it would seem to me that it would be very dubious that an administration would want to set up that kind of collision with the Congress on an MFN question.[109]

The possibility that a court might, in fact, deem the legislative vetoes severable was not much of an issue in substantive policy terms, however, because the disapproval resolutions that Members had used pursuant to these veto provisions in the statute had never served a significant role in affecting policy outcomes. Whether or not Congress would continue to have access to one-house vetoes, in other words, was not a question that had any significant implications for policy-making under the statute. Thus, for example, when a report in the *Congressional Quarterly Almanac* described the unsuccessful fate of the various disapproval resolutions introduced in the year in which *Chadha* was announced, it noted that "[a]s in previous years, Congress in 1983 sidetracked legislation to deny most-favored-nation trading status to China, Hungary[,] and Romania."[110] Though disapproval resolutions had been introduced every year since 1976 when President Ford first requested an extension of the waiver for Romania, the resolutions usually received no action from the relevant committees or were reported adversely to the floor.[111] In the one instance when such a resolution was brought to a vote, when Representative Richard Schulze (R-Pa.) attempted to disapprove the President's waiver extension for Romania in 1979, the resolution was defeated by a large margin.[112]

When Senator Danforth claimed, at the time of *Chadha*, that Congress could continue to attempt to overturn presidential

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[109] *Id.* at 66 (statement of Sen. Danforth).

[110] *Favored Nation Trade*, 39 CONG. Q. ALMANAC 264, 264 (1983).

[111] All Senate resolutions and four House resolutions died in committee. S. Res. 171, 98th Cong., 1st Sess. (1983) (Romania); S. Res. 428, 97th Cong., 2d Sess. (1982) (Romania); S. Res. 555, 94th Cong., 2d Sess. (1976) (Romania); H. Res. 234, 99th Cong., 1st Sess. (1985) (China); H. Res. 570, 97th Cong., 2d Sess. (1982) (China); H. Res. 775, 96th Cong., 2d Sess. (1980) (Romania); H. Res. 1547, 94th Cong., 2d Sess. (1976) (Romania). One House resolution died when a motion to discharge from the House Ways and Means Committee was tabled. H. Res. 475, 99th Cong., 2d Sess. (1986) (China). All other House resolutions were reported adversely and, with one exception, were indefinitely postponed. H. Res. 258, 98th Cong., 1st Sess. (1983) (China); H. Res. 257, 98th Cong., 1st Sess. (1983) (Hungary); H. Res. 256, 98th Cong., 1st Sess. (1983) (Romania); H. Res. 521, 97th Cong., 2d Sess. (1982) (Romania); H. Res. 653, 95th Cong., 1st Sess. (1977) (Romania).

[112] H. Res. 317, 96th Cong., 1st Sess. (1979). The House defeated the resolution by a vote of 126 to 271. For the actual roll call vote, see 125 CONG. REC. 20,660 (1979). The one exception to this history of disapproval resolutions pursuant to § 402 is the resolution directed at disapproving MFN to China in 1990—it was passed by the House. H.R.J. Res. 647, 101st Cong., 2d Sess. (1990). This special case will be discussed in Part II.B.2.

waivers through one-house vetoes irrespective of the Court's decision, he was trying to alleviate the frustration that some Members felt toward the Court. He was not, in other words, reflecting a sense that the loss of the one-house veto mechanism would deal a significant blow to Congress' control over the implementation of Jackson-Vanik. Thus, several years later the Chairman of the House Ways and Means Committee, Representative Dan Rostenkowski (D-Ill.), responded to a disapproval resolution of precisely the sort deemed unconstitutional in *Chadha* by brushing it away as an unnecessary administrative burden that was not worth the court fight it could trigger. Representative Rostenkowski reminded his colleagues that in *Chadha* "the Supreme Court struck down as unconstitutional the very sort of one-House veto measure represented by House Resolution 475," and he "strongly urge[d] Members not to risk needless, costly, and potentially time consuming litigation on this issue."[113]

Isolating for analysis the provisions of § 402 that were tainted by *Chadha* helps explain why the decision did not have much impact on policy questions regarding the extension of MFN to NME countries: in the nine years of the statute's operation before *Chadha*, the disapproval resolutions pursuant to these provisions were never particularly important in determining the outcomes of these policy questions. The benefit of this analysis is that, at the same time that it illuminates the relative unimportance of the tainted provisions, it also points to those procedures that were, in fact, central to interbranch struggles over policy outcomes. Thus, a full explanation of *Chadha*'s impact, or lack of impact, on Jackson-Vanik politics requires an understanding of alternative procedures. This understanding will be presented in the following two sections. The first section will describe these procedures and the ways in which they proved much more important and practical than the legislative vetoes invalidated by *Chadha*. The second section will explain why these alternative procedures were more useful than the legislative vetoes.

a. *Conditions bills*. The procedural expression of the most important interbranch controversies under Jackson-Vanik did not take the form prescribed by the statute. The most important

[113] 132 CONG. REC. 17,958 (1986) (statement of Rep. Rostenkowski).

interbranch controversies under Jackson-Vanik were not, in other words, characterized by disapproval resolutions or legislative vetoes that threatened to overturn the President's decision to extend MFN to a particular NME country. Instead, they revolved around independent bills that had no legal connection to the congressional review process built into the President's waiver authority in Jackson-Vanik. The key difference between disapproval resolutions and these independent conditions bills is that conditions bills allow Congress to threaten the President's waiver on whatever grounds are relevant to the country in question. Disapproval resolutions pursuant to § 402 ostensibly become necessary only if Congress objects to the President's waiver of the statute's freedom-of-emigration requirements. Conditions bills, on the other hand, can threaten to overturn a President's waiver by placing unlimited numbers and kinds of conditions on the President's authority to extend MFN to a particular country at a particular time. The two cases in which Congress was most dedicated to attempting to overturn the President's waiver demonstrate that conditions bills rather than disapproval resolutions were the central procedural focus of the interbranch controversy and that issues larger than emigration rights inspired these controversies.

The first expression of congressional sentiment threatening the President's authority to grant a Jackson-Vanik waiver that was sufficiently powerful to result in a bill or resolution that passed at least one House occurred in the case of Romania in 1987. The reason that anti-Romanian sentiment became so much more widespread in Congress in the mid-to-late 1980s than it had been in the 1970s is that the human rights conditions in Romania became markedly worse. A State Department official who monitored the situation at the time recalled:

> [E]verything came to a head in 1987 with Romania MFN. There had always been some rumblings against granting MFN to Romania because of human rights problems but the rumblings became a real earthquake in the 1980s as the human rights abuses got worse and became more obvious. They got much worse because the economic situation in Romania was really bad in the early '80s. So Ceausescu started to bleed his people of basic necessities as a way of increasing his hard currency reserves. So as the economic situation got worse and the human rights abuses increased, Romania's opponents in Congress grew, and its supporters,

> i.e., those who, under better economic situations, might have done business with Romania, dwindled.[114]

The legislative actions that came closest to directly overturning the President's decision to continue extending MFN to Romania were bills that specifically cited religious persecution and oppression of ethnic minorities as conditions that must be improved if the President wanted to use his waiver authority. These bills were seen as conscious additions, or alternatives, to Jackson-Vanik. A co-sponsor of one of these bills, Senator William Armstrong (R-Colo.), stated:

> While Jackson-Vanik uses the specific right of free emigration by which to measure progress in human rights, it would be negligent to ignore Romania's human rights abuses in other areas. This is particularly true in light of the fact that the United States Helsinki Watch Committee, among others, has called the Romanian Government "one of the most egregious offenders of human rights in Eastern Europe."[115]

Since both the House and the Senate passed bills that threatened to suspend MFN for Romania unless the President could certify that it was making progress in its treatment of ethnic and religious minorities,[116] sponsors of the provisions felt that they had won an important victory even though these bills were never actually enacted into law.

> The inclusion of human rights improvements as a condition for preferential trade status is an important development. Congress, by its vote on suspension of Romanian MFN, has placed human rights discussion as a priority in bilateral relations and we hope that this development will continue to motivate decisions concerning increased trade and relations.[117]

Objections to these provisions citing religious persecution and oppression of ethnic minorities were very similar to objections that had been voiced against the disapproval resolutions that had been introduced almost every year since Romania was first granted MFN in 1975. Most importantly, opponents argued that

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[114] Interview with former Romania Desk Officer, Bureau of European and Canadian Affairs, U.S. Department of State, in Washington, D.C. (July 31, 1991).

[115] 133 CONG. REC. 17,739 (1987) (statement of Sen. Armstrong).

[116] H.R. 1250, 100th Cong., 1st Sess. (1987); S. 1093, 100th Cong., 1st Sess. (1987).

[117] Letter from Representatives Tony Hall (D-Ohio), Frank Wolf (R-Va.), and Chris Smith (R-N.J.) to fellow members of Congress (Apr. 29, 1988) (on file with the *Harvard Journal on Legislation*).

MFN to NME countries should not depend on human rights issues beyond freedom of emigration. Senator Robert Packwood (R-Or.), for example, explained:

> We deny most-favored-nation status to those countries that abuse religious freedoms, and make no mistake about it . . . the conduct of Romania, when it comes to religious freedom is brutish, boorish, deplorable, disgusting. There is no question about that.
>
> But the Jackson-Vanik amendment and the extension of most-favored-nation status to Romania is premised on emigration: emigration, not religious freedom.
>
> Romania has a better record of emigration than any other European Eastern bloc country . . . .[118]

In addition, opponents objected to the suspension or termination of MFN because suspension or termination of MFN would eliminate the annual review process. While acknowledging the strong sentiment in favor of withdrawing Romania's most-favored-nation status because of religious persecution, Senator Danforth argued against such a course because "the fact of the matter is that the annual review . . . provide[s] us with the one opportunity we have to apply some leverage on Romania."[119] Denying Romania MFN, in other words, would deny Congress the opportunity to threaten Romania in the future.

In the end, these bills conditioning MFN for Romania were never enacted because the Ceausescu regime itself rejected MFN before Congress had the opportunity to suspend it. State Department officials who were involved in the U.S.-Romanian negotiations over MFN at the time described this outcome as one in which "Ceausescu quit before he got fired."[120] Trade journals reported that "Romania, which renounced its waiver before the question of renewal for 1988 came up, would have lost the waiver anyway because of human rights concerns unrelated to emigration."[121] The reason that Romania felt it would have "lost the waiver anyway" is that the bills representing these human rights concerns received widespread support in both the

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[118] 133 CONG. REC. 17,745 (1987) (statement of Sen. Packwood).

[119] *Id.* (statement of Sen. Danforth).

[120] Interview with former officer, Bureau of Economic and Business Affairs, U.S. Department of State, in Washington, D.C. (July 31, 1991).

[121] *State Department Notes Emigration Gains, Says Other Factors Figure in Trade Waiver*, 6 Int'l Trade Rep. (BNA) 205 (Feb. 15, 1989).

House and the Senate.[122] This popularity of the conditions bills had caught the attention of the Administration, which, in turn, had affected Romanian perceptions and attitudes. The Romania Desk Officer at the time recalled:

> [I]t became clear to the Romanians in 1987, when Deputy Secretary of State Whitehead went over and read them the riot act on human rights abuses, that the Administration would not necessarily go to bat for them in Congress even if Reagan asked for a waiver, unless they made some real progress in human rights. They were violently opposed to allowing us to slowly expand our demands related to their domestic concerns, so once they figured out that the Administration was not particularly enthusiastic about combatting anti-Romanian sentiment in Congress, they decided to pull out.[123]

Resolutions disapproving MFN for Romania had been introduced almost every year since 1975 when MFN for Romania was first granted, but it was not until 1987 that Congress made it clear that improving Romania's general human rights record—something the Ceausescu regime was not interested in doing—would truly be required.

Because Congress never reached the point where it needed to enact conditions bills to overturn an attempt by the President to extend MFN to Romania, the formal requirements for presidential waivers remained the same. In other words, any country receiving a waiver is still bound only by Jackson-Vanik's attention to freedom of emigration. While the formal process remained unchanged, however, it was conditions bills rather than disapproval resolutions that served as the focus of interbranch tension. This has continued to be true in subsequent cases of high visibility executive-legislative conflict, as in "[t]he most contentious review struggle [which] came in response to the President's 1990 decision to extend Most Favored Nation Status for Chinese exports to the United States."[124] During this controversy, the precedent for congressional influence over MFN pol-

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[122] The House passed H.R. 1250 as amendment #64 to H.R. 3 by a vote of 232 to 183. 133 CONG. REC. 10,694–95 (1987). The Senate passed S. 1093 as amendment #323 to S. 1420 by a vote of 57 to 36. 133 CONG. REC. 17,761 (1987).

[123] Interview with former officer, Bureau of European and Canadian Affairs, U.S. Department of State, in Washington, D.C. (July 31, 1991).

[124] Richard Bush, *America's China Policy and the Role of the Congress, the Press, and the Private Sector: The Role of Congress in Shaping Washington's China Policy*, HERITAGE FOUNDATION REP. (An Asian Studies Center Forum; The Heritage Lectures, No. 338), July 9, 1991, at 7.

icy established in the Romania case was ever-present on Capitol Hill. Representative Chris Smith (R-N.J.) noted:

> [A]s I think Members know, while Jackson-Vanik specifically focuses on emigration figures, the level of compliance with internationally recognized human rights standards must be included in our criteria. I think part of the precedence [sic] for that was our work in the mid-1980's on suspending and then perhaps even revoking MFN for Romania.[125]

Congressional attempts to punish China for human rights abuses after the Tiananmen Square massacre in 1989 were very similar to congressional attempts to punish Romania a few years earlier. In both cases, Congress focused mostly on conditions bills because they allowed for the explicit expansion of human rights issues beyond the freedom-of-emigration concerns articulated in Jackson-Vanik. In both cases, the very fact that the central issues were not emigration issues made it seem more reasonable to exercise influence over policy by specifying the human rights violations at issue through conditions bills rather than pushing for disapproval resolutions pursuant to Jackson-Vanik. One congressional staff member who worked directly on China MFN issues noted:

> [T]he first China MFN conditions bill was not until 1989. Sure, we'd had disapproval resolutions way back when, but China was never really an issue under Jackson-Vanik until 1989. China never really had emigration problems. So even though Jackson-Vanik was really directed at the Soviet Union, China was just sort of hooked into the statute by accident in 1974 because it is a NME. Once China became the hotspot, though, we were obviously going to use the whole Jackson-Vanik annual review process to introduce bills conditioning the President's extension of MFN.[126]

As in the Romania case, opposition to the conditions bills in the China case rested on the argument that Jackson-Vanik should not be distorted by expansive readings. Senator Danforth argued against the incorporation of additional human rights conditions into Jackson-Vanik by claiming that "[w]e took the position that Jackson-Vanik meant that emigration was the sole

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[125] *Most-Favored-Nation Status for the People's Republic of China: Hearings Before the Subcomm. on Human Rights and International Organizations, Asian and Pacific Affairs, and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. 4 (1990) [hereinafter *Hearings on MFN Status for the People's Republic of China*] (statement of Rep. Chris Smith).

[126] Interview with Senate legislative aide, in Washington, D.C. (Aug. 14, 1991).

condition for most-favored-nation status, and we should not extend that further."[127] As in the Romania case, too, conditions bills were introduced alongside disapproval resolutions as alternative forms of asserting congressional control over policy. Thus, at the same time that Representative Gerald Solomon (R-N.Y.) introduced a resolution disapproving a Jackson-Vanik waiver for China, Representative Donald Pease (D-Ohio) introduced a conditions bill articulating new human rights conditions that China would have "to meet before the president could waive Jackson-Vanik for another year in 1991."[128]

There is one important difference between the two cases, however, that might suggest, at first glance, that the post-1989 China case would not have been one in which conditions bills would take center stage. In 1990, Congress codified the procedural changes to the Jackson-Vanik legislative vetoes required by the legal reasoning in *Chadha*. These technical amendments to the statute, which were enacted as part of the Mini-Trade Bill of 1990,[129] were

> intended to remove the possibility that procedures in Title IV might be unconstitutional, without changing the underlying scheme of the law . . . .
>
> . . . .
>
> The [one-House veto] defect is cured . . . by a provision of the bill amending the law to make the resolution of disapproval a joint resolution. Since the resolution of disapproval would, unlike the existing law, be subject to Presidential veto and the Congress overriding the veto, the Committee bill allows 45 days in addition to the time allowed under current law for this process to be completed.[130]

It was more evident in the China case, now that Congress had formally amended the statute, that Congress had the authority to engage in policy-making with disapproval resolutions than it was in the Romania case. Nonetheless, a careful look at the environment in which Members proposed disapproval resolutions demonstrates that in the China case, as in the Romania case, conditions bills served as the lightning rod for interbranch tension. The reason for this is that the driving force behind the

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[127] 137 CONG. REC. S10,529 (daily ed. July 22, 1991) (statement of Sen. Danforth).

[128] John R. Cranford, *House Passes Bills to Punish China for Tiananmen Action*, 48 CONG. Q. WKLY. REP. 3490, 3490 (1990) [hereinafter Cranford, *House Passes Bills to Punish China*].

[129] Customs and Trade Act of 1990, Pub. L. No. 101-382, 104 Stat. 629 (codified as amended in scattered sections of 15, 16, 19, 20, 26, and 42 U.S.C. (1988)).

[130] S. REP. No. 252, 101st Cong., 1st Sess., at 51–52 (1990).

congressional commitment to punishing China—the massacre in Tiananmen Square—had nothing to do with freedom-of-emigration issues.

With respect to the procedural mechanisms available for attacking the President's extension of MFN, Representative Stephen Solarz (D-N.Y.) explained:

> [I]n the Congressional context we have one of two options. We can either move on a resolution of disapproval, which rejects the President's determination. Or we can adopt legislation which would establish conditions, in addition to freedom of emigration, that China would have to meet in order for MFN to be renewed when it came up for a subsequent determination a year from now.[131]

The first option, terminating normal trade with China without articulating the relevant congressional concerns and without setting guidelines by which the Chinese government might satisfy them, seemed unreasonable to Representative Solarz. Therefore, he introduced a bill, with several co-sponsors, that would "require the president to certify that China ha[d] continued to release political prisoners."[132] The bill also required that the Chinese government "provide the names of and account fully for the several hundred people it says were arrested in last year's crackdown and since released."[133] Representative Solarz's view of conditions bills as eminently more reasonable than disapproval resolutions was consistent with the views of most Members; unlike disapproval resolutions, conditions bills received immediate widespread support in Congress. Unlike any of the disapproval resolutions that had been introduced pursuant to § 402, therefore, the threat represented by conditions bills was of real concern to the Administration. In describing the threats to the President's unfettered waiver authority with reference to China MFN in 1990, one reporter concluded that "[i]n Congress, a controversial battle on renewal is being waged, and . . . it is likely to result in new conditions for the extension of MFN status to China."[134] It was clearly the conditions bill option

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[131] *Hearings on MFN Status for the People's Republic of China*, *supra* note 125, at 265 (statement of Rep. Solarz).

[132] John R. Cranford, *Trade and Foreign Policy: The Ties That Bind*, 48 CONG. Q. WKLY. REP. 1773, 1777 (1990) [hereinafter Cranford, *Trade and Foreign Policy*].

[133] *Id.*

[134] Lucille A. Barale, *U.S. MFN Renewal for China: The Jackson-Vanik Amendment*, E. ASIAN EXECUTIVE REP., June 1990, at 9, 9.

rather than the disapproval resolution option that turned the policy controversy into an executive-legislative tug of war.

b. *Why Conditions Bills Take Center Stage.* To understand why conditions bills were central to the interbranch controversies that arose under Jackson-Vanik is to understand why *Chadha* had little impact on the executive-legislative balance of power under the statute. The most immediate explanation is that bills independent of the statute were much better suited to articulating congressional objections to a variety of human rights violations than were the disapproval resolutions pursuant to the statute. While Jackson-Vanik defines the President's authority to extend MFN to NME countries in terms of waivers of freedom-of-emigration restrictions, however, there is nothing in the statute that prevents Congress from overturning these waivers for reasons completely unrelated to these freedom-of-emigration restrictions. The need to expand the scope of Jackson-Vanik might have been the most important factor in triggering the use of conditions bills. The popularity of these bills is better explained, however, by an analysis of why the disapproval resolutions never became important policy-making tools than by the fact that these legislative vetoes were tied to provisions addressing only freedom-of-emigration rights.

Senator Jackson might very well have believed, at the time that his amendment was being drafted, that congressional concern with freedom-of-emigration rights, or perhaps even with human rights generally, would result in the lifting of MFN status for certain countries at certain times. But the actual implementation of the statute has proven otherwise. Those who introduced legislative vetoes never intended them to result in the actual termination of MFN. Conditions bills were very popular, therefore, because they increased Congress' capacity to threaten countries without immediately revoking their MFN status. One State Department official who worked both on the Romania case in the mid-1980s and on the China case after Tiananmen Square explained:

> You begin to get conditions bills because people realized that cutting off MFN totally was not a good idea. But the possibility of really cutting it off was never an issue until Romania started getting a lot of people very angry in the mid-1980s. So when a lot of people, rather than just the individual Member here and there who happened to have a

> large community of Romanians in his district or whatever, started to want to punish Romania for its human rights violations, conditions bills became very popular. And it was a very similar situation to the one we have now with China. People were looking for some way for Congress to express displeasure and make some kind of threat without killing MFN entirely.[135]

Independent of the review procedure in Jackson-Vanik, conditions bills allow their drafters to specify when, why, how, and for how long MFN will be suspended. Because conditions bills can, therefore, be less immediate and less final than disapproval resolutions, they are, as Representative Sam Gibbons (D-Fla.) argues, "more feasible politically than an outright ban."[136]

In order to understand this superior feasibility of conditions bills, it is necessary to explore how and why weaker forms of statutory control over presidential actions were able to receive more congressional support than stronger forms of statutory control. A congressional staffer who worked on the bills conditioning the extension of MFN to Romania in the mid-1980s recalled how her office learned to capitalize on the fact that most Members found terminating MFN too draconian:

> 1985 was the first time we introduced a conditions bill rather than a disapproval resolution to kill MFN for Romania. But we knew we wouldn't be able to pass it. It was essentially the same as the disapproval resolutions Phil Crane had been introducing for years and years except that our bill talked about rights of ethnic minorities and religious rights. But then the next time we introduced it, in 1987, we had a much more sophisticated bill. And we really pushed to try to get this one through because we really thought we could. Since we were introducing an independent bill, we had the leeway to say six months instead of one year. And more importantly, we had the leeway to say "suspend" instead of "terminate." So we were able to argue pretty convincingly that our bill was much less harsh than [a proposed] disapproval resolution.[137]

Representative Frank Wolf (R-Va.), one of the sponsors of the 1987 Romanian conditions bill, believed that the increase in the bill's sophistication with respect to political feasibility was essential: "[Our last] amendment on this floor would have totally

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[135] Interview with legal adviser, Office of Legal Adviser, U.S. Department of State, in Washington, D.C. (Aug. 8, 1991).

[136] Cranford, *Trade and Foreign Policy, supra* note 132, at 1777.

[137] Interview with House legislative aide, in Washington, D.C. (Aug. 12, 1991).

suspended [MFN for Romania]. This one will suspend it for just 6 months and is totally different."[138] Senator William Armstrong, one of the bill's co-sponsors in the Senate, also presented the bill as a sophisticated measure:

> [T]his is not a drastic or a severe approach to the problem. We are not . . . terminating MFN status for all time. In fact, . . . MFN status will be restored automatically without the President or Congress or anybody else, at the end of 6 months. It is just what I have described, a temporary suspension.[139]

That disapproval resolutions offer an outcome too drastic to have widespread support in Congress is also evident from Congress' failure to suspend MFN status for China after the Tiananmen Square massacre. While numerous conditions bills were introduced affecting MFN status for China, it was the ones that postponed actual suspension of MFN for the longest period of time or attached the weakest conditions to the President's waiver authority that were ultimately most successful. In 1990, for example, the House Ways and Means Committee adopted Representative Pease's bill, which would have required "President Bush to certify before June 4, 1991, that China ha[d] made 'significant progress' toward achieving specific human rights goals. Otherwise, he could not extend so-called most-favored-nation (MFN) trade status to China for an additional year, beginning July 1991."[140] In adopting Pease's bill, the House Ways and Means Committee "rejected . . . a tougher substitute offered by Rep. Thomas Downey [(D-N.Y.)]."[141] Downey's bill was tougher than Pease's because it "would have required the Chinese to meet—not merely make progress toward—specified standards of behavior."[142]

In keeping with the political logic that makes weaker forms of MFN threats more popular in Congress than stronger ones, Representative Nancy Pelosi (D-Cal.) "toned down her [1990] MFN legislation" when she reintroduced it in 1991, "removing an amendment making favored status conditional on the end of

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[138] 133 CONG. REC. H2862 (daily ed. Apr. 30, 1987) (statement of Rep. Wolf).

[139] 133 CONG. REC. S8789 (daily ed. June 26, 1987) (statement of Sen. Armstrong).

[140] John R. Cranford, *Committee Links China Status to Progress on Rights*, 48 CONG. Q. WKLY. REP. 3102, 3102 (1990) [hereinafter Cranford, *Committee Links China Status to Progress on Rights*].

[141] Ronald D. Elving, *Bill Links China's MFN Status to Human Rights Progress*, 48 CONG. Q. WKLY. REP. 2200, 2200 (1990).

[142] *Id.*

allegedly forced abortions in China."[143] In addition to toning it down, she announced that "her proposal call[ed] on China to 'make significant progress' toward improving human rights, not necessarily to make changes overnight."[144] Unlike disapproval resolutions, which would terminate MFN status upon enactment, Pease's and Pelosi's bills would have given China a full year to demonstrate that it was making some sort of progress in a number of human rights areas before MFN extension would be prohibited. Furthermore, the determination of whether or not China had made sufficient progress would rest with the President. These conditions bills allowed the President more time and more negotiating leeway than the disapproval resolution that was introduced pursuant to Jackson-Vanik,[145] which threatened to "cancel China's current MFN eligibility outright";[146] not surprisingly, the disapproval resolution was described as "highly unlikely to become law."[147]

Even the strongest supporters of disapproval resolutions believed that actual, outright termination of MFN status was not a policy for which there would ever be much support. In fact, many of them argued that disapproval resolutions were never meant to achieve such an outcome. In calling for support of his resolution disapproving MFN for Romania in 1986, for example, Representative Tony Hall (D-Ohio) argued:

> Discharging and passing this resolution will not end MFN for Romania. That would require action by both bodies and a signature from the President.
>
> However, bringing this resolution up and passing it will send a strong signal to the Romanian Government that there is deep congressional concern about human rights violations and repression in Romania.[148]

One of the staffers of a leading proponent of disapproval resolutions explained similarly:

> We don't actually want to see our disapproval resolutions pass, of course. No one wants to. The ideal, as we see it, is to get strong votes in the House and Senate approving the resolution, and then get the President to veto it. This is the

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[143] Bruce Stokes, *Debating China Trade Policies*, 23 NAT'L J. 1177, 1177 (1991).

[144] *Id.*

[145] H.R.J. Res. 647, 101st Cong., 2d Sess. (1990).

[146] Cranford, *Committee Links China Status to Progress on Rights*, *supra* note 140, at 3102.

[147] *Id.*

[148] 133 CONG. REC. H4965 (daily ed. July 29, 1986) (statement of Rep. Hall).

> best way to send a definitive, strong message to the Chinese that they're on wobbly ground.[149]

This staffer saw disapproval resolutions as a mechanism for making a uniquely powerful statement. In order for this vision to be realized, however, the disapproval resolutions had to receive wide support within Congress. For this reason, the staffer expressed a deep sense of frustration:

> What is frustrating is the lack of faith that most Members seem to have. They fear that a strong vote for a disapproval resolution means that it will be enacted. They get worried that the thing will spiral out of control if they produce a strong vote and that some people will actually try to override the President's veto.[150]

With a deep faith in the capacity of disapproval resolutions to send a powerful message without actually being enacted, another staffer noted that "when business groups come to me to express how worried they are about our disapproval resolutions, I say to them, 'don't worry; our resolution will not result in the termination of MFN.'"[151] Thus, in the China case, Representative "Schulze and others support[ed] the joint resolution that would cancel MFN immediately in order to bring stiff pressure on China to change its human rights policies. They sa[id] they want[ed] a vote even if the resolution [would] ultimately [be] vetoed and that veto [would be] sustained."[152]

The staffer of another Member who was a strong supporter of disapproval resolutions was well aware of the wide popularity of conditions bills. This staffer noted:

> It seems so much more logical to start with your hardest punch first. Conditionality bills are fine. And they're much more reasonable in terms of what will ultimately be enacted, obviously. But you know, of course, that no conditionality bill will ever be enacted that says "the President must . . . ." Why not start with the loudest, strongest symbol and then go back and try the next strongest thing? Start with a strong disapproval resolution that the president vetoes, then go to one of these conditions bills.[153]

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[149] Interview with House legislative aide, in Washington, D.C. (Aug. 20, 1991).
[150] *Id.*
[151] Interview with House legislative aide, in Washington, D.C. (Aug. 22, 1991).
[152] Cranford, *Committee Links China Status to Progress on Rights*, *supra* note 140, at 3102.
[153] Interview with House legislative assistant, in Washington, D.C. (Aug. 22, 1991).

This staffer was also well aware that his view of how the congressional review process should work was becoming less and less likely to acquire support. "As Tiananmen Square fades further and further into history, making people less dedicated to expressing their anger, and as conditionality bills are so popular now, it makes it very tough to get people to go along with our disapproval resolution philosophy on things."[154]

The lack of support for disapproval resolutions is reflected in the debate over whether conditions bills would lead to the revocation of MFN. If disapproval resolutions had represented a viable policy option, this debate would have revolved around whether termination of MFN was a desirable outcome. Instead, the undesirability of such an outcome was taken for granted. Thus, even Members who were most opposed to the Administration argued either that conditions bills would not lead to the termination of MFN or that those who worried that disapproval resolutions might actually be successful simply had no faith in the Jackson-Vanik congressional review process.

In support of the Bush administration's objection to any kind of conditions bill, Senator Larry Craig (R-Idaho) argued that there could be no distinction between conditions bills and disapproval resolutions:

> Applying conditions to MFN would amount to a public challenge by our Government that would be impossible for the Chinese leadership to meet. The Chinese government would never succumb to this sort of unilateral pressure because it would imply a weakness on their part. Therefore attaching conditions will simply serve as a 1 year notice of termination of relations between the United States and China.[155]

Similarly, in response to the claim that the conditions bills affecting Romanian MFN were distinct from disapproval resolutions, Representative Bill Frenzel (R-Minn.) tapped the widespread concern regarding potential termination by arguing:

> All witnesses from the business community involved in trade with Romania were in agreement with the administration that a 6 month suspension would have the same effect as letting MFN status lapse altogether. In the everyday world of business decisions it is not conceivable that trade, interrupted for 6 months[,] would easily resume again.[156]

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[154] *Id.*

[155] 137 CONG. REC. S10,626 (daily ed. July 23, 1991) (statement of Sen. Craig).

[156] 133 CONG. REC. H2865 (daily ed. Apr. 30, 1987) (statement of Rep. Frenzel).

The debate, then, was about whether a middle ground was possible. Those who wanted formally to impose new conditions on the President's use of the waiver authority argued that conditions bills would provide such a middle ground. With respect to his conditions bill on China MFN, for example, Representative Pease stated:

> Some argue that attaching conditions to the extension of MFN will ultimately bring about revocation. Let me make clear that those of us involved in developing the original conditionality proposal of this year . . . sought to fashion conditions that would prove effective and meaningful in the struggle for better human rights policy in China without being so stringent that the Government of the People's Republic of China would not be able to fully comply within the allotted time period and our President would be forced to cut off MFN.[157]

In contrast, those who opposed the imposition of new conditions on the President's use of the waiver argued that conditions bills would ultimately produce the same result as a successful disapproval of the President's waiver. Senator Danforth, for example, claimed:

> If we enact [a conditions bill], the result would be to terminate most-favored-nation status . . . . Maybe that is what we want to do. Maybe that is what Senators would like to vote for. But let us not delude ourselves that there is such a thing as a middle ground, that there is such a thing as conditional most-favored-nation status.[158]

What both sides of this debate reflect, at any rate, is that terminating MFN was a policy outcome over which there was interbranch consensus—terminating MFN generally was considered to be too draconian.

The weaker forms of congressional MFN threats received more support than the stronger ones for three main reasons. First, threats which actually resulted in the termination of MFN would hurt American businesses. Thus, the 1987 conditions bill threatening Romanian MFN received widespread support in part because the economic situation in Romania was so weak that very few American businesses cared about extending MFN to Romania for another year. In contrast, the Bush administration succeeded in preventing the enactment of conditions bills in the

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[157] 137 CONG. REC. H5317 (daily ed. July 10, 1991) (statement of Rep. Pease).
[158] 137 CONG. REC. S10,528 (daily ed. July 22, 1991) (statement of Sen. Danforth).

China case by claiming that "[d]enying MFN status to China . . . would also have extremely damaging economic consequences for U.S. business and U.S. consumers."[159]

The second reason why terminating MFN has been an unpopular policy is that terminating MFN has been considered counterproductive with respect to achieving human rights goals. Former Ambassador to China Winston Lord warned, for example, that immediate "[t]ermination of the trade status would hurt the wrong people in China."[160] David Michael Lampton, the President of the National Committee on U.S.-China Relations, argued: "Congress should take into account the desires of the Chinese people. Citizens of the PRC with whom I have spoken . . . do not want MFN treatment for China ended. These are persons who have no sympathy for Beijing's current policy. Indeed, they have suffered under it."[161] One of the staffers responsible for meeting with interested groups on the issue of terminating MFN treatment for China noted similarly:

> [S]tudent groups themselves, . . . the groups that have been most vocal on the anti-China side, . . . did not want to cut off MFN with disapproval resolutions right away partly because doing so would hurt the wrong people and partly because it would eliminate Congress' foot in the door. Terminating MFN would deprive us [of] the opportunity to keep looking over their shoulder.[162]

The third reason why ending MFN has never been a policy to which Members have been committed is that it could open an unseemly can of worms for American human rights policy generally. In this regard, Representative Solarz has noted that "we give MFN to a whole series of repressive regimes with respect to which we express our concerns about their violation of human rights in other ways."[163] To terminate the MFN status of a NME country because of general human rights violations would thus bring into question the variety of other non-statutory means by which the President encourages countries to improve their human rights records. It would also bring into question the

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[159] *Hearings on MFN Status for the People's Republic of China*, *supra* note 125, at 232 (statement of Richard Solomon, Assistant Secretary of State, East Asian and Pacific Affairs).

[160] *Id.* at 18 (opening remarks of Ambassador Winston Lord).

[161] *Id.* at 22 (statement of David Michael Lampton, President, National Committee on U.S.-China Relations).

[162] Interview with House legislative assistant, in Washington, D.C. (Aug. 16, 1991).

[163] *Hearings on MFN Status for the People's Republic of China*, *supra* note 125, at 123 (statement of Rep. Solarz).

MFN status of non-communist countries that do not fall under Jackson-Vanik. Holly Burkhalter of Human Rights Watch addressed this point head-on when she noted: "[W]e . . . know that the Jackson-Vanik law is a sort of imperfect instrument from the outset because it only applies to communist countries. Thus, when a country like Somalia kills about 55,000 of its citizens in the course of a counter-insurgency . . . , no one even talks about MFN."[164] For this reason, Senator Packwood disapproved of terminating China's MFN status as punishment for Tiananmen Square:

> [T]he reason we are having this debate about China today [is n]ot because of their trade policy, not because of their arms sales, not because of a variety of other things that have been listed, but because of their human rights policy. . . .
>
> That may be a fair basis for the United States to add to its policy of denying most-favored-nation status to countries. But in that case it should not be limited to China. Among the countries that have most-favored-nation status today are Libya, Iran, Iraq, Syria, all bastions of democracy and protectors of civil liberties. Nonsense.[165]

In sum, conditions bills received broader support than disapproval resolutions because the direct and immediate revocation of MFN status that would result from the enactment of a disapproval resolution was not a viable option for most Members. Conditions bills represented policies that Members felt more comfortable supporting. As a staff member of one of the proponents of a conditions bill explained, "[C]onditions bills are popular because they represent the best of all possible worlds. Members need a strong way to protest human rights abuses at the same time that they know they aren't doing something that might actually kill MFN."[166] In other words, conditions bills were not only less likely to result in outright termination of MFN but also represented a more powerful form of protesting human rights abuses. One staffer explained that conditions bills were more threatening to Beijing than disapproval resolutions

> because [conditions bills get] a lot more support in Congress. Disapproval resolutions don't really catch Beijing's attention as much because not as many people vote for them. Besides, [disapproval resolutions] represent a sledgehammer policy. If we really do terminate MFN, then Beijing would probably

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[164] *Id.* at 96 (statement of Holly Burkhalter, Human Rights Watch).
[165] 137 CONG. REC. S10,669 (daily ed. July 23, 1991) (statement of Sen. Packwood).
[166] Interview with House legislative assistant, in Washington, D.C. (Aug. 22, 1991).

> say, "O.K., fine. Go right ahead. Just don't tell us what to do with our own people." Conditions bills, on the other hand, keep us involved so Beijing can't so easily say "O.K., fine, we'll just do as we please."[167]

Representative Pease supported the view that "the *threat* of revocation of MFN is a bigger, more effective stick than actual revocation,"[168] noting:

> [H]istory has shown that the use of conditional MFN extension has achieved the desired effect, in terms of pushing the Chinese government in the direction of human rights reform. The conditionality bill that I sponsored last year provides a case in point. The mere introduction of this legislation resulted in the release of a number of political prisoners in China.[169]

While the Soviet Union seems to provide a counter-example to the view that disapproval resolutions do not represent a viable policy option, a brief analysis of the Soviet case proves otherwise. It is true that in the case of the Soviet Union, unlike most other cases, there was widespread support for denying MFN status completely.[170] After all, "[t]he Soviet Union was, and remains the principal target of Jackson-Vanik."[171] Sensitive to the importance of the Soviet case, the Bush administration has moved very carefully and slowly toward its goal of asking Congress to waive freedom-of-emigration restrictions for the Soviet Union. The Administration has imposed Jackson-Vanik expectations on the Soviet Union more strictly than on any other country. For example, it was clear by 1989 that "Gorbachev's administration ha[d] loosened restraints on Soviet Jews and other ethnic and religious minorities. More than 60,000 Jewish émigrés were allowed to leave in 1989, and twice that number may be allowed to leave in 1990."[172] Nonetheless, the Bush administration was not ready to ask for MFN because "such

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[167] *Id.*

[168] 137 CONG. REC. H5317 (daily ed. July 10, 1991) (statement of Rep. Pease).

[169] *Id.*

[170] "During a period of increased emigration in 1978-79, there was a growing consensus within the Carter Administration to grant a one-year waiver of Jackson-Vanik to the Soviet Union. However, Senator Jackson insisted that the high emigration rate did not justify granting MFN status." Lawyers Committee for Human Rights, *supra* note 26, at 9 (citation omitted).

[171] *Id.*

[172] Ronald D. Elving, *Emigration Holdup Snags Soviet Pact*, 48 CONG. Q. WKLY. REP. 1640, 1640 (1990).

practice ha[d] yet to be codified, a condition Bush had set for waiving Jackson-Vanik" for the Soviets.[173]

Although the Soviet Union was held to particularly high standards with respect to Jackson-Vanik, one should not therefore conclude that the legislative vetoes over the President's waiver authority would have operated any differently with the Soviet Union than they did with other NME countries. Congress' power over MFN policy for the Soviet Union has been that the status quo favored those who supported denial or termination of MFN. In the cases of Romania and China, in contrast, terminating MFN would have produced a change in the status quo. One congressional staffer, a strong supporter of the disapproval resolution process, explained the essence of Congress' policy-making power as follows:

> The USSR is very different for a very simple reason. You don't have MFN in place, so Jackson-Vanik becomes a much more powerful tool. Russian families in your district cannot come up here and say that killing MFN will destroy any chance they have of getting their relatives out of there . . . . There's no business lobbyists that can come up here and say things like, "Well, the reason we invested in China in 1982 is that we had just completed a trade agreement, and now you're going to take it away from us?" There's no such constituency for the USSR.[174]

Thus, had the Soviet Union been subject to the legislative vetoes in § 402, it is unlikely that the vetoes would have been any more significant in the interbranch struggle over policy outcomes than they have been in the MFN struggles over other NME countries. In other words, Congress' control over MFN policy toward the Soviet Union was conducted through powers that were unaffected by *Chadha*.

If the legislative veto built into § 402 did not carry any weight in terms of policy outcomes, does this mean that it served no purpose? Obviously not. Both at the time of the hearings exploring *Chadha*'s potential impact on Jackson-Vanik and at the time of particular presidential waivers, Members have made it clear that they consider the statutory requirement for annual presidential reports and the concomitant requirement that Congress be given the opportunity to overturn the President's waiver decisions to be very important. The guaranteed forum

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[173] *Id.*

[174] Interview with House legislative assistant, in Washington, D.C. (Aug. 6, 1991).

for discussion created by these review procedures allows Congress to play a role in the conduct of international economic policy. As one of the general counsels for the U.S. Trade Representative ("USTR") noted, "the key to congressional leverage" over the President under Jackson-Vanik "is the annual cycle."[175] The value of the legislative vetoes of § 402 is that they ensure that Congress can take advantage of this leverage, thereby forcing the President to pay attention to congressional concerns.

Disapproval resolutions play an important role in ensuring that Congress will be able to obtain the President's attention on policy matters relating to Jackson-Vanik because the statute guarantees expedited procedures for disapproval resolutions but not for conditions bills. Since conditions bills are technically independent of the statute, they do not enjoy the benefit of "time limits on committee and floor action and severe restrictions on amendments [that can] ease the way for passage in the House and the filibuster-prone Senate."[176] Thus, only by piggybacking on less popular disapproval resolutions which have the built-in momentum that comes with expedited or fast-track procedures have some conditions bills been able to get as far in the legislative process as they have. One of the general counsels of the USTR explained:

> It might very well be true that the conditions bills have become the name of the game, but the disapproval resolutions are still very important because it's the fast-track that gives Congress leverage. These bills would not necessarily catch anyone's attention unless the statute specifically provided for this period every year when Congress is supposed to think about whether it wants to overturn the President's waiver or not. And some of them wouldn't necessarily move as fast through the committees if the statute didn't guarantee fast-track procedures for the disapproval resolutions. Sure, these conditions bills provide the tools by which Congress and the President play out the policy game. But it's the disapproval resolutions that give Congress a way to get the President's attention.[177]

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[175] Interview with general counsel, Office of U.S. Trade Representative, in Washington, D.C. (Aug. 21, 1991).

[176] John R. Cranford, *MFN: Not Just for Favorite Nations*, 48 CONG. Q. WKLY. REP. 1774, 1774 (1990).

[177] Interview with general counsel, Office of U.S. Trade Representative, in Washington, D.C. (Aug. 21, 1991).

From a Member's point of view, the formal requirement that Congress' policy views under Jackson-Vanik be recognized seems to be a more important objective than the enactment of particular policies. One of the USTR general counsels explained, "Once they have our attention, then they can be made happy if we promise them that we're listening to them. Look at how the China situation got resolved."[178] By "the China situation," this official meant President Bush's 1991 request for a waiver of Jackson-Vanik restrictions. Despite the President's constant and consistent claim that he would veto any conditions bill, no matter how mild, there was great momentum during the 102d Congress to pass such a bill, since the 101st Congress had tried unsuccessfully to impose some form of new conditions on China's access to MFN status. In July 1991, President Bush wrote a detailed letter outlining the various ways in which the Administration planned to push the Chinese government into improving its domestic human rights conditions and controlling its sale of nuclear weapons. As a result, those Senators who were eager to punish China but, at the same time, were unsure about the wisdom of imposing new conditions on the Chinese government finally agreed to support the Administration.[179] Thus, while the disapproval resolutions pursuant to Jackson-Vanik have never played a significant role in affecting policy outcomes, the congressional review procedures of the statute have clearly been essential in formalizing the President's commitment to keeping Congress informally involved in particular policy decisions.

This congressional review under Jackson-Vanik has not undermined the President's control over policy-making, however. In fact, the Executive can be said to have won all interbranch fights over the formal structure of Jackson-Vanik. What every Administration since 1974 has objected to and fought is the expansion of formal, statutory directives regarding MFN policy toward particular countries. Every Administration has argued that the imposition of new restrictions would "open a trade policy Pandora's Box [because there are many] countries with poor human rights records . . . that have MFN status,"[180] and

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[178] *Id.*

[179] *See* Keith Bradsher, *Inquiry Is Delayed by U.S. on China's Import Barriers*, N.Y. TIMES, Aug. 24, 1991, at 40.

[180] Alyson Pytte, *Bush Renews MFN for China, Stirs Angry Hill Reaction*, 48 CONG. Q. WKLY. REP. 1639, 1639 (1990).

that the imposition of new restrictions would undermine the value of Jackson-Vanik for quiet diplomacy. A State Department legal adviser explained:

> Of course the President uses the threat of MFN removal to fight for human rights issues. And of course he does this partly because Congress demands it of him. But the Administration can much more effectively bring pressure to bear on human rights issues when it does it by quiet, behind-the-scenes diplomacy than if it is required [to do so] by statute.[181]

The State Department legal adviser explained further how the existing Jackson-Vanik review requirements play an important role in this "behind-the-scenes diplomacy":

> It is good to have that threat of congressional action in the background when the President is engaged in this kind of quiet diplomacy. Having a threat that the President can blame on Congress strengthens the President's hand. If termination were actually required by legislative directive, though, it would do very little for human rights. MFN is a very blunt instrument. There are many other ways for us to put pressure on countries. But if you use MFN, it kills those other possibilities.[182]

The Executive Branch can be said to have won because it has succeeded, even in the case of post-Tiananmen Square China, in preventing any enactment of new restrictions on its waiver authority.

Two characteristics of the operation of Jackson-Vanik make *Chadha* irrelevant to this Executive Branch victory, however. First, the true value of Jackson-Vanik review procedures has been their capacity to force the Administration to acknowledge specific congressional concerns. Thus, powerful Members who might otherwise have pushed for conditions bills chose not to support such bills when the Administration addressed their concerns directly. Senator Max Baucus (D-Mont.), for example, explained his decision to prevent the imposition of any new conditions on China's MFN as follows:

> This is an issue where we all share common goals—to bring about reform in China while maintaining trade with the world's largest nation . . . .

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[181] Interview with legal adviser, Office of Legal Adviser, U.S. Department of State, in Washington, D.C. (Aug. 8, 1991).

[182] *Id.*

> That is why I and several of my colleagues have put pressure on the administration to take action at stopping abuses by China.
>
> Late last week, President Bush wrote me a lengthy letter. It was not—as some have said—filled with "mostly rhetoric." It was, for the first time in this administration, a comprehensive review of our policy toward China and a plan for future relations.[183]

Baucus' decision to resist imposing new restrictions on the President's authority had little to do with *Chadha* but much to do with his sense that the Administration was being responsive to congressional concerns. At the same time that the main function of Jackson-Vanik review procedures has been to ensure constant and substantive interbranch communication rather than to ensure particular outcomes through statutory directives, the second relevant characteristic of the Jackson-Vanik review procedures is that MFN termination itself has never been a policy option that has carried much support in Congress. These two characteristics of the operation of § 402 legislative vetoes show that while it might make sense to speak of Executive Branch victories under the statute, it makes little sense to attribute these victories to *Chadha*.

Although *Chadha* had little effect on the central interbranch policy struggles under the statute, *Chadha* might have actually enhanced Congress' capacity to make use of Jackson-Vanik review procedures. Though Members never wanted to use the legislative vetoes to overturn the President's waivers, they found the legislative vetoes a valuable way to express anger and frustration. *Chadha* can be said to have made it easier for legislative vetoes to fulfill this function. Because *Chadha* prohibits one- or two-house vetoes from taking any legal effect unless they pass both chambers and are presented to the President, it is now possible for a greater number of Members to vote in favor of disapproval resolutions without fearing that their votes will result in actual revocation of MFN status. Before *Chadha*, a simple majority in one chamber voting in favor of such a resolution would have required the termination of MFN for the country in question. Only after *Chadha* guaranteed that a one-house veto would not result in legal action did a one-house veto pass the House.[184] Thus, while it is true that such a resolution

[183] 137 CONG. REC. S10,668 (daily ed. July 23, 1991) (statement of Sen. Baucus).
[184] H.J. Res. 647, 101st Cong., 2d Sess. (1990).

would have resulted in the termination of MFN for China if it had not been for *Chadha*, it is also true that it succeeded in the House precisely because all Members knew that the resolution would mean nothing, legally, without joint Senate approval. And Senate approval would have been impossible since the House resolution was not passed until the very end of the congressional session so that there was no time for a similar resolution to be approved in the Senate. Thus, supporters of the resolution "concede[d]" that its success in the House "was a more symbolic than substantive act."[185] Such a symbolic act would have been impossible without *Chadha*.

The way in which the Bush administration lobbied members of the House of Representatives in 1991 to prevent them from voting for bills conditioning the President's waiver authority of Jackson-Vanik restrictions for China reflects an understanding of the logic of congressional behavior that provides incentives for Members to vote for bills or resolutions that have little chance of ever being enacted. One staffer who helped support the Administration's position recalled:

> [T]he Administration made it look as if it was worse off than it actually was. That way, fewer Members would think they had Senate cover. If Members thought the Senate was very unlikely to pass a conditions bill, then they'd feel much less inhibited about voting against the Administration. If they thought, as the Administration made it seem, that the bill was really going to pass through the Senate, then they'd be much less likely to vote for the bill.[186]

In the Senate, meanwhile, Senator Slade Gorton (R-Wash.) followed the same logic when he predicted correctly that the 1991 conditions bill would not receive a veto-proof majority: "We know now the bill in its present form will be vetoed by the President. We know too that the veto will be sustained. Many of the Members, I daresay, who vote for the bill will be relieved at that result, and will have the best of both worlds."[187] Thus, because *Chadha* made it more difficult for Members' legislative actions to have legal consequences, it has allowed Members to express their concerns more visibly in those cases where there has been widespread disgust with the human rights violations of a particular country subject to Jackson-Vanik restrictions. To

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[185] Cranford, *House Passes Bills to Punish China*, *supra* note 128, at 3490.
[186] Interview with House legislative aide, in Washington, D.C. (Aug. 16, 1991).
[187] 137 CONG. REC. S10,605 (daily ed. July 23, 1991) (statement of Sen. Gorton).

suggest that congressional review under Jackson-Vanik has been "more symbolic than substantive"[188] is somewhat misleading, however, because it suggests that the need to express and to force the President to acknowledge congressional concerns is meaningless and a waste of time. Congressional review under Jackson-Vanik might very well be irrelevant to the specific controversies that revolve around the ever-present tug of war between the branches. But it is an integral part of the objectives that Members feel a responsibility to pursue, and it is one of the objectives which the legislative vetoes have been essential in allowing Members to fulfill.

Chadha proved to be relatively insignificant in the central interbranch struggles that have taken place under Jackson-Vanik because neither the possibility of making one-house vetoes severable nor the possibility of using joint resolutions instead of legislative vetoes has made it more or less likely that NME countries subject to Jackson-Vanik will receive presidential waivers extending their MFN. While *Chadha* affected other sections of Title IV that had much greater potential than did § 402 to alter the balance of power between the branches over trade policy with NME countries, it ultimately was irrelevant to the balance of power under these sections as well.

2. Sections 404 and 405

Sections 404 and 405, provisions whose tainting by *Chadha* also threatened to undermine Congress' role in policy-making, authorize the President to enter into bilateral commercial agreements with NMEs. However, such an agreement can take effect only if it is "approved by the Congress by the adoption of a concurrent resolution."[189] Sections 404 and 405 were tainted by *Chadha* because concurrent resolutions need not be presented to the President in order to take effect. Since these legislative vetoes, unlike the vetoes of § 402, were structured in an approval rather than a disapproval format, however, their potential severance from the statute carried very serious implications. Disapproval resolutions place the benefit of momentum with the Executive Branch because, if Congress disagrees with a proposed presidential action, it must take the initiative to pass a

[188] Cranford, *House Passes Bills to Punish China*, *supra* note 128, at 3490.
[189] 19 U.S.C. § 2435(c) (1988).

disapproval resolution within the specified time period in order to veto the action in question. Approval resolutions, on the other hand, place the benefit of momentum with Congress. Because no action can be taken without Congress' approval, the President must convince Congress to approve his proposed action within the specified time period. In the case of disapproval resolutions, the benefit of momentum remains with the Executive Branch whether or not the congressional authority to overturn proposed actions is deemed severable. In the case of approval resolutions, on the other hand, the benefit of momentum is switched from Congress to the Executive Branch if the congressional authority to require approval is severed from the statute. Once an approval form of the legislative veto is severed, the Executive Branch need no longer wait for congressional affirmation of its proposed actions.

In 1990 Congress amended the concurrent resolutions of approval required under §§ 404–405 to joint resolutions of approval—a simple change that requires Congress' approval of bilateral trade agreements to be presented to the President for final approval. In explaining why these concurrent resolutions underwent technical amendments making them consistent with *Chadha* even though "the facts of the *Chadha* decision do not include either concurrent (as distinguished from one-house) legislative actions or legislative approvals (as distinguished from disapprovals),"[190] the Committee Report explained:

> If the Executive Branch . . . concluded that the section 405 concurrent resolution procedure was separable from the statutory authority granted the President to enter into such trade agreements, then the President might enter into such an agreement and proclaim MFN for the country concerned without seeking Congressional approval. This could extinguish the role of Congress in approval of such trade agreements.
>
> This result is particularly undesirable in light of the President's decision to negotiate a trade agreement with the Soviet Union pursuant to section 405 by June of 1990.[191]

When the Bush administration began negotiating a bilateral trade agreement with the Soviet Union in 1989, in other words, *Chadha*'s taint of § 405 threatened to have political consequences.

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[190] S. REP. No. 252, 101st Cong., 2d Sess. 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 928, 979.

[191] *Id.*

Congress thus averted this potentially profound change in inter-branch power relations by ensuring that the requirements for congressional approval of new bilateral trade agreements would remain operative. This was accomplished by a simple, technical amendment that essentially preserved the status quo: requiring the President to approve Congress' approval of his own proposal is not very different from simply requiring Congress to do the approving. Amending a concurrent resolution of approval into a joint resolution of approval did not, in other words, make much practical difference. Moreover, in every case in which the President had submitted a trade agreement for congressional approval, approval had always been granted without much controversy.[192]

However, "in the fall of 1989," when the Bush administration "knew that [it] would be negotiating a Soviet trade agreement,"[193] it was not so obvious that *Chadha*'s potentially profound political implications for the statute would be averted. "That is when we started to look at the statute and were forced to think about the *Chadha* problem,"[194] recalled one of the general counsels at the USTR. In the face of the unresolved nature of *Chadha*'s legal effect on the concurrent resolutions of approval, the interagency policy group that was formed to explore the issue saw two options. One member of the White House Counsel's Office who worked on the issue explained:

> We could either tough it out, going forward with our view that the concurrent resolutions were severable, not submit the agreement for approval and then wait and see if Congress did anything; or we could work with Congress in getting the statute amended to comply with *Chadha* and then proceed as usual in submitting the agreement for congressional approval.[195]

Each of these two options had specific disadvantages that were carefully explored by the policy group:

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[192] Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania, Apr. 2, 1975, 26 U.S.T. 2305; Agreement on Trade Relations Between the United States of America and the Hungarian People's Republic, Mar. 17, 1978, 29 U.S.T. 2711; Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, 31 U.S.T. 4651.

[193] Interview with general counsel, Office of U.S. Trade Representative, in Washington, D.C. (Aug. 23, 1991).

[194] *Id.*

[195] Interview with official, Office of White House Counsel, in Washington, D.C. (July 15, 1991).

> If we proceeded on the assumption that we could implement a bilateral agreement without congressional approval, some private party might take it to court, arguing that the concurrent resolutions were not severable, and that would slow down the process for months. More importantly, Congress would undoubtedly get angry and rescind the authority altogether. The downside to [amending the statute and submitting the agreement for congressional approval] was that Congress might not be able to enact the required amendments to the statute in time. All of us, knowing that Jackson-Vanik is a sacred cow up on the Hill, were afraid that anything to do with Jackson-Vanik and the Soviet Union would be incredibly controversial and that it would take forever to get anything done.[196]

The only course of action for the Administration quickly became self-evident when Members learned of these discussions among Executive Branch legal counsels. Representative Rostenkowski and Senator Lloyd Bentsen (D-Tex.), the chairs of the House Ways and Means Committee and Senate Finance Committee, respectively, "made it very clear that it was not a good idea for us to even think about signing a binding trade agreement with the Soviet Union without submitting it to Congress."[197] A State Department official who participated in the policy group explained:

> It was just not in the cards for us to enforce a USSR trade agreement without Congress, so we gave them time to change the statute. My legal opinion, as well as that of most others with regard to the severability of the trade agreement approval process, was that it *was* severable. Legally, in other words, we could engage in a binding agreement without Congress if we really wanted to. But it was also my opinion, as well as that of most everybody else, that it would be politically stupid to try to behave that way.[198]

The USTR official noted that there was relatively little interbranch controversy over this issue because members of Congress as well as Executive Branch officials were well aware that it would be politically impossible for the President to attempt to complete a bilateral trade agreement with the Soviet Union without congressional approval:

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[196] Interview with general counsel, Office of U.S. Trade Representative, in Washington, D.C. (Aug. 23, 1991).

[197] *Id.*

[198] Interview with legal adviser, Office of Legal Adviser, U.S. Department of State, in Washington, D.C. (Aug. 9, 1991).

> They all knew, and we all figured out pretty quickly, that Congress could have amended the statute to rescind our authority in a second . . . . There was nothing for us to gain from annoying them. So there was no pretending that we were going to create a fight on this one. I think some people on the Hill did get upset when we said, "If you don't fix the statute soon, we might have to go ahead and get the trade agreement done on our own." But it quickly became evident that, under the circumstances, amending Jackson-Vanik would just be a technical issue.[199]

It was precisely because *Chadha* implied such a profound change in practical power relations under these sections, then, that it ultimately had no impact on them. The decision implied that the President could negotiate and conclude a bilateral trade agreement with the Soviet Union without congressional approval because it implied that the concurrent resolution of approval was severable from the statute. Members of the Executive Branch who stood to win from such a practical implementation of the decision's implications were not willing to invest the necessary political capital to transform these implications into political effects, however. They were unwilling to do so because Congress would have retaliated in a way, such as rescinding the President's authority to negotiate bilateral trade agreements altogether, that would have proven counterproductive for the President's desire to enhance his discretion. Thus, even when the narrow procedural concerns of the Supreme Court in *Chadha* had broad political implications for the balance of power between the branches, these implications could not be realized because of the complexity and variety of controls and powers associated with the tug of war between the branches. This complexity made it politically infeasible, irrespective of legal feasibility, for the Executive Branch to fight for the elimination of one of Congress' control mechanisms.

3. Section 407

One other section tainted by *Chadha* was § 407, which provides that "either House has the power to prevent MFN for a NME country, even if the President finds the country in compliance with the Jackson-Vanik amendment."[200] Section 407 al-

[199] Interview with general counsel, Office of U.S. Trade Representative, in Washington, D.C. (Aug. 23, 1991).

[200] S. REP. NO. 252, *supra* note 190, at 52.

lowed Congress to veto the President's determination that a country is in compliance with Jackson-Vanik by "passing a resolution of disapproval within 90 days after the President makes his finding."[201] In keeping with the other technical amendments of 1990, this "defect [was] cured by a provision of the bill providing for the use of a joint resolution."[202] However, these changes had even less impact on executive-legislative relations than the other cures required by *Chadha*. No President has ever claimed that any NME country was in compliance with Jackson-Vanik until after the recent collapse of the communist bloc. In 1990, when President Bush certified that Hungary was in compliance with all Jackson-Vanik requirements,[203] Congress not only accepted the President's determination without question, but it subsequently introduced a bill[204] that would permanently exempt Hungary and Czechoslovakia from Jackson-Vanik restrictions, thereby eliminating the need for annual waivers. Section 407 was rarely the forum for any political action or even proposed political action, let alone a forum for any interbranch power struggles. Thus, the fact that *Chadha* tainted its constitutionality was obviously irrelevant to the interbranch struggles that did take place under Jackson-Vanik.

III. Conclusion

An analysis of the history and development of MFN policy toward NME countries under Title IV of the Trade Act in terms of executive-legislative battles leads one to conclude that both the Executive and the Congress won. The Executive Branch has succeeded in preventing all legislative veto attempts, including vetoes of the sort deemed unconstitutional in *Chadha*, as well as bills that threatened to condition the President's authority. While Congress has lost these battles over legal control, it has succeeded in getting the Executive Branch to make congressional concerns central to the policy-making process. Although every Administration since 1974 has argued that Jackson-Vanik review procedures are relevant only to freedom-of-emigration issues, Congress has essentially succeeded in broad-

[201] *Id.*
[202] *Id.*
[203] *See* H.R. Doc. No. 104, 101st Cong., 1st Sess. 1 (1989).
[204] H.R. 1724, 102d Cong., 1st Sess., 105 Stat. 1233 (1991).

ening the terms of debate. Thus, those who testified for the Administration during the hearings on the annual waivers required by Jackson-Vanik for the controversial cases of both Romania and China spent more time discussing the rights of religious minorities, abuse of political prisoners, and trade problems than emigration statistics. In justifying the President's waiver of Jackson-Vanik restrictions for China in 1990, for example, the State Department claimed that "MFN would advance freedom of emigration and the cause of human rights and reform in China and would protect other vital US interests such as American trade and investment."[205] President Bush explained to Congress, "We want to see China return to the path of reform, show greater respect for human rights, adhere to international norms on weapons sales, and practice fair trade."[206]

After the Ceausescu regime was toppled in 1989, the Bush administration chose to postpone its request for a re-extension of MFN to Romania because of human rights violations that were completely unrelated to freedom of emigration. A staffer of one of the Members who supported the expansion of the scope of Jackson-Vanik provided an example of how the Administration had informally accepted this change in scope:

> Ceausescu was ousted in December 1989 and things were looking good for re-extending MFN to Romania, but then in June 1990, the group in power started killing protesters, so the Administration decided not to ask for MFN then. Ambassador Allan "Thumpy" Green . . . [said,] "I was coming to tell you that we would ask for MFN for Romania, and that you should support the State Department on this, but with the news this morning . . . now is not the time to give Romania MFN." So they didn't ask for it then.[207]

One of the officers at the Romania Desk of the Commerce Department recalled the same event:

> After the Revolution in 1989, if things had moved along nicely, then Romania would have been in a good position to get MFN. But chomping down on protesters in June 1990 really forced MFN for Romania to go on the back burner. Now there's potentially a new problem that might keep Ro-

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[205] OFFICE OF PUBLIC COMMUNICATION, BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, MOST-FAVORED-NATION (MFN) TRADE STATUS FOR CHINA (May 1990) (on file with the *Harvard Journal on Legislation*).

[206] Letter from President George Bush to Senator Robert Dole (July 19, 1991) [hereinafter Letter from President Bush] (on file with the *Harvard Journal on Legislation*).

[207] Interview with House legislative aide, in Washington, D.C. (Aug. 2, 1991).

> mania MFN on the back burner. Many have argued that the elections last May were not really free. I don't know what will happen with that, but there's no question that within the Administration, MFN is tied to political problems much broader than just emigration rights.[208]

Congress can be said to have won, then, because Jackson-Vanik congressional review of the extension of MFN has become an occasion for addressing all kinds of human rights violations by the country in question, irrespective of the specific terms in the statute.

Congress can also be said to have won in that Congress has satisfied its desire for constant, albeit informal, Executive Branch consultation and attention. One of the major congressional complaints that, together with the Tiananmen Square massacre and China's proliferation of nuclear arms, fueled desires to condition China's MFN status in 1990 and 1991 was China's unfair discrimination against American products. A few months after President Bush promised, in his personal letter to a group of concerned Senators, that he would pay attention to this problem,[209] Senator Baucus began to object publicly to the Administration's lack of action.[210] Soon thereafter, "President Bush . . . ordered a wide-ranging investigation into Chinese import barriers that could [have led] to punitive duties on imports from China."[211] Starting this investigation was clearly "[p]art of the price [the Administration] paid for the support of seven Democratic senators from farm states . . . [in] a fierce political battle . . . to win the renewal of China's most-favored-nation trade status."[212]

The agenda of Secretary of State Jim Baker's meeting with Chinese leaders in November 1991 was also directly related to the President's informal concessions to Congress in his letter of July 1991. The main issues Baker intended to address were those that had fueled congressional attempts to condition the President's authority to continue China's MFN status. Baker opened his talks with the Chinese leaders with "a series of specific

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[208] Interview with official, U.S. Department of Commerce and International Trade Administration, in Washington, D.C. (Aug. 5, 1991).

[209] *See* Letter from President Bush, *supra* note 206.

[210] *See Senator Baucus Pleased with Administrations Overdue Decision to Initiate Section 301 Investigation of China's Trade Barriers; Calls for Firm Action on Other Fronts*, MAX BAUCUS REPORTS (Senator Max Baucus), Oct. 10, 1991, at 30.

[211] Keith Bradsher, *Bush Said to Order China Import-Barrier Inquiry*, N.Y. TIMES, Oct. 10, 1991, at A18.

[212] *Id.*

requests that China cease any transfers of nuclear weapons technology to countries like Algeria and Iran and that it release some of the pro-democracy political prisoners."[213] Thus, even though Baker obtained only "limited Chinese gestures to curb missile sales [and] little progress toward easing China's suppression of human rights,"[214] there was "evident reluctance in the Senate to attack the Baker mission because of a sense that he had pressed the Chinese for change in the areas that Congress was most concerned about."[215]

Chadha was related indirectly, if at all, to these wins by Congress and the Executive Branch. Those who have assumed otherwise have not been sensitive to the difference between conditions bills and disapproval resolutions—*Chadha* affected the disapproval resolution procedure, but it was around the conditions bills that the executive-legislative tug of war revolved. They have also failed to note that provisions tainted by *Chadha* could be so critical for congressional control, as in the case of the approval requirements over bilateral trade agreements, that it was politically infeasible for the Administration to take advantage of its legal victory. In addition, little attention has been paid to the fact that many of the provisions directly affected by *Chadha* are dead wood provisions in the sense that no politics ever occurred under them. These conclusions emerge from matching particular policy debates and the political feasibility of particular policy outcomes to the precise provisions affected by *Chadha*.

The question that remains is whether *Chadha* caused conditions bills to emerge as the central procedural mechanism around which interbranch policy debates revolved or whether conditions bills would have become central to the policy process irrespective of *Chadha*. One State Department legal adviser argued that "[t]he reason that you first start getting conditions bills in 1985 is that there was no occasion for using them before that. Conditions bills emerged when Members started to focus on using MFN to combat human rights abuses that really upset

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[213] Thomas L. Friedman, *Baker Asks China to Free Prisoners*, N.Y. TIMES, Nov. 16, 1991, at 3.

[214] Thomas L. Friedman, *Baker's China Trip Fails to Produce Pledge on Rights*, N.Y. TIMES, Nov. 18, 1991, at A1.

[215] Adam Clymer, *China Rebuff Seems Unlikely to Hurt Trade Status*, N.Y. TIMES, Nov. 19, 1991, at A8.

them. And you don't get that until Romania starts to crack down in the early 1980s."[216]

The fact is, however, that *Chadha* arguably left Congress with no other option besides conditions bills for exercising review over the President's waivers. Though some had argued at the time of *Chadha* that Congress would fight the Executive Branch in court if a one-house veto was not accepted as a legitimate form of disapproval, and although some Members continued to introduce disapproval resolutions pursuant to § 402, it was generally accepted that "Jackson-Vanik [did] not contain a constitutionally acceptable process for congressional review of a Presidential recommendation of a waiver" until 1990 when the unconstitutional one-house vetoes and concurrent resolutions were amended to constitutional forms.[217] A Finance Committee aide noted that members of the Finance Committee assumed during this period that "the Jackson-Vanik veto provision was no longer valid."[218]

One could argue, therefore, that by eliminating a viable disapproval resolution procedure, *Chadha* forced Members to use conditions bills when they chose to object to presidential waivers. Thus, it was not until after *Chadha* that a bill threatened to apply Jackson-Vanik restrictions to NME states based not only on restrictions on emigration but also on religious discrimination. It was not until after *Chadha* that Congress proposed a trial period in which the President had to certify that definite progress had been made. Bills independent of the disapproval resolution procedure in § 402 that were meant to affect the respective powers of the Executive and Legislative Branches over MFN extensions had certainly been introduced long before *Chadha*.[219] These bills, however, represented major structural changes in the Jackson-Vanik review procedures. It was not until after *Chadha* that Members began to introduce bills that threatened MFN status in much the same way as disapproval

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[216] Interview with legal adviser, Office of Legal Adviser, U.S. Department of State, in Washington, D.C. (Aug. 9, 1991).

[217] Barale, *supra* note 134, at 12.

[218] *Favored Nation Trade*, *supra* note 110, at 265.

[219] Within two weeks of the enactment of the Trade Act in 1974, a bill was introduced re-establishing only the provisions of the original, waiverless Jackson-Vanik Amendment. H.R. 1265, 94th Cong., 1st Sess. (1975). Bills were also introduced to relax the conditions for issuing the Jackson-Vanik waiver to a NME country. These extended the term of the President's waiver authority from one to five years, for example, and eliminated the assurances requirement. *See* S. 339, 96th Cong., 1st Sess. (1980); H.R. 1835, 96th Cong., 1st Sess. (1980).

resolutions, as a way of addressing specific congressional concerns about individual NME countries.

It is unclear whether the unique political events in Romania and China that happened to take place after *Chadha* were more important than *Chadha* itself in leading Members to adopt conditions bills as their main review mechanism. It is probably fair to say, however, that *Chadha* helped speed up the process by which Members discovered the superior flexibility and popularity of conditions bills as compared with disapproval resolutions. Conditions bills have so far been just as unsuccessful at circumscribing the President's authority as disapproval resolutions have been at overturning the President's decisions. That they operate differently from disapproval resolutions, however, means that Congress has enhanced its ability to express views that it wants the President to consider when he exercises his authority under Jackson-Vanik. In other words, while *Chadha* might not have had any effect on the balance of policy-making power between the branches, it helped to clarify the variety of ways in which Members can use the extensive powers of their institution to achieve their objectives. For those who understand Members' objectives under Jackson-Vanik only in terms of specific policy outcomes, however, *Chadha* represents a decision that had no political impact and the legislative veto represents an institutional reform that didn't matter.

NOTE

CONGRESSIONAL LIMITS ON AGENCY DISCRETION: A CASE STUDY OF THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

ERIK H. CORWIN*

Defining the proper scope of power to be delegated from Congress to administrative agencies has long been the subject of debate. Twelve years of Republican administrations and a Democratic Congress have only increased the tension between the two branches of government. Frustrated with agencies that seem to abuse broad grants of power, Congress has turned to legislating in narrow, specific terms as one approach to limiting agency discretion.

In this Note, Mr. Corwin analyzes the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), an extreme example of Congress using specific statutory mandates to control the Reagan EPA. He argues that detailed mandates such as HSWA can be effective political tools for limiting agency discretion. However, the author argues that statutes like HSWA are not effective as a policy matter because they preclude agencies from implementing the best solutions to regulatory problems.

Whether Congress should delegate broad discretionary power to regulatory agencies or legislate only in narrow, specific terms is a question that has received increasing attention in recent years. Both legal commentators and members of the judiciary have highlighted the problems of broad administrative discretion and have called for revival of the nondelegation doctrine to force Congress to legislate with greater specificity. At the same time, Congress during the 1980s began moving in precisely the direction these commentators suggest. Responding to developments in both the Executive Branch and the courts, Congress has increasingly included an unprecedented level of detail in regulatory statutes.

This Note evaluates the arguments for and against specific statutory mandates through an analysis of a single case study: implementation of the hazardous waste land-disposal provisions enacted as part of the Hazardous and Solid Waste Amendments of 1984 ("HSWA").[1] At the time of its passage, HSWA was

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[1] Pub. L. No. 98-616, 98 Stat. 3221 (1984) (amending the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6991).

widely recognized as an extreme example of Congress using statutory language to limit agency discretion. The Note asks two questions. First, has statutory specificity proven effective as a tool for achieving congressional control over the Environmental Protection Agency ("EPA") in the hazardous-waste area? Second, have the limitations on the EPA's discretion fostered an effective approach to managing the health and environmental risks posed by hazardous wastes?

To briefly foreshadow the conclusions, the HSWA implementation experience indicates that, through a combination of specific statutory provisions and sustained oversight, Congress can induce a recalcitrant agency to comply with legislative objectives. Although full implementation of all the requirements set out in HSWA was probably impossible, the EPA has faithfully implemented the statutory provisions with which Congress seemed most concerned. Nevertheless, Congress' success in controlling the EPA has come at the expense of a reasoned approach to the regulation of hazardous wastes. Implementation of HSWA has dramatically changed hazardous-waste management practices. These changes, however, have been achieved within a rigid statutory framework that has prevented full consideration of the costs and risks associated with different waste-management alternatives.

The Note is divided into five parts. Part I reviews the debate over revival of the nondelegation doctrine and the reasons for the increasing use of statutory specificity by Congress. Part II discusses the historical development of HSWA and summarizes its various provisions regarding land disposal of hazardous wastes. Part III evaluates HSWA both as a tool for controlling the bureaucracy and as an instrument of regulatory policy. Part IV discusses the implications of the HSWA experience for the appropriate scope of agency discretion. Finally, Part V offers a brief summary and concluding remarks.

I. The Context: The Nondelegation Doctrine Debate and the Increasing Use of Statutory Specificity by Congress

A. *The Nondelegation Doctrine Debate*

In recent years, a growing group of commentators has called for a revival of the nondelegation doctrine.[2] Under this doctrine,

[2] *See, e.g.*, John H. Ely, Democracy and Distrust 131–34 (1980); Peter H. Ar-

which has been dormant since the 1930s, courts may strike down broad delegations of authority as violating the constitutional requirement that "[a]ll legislative powers . . . shall be vested in a Congress of the United States . . . ."[3] Perhaps the most prominent examples of renewed interest in the nondelegation doctrine are Justice Rehnquist's opinions in *Industrial Union Department v. American Petroleum Institute*[4] and *American Textile Manufacturers Institute, Inc. v. Donovan*.[5] In these cases, the Supreme Court considered a statutory requirement that the Occupational Safety and Health Administration set standards for exposure to toxic chemicals in the workplace "which most adequately assure[], to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity . . . ."[6] According to Rehnquist, the phrase "to the extent feasible" was sufficiently indeterminate to render the legislative mandate "largely, if not entirely, precatory."[7] Arguing that the Court "ought not to shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority,"[8] Rehnquist urged that the statute be struck down as a violation of "the doctrine against uncanalized delegations of legislative power."[9]

According to advocates of a return to the nondelegation doctrine, the ability of Congress to provide broad grants of discretionary authority, or merely to set vague, unattainable goals,[10]

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anson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345 (1987); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295 (1987); David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740 (1983) [hereinafter Schoenbrod *Goals Statutes or Rules Statutes*]; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987).

[3] U.S. CONST. art. I, § 1. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[4] 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

[5] 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting). Chief Justice Burger joined Justice Rehnquist's dissent.

[6] 29 U.S.C. § 655(b)(5) (1988).

[7] *Industrial Union*, 448 U.S. at 682 (Rehnquist, J., concurring); *see also American Textile Mfrs.*, 452 U.S. at 545 (Rehnquist, J., dissenting) (commenting that "the 'feasibility standard' is no standard at all").

[8] *Industrial Union*, 448 U.S. at 686.

[9] *Id.* at 675.

[10] Schoenbrod persuasively argues that "action-forcing" statutes that create an absolute duty to achieve abstract goals are essentially equivalent to broad delegation statutes. In discussing the failures of the Clean Air Act, Schoenbrod offers the following analysis:

> This Article . . . emphasizes the Act's similarity in structure to broad delegation statutes and perceives its absolutism and complication as symptoms of this structure. The claim that the Act differs from broad delegation statutes in

allows legislators to claim credit for solving national problems while avoiding hard policy choices. From the standpoint of democratic theory, this pattern is said to undermine accountability. Decisions are made not by elected representatives, but rather by "faceless bureaucrats" who "are neither elected nor reelected, and are controlled only spasmodically by officials who are."[11] Moreover, the proclivity of legislators to delegate authority rather than to make policy choices renders voters unable to judge their representatives effectively, thereby depriving elections of their meaning as instruments of popular control.[12]

Broad delegations are also said to have adverse consequences when viewed from a policy standpoint. Given a broad grant of authority and insulation from political control, agencies are likely to be "captured" by prominent groups in their environment. For many, this was the lesson of experience with the New Deal agencies, which were often perceived to have used their broad authority to serve the interests of a narrow clientele.[13] Alternatively, broad grants of discretion can lead to a policy gridlock by leaving "key value choices to low visibility decisionmakers fearful of making controversial choices."[14] The likelihood of such gridlock is particularly great in areas characterized by high levels of conflict or scientific uncertainty.

> having made hard choices . . . is undeserved . . . . [C]umbersome procedures and absolutist goals can still beg the question of what will be done in substance. Commentators from a broad range of perspectives are content to maintain the basic structure in which Congress specifies clean air goals and delegates power to promulgate controls to reach those goals; they would, however, add elements of flexibility—the hallmark of the broad delegation model.

Schoenbrod, *Goals Statutes or Rules Statutes*, *supra* note 2, at 751.

[11] ELY, *supra* note 2, at 131; *see also Industrial Union*, 448 U.S. at 685 (Rehnquist, J., concurring) (arguing that the nondelegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"). Note, however, that the absence of sustained oversight does not necessarily indicate a lack of congressional control over agency decisions. *See* Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

[12] ELY, *supra* note 2, at 132 (arguing that "by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic").

[13] *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 7 (1981); Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1187 (1973).

[14] Schoenbrod, *Goals Statutes or Rules Statutes*, *supra* note 2, at 753–54; *see also* Jaffe, *supra* note 13, at 1190 (arguing that "[a]n agency . . . may have very little political leverage and be incapable of resolving power conflicts").

Advocates of a return to the nondelegation doctrine have not gone unchallenged.[15] Aside from the question of whether it is possible to develop a workable judicial standard to police congressional delegations,[16] significant problems are likely to arise in a regime in which Congress dictates both the means and the ends of regulatory policy through narrow statutory enactments. In responding to the charge that delegation undermines accountability, Professor Mashaw has argued that broad delegations may serve "as a device for facilitating responsiveness to voter preferences expressed in presidential elections."[17] In his view, "if congressional statutes were truly specific with respect to the actions that administrators were to take[,] . . . presidents and administrations could respond to voter preferences only if they were able to convince the legislature to make specific changes in the existing set of specific statutes."[18] By contrast, altering regulatory policy to conform to changes in voter sentiment is less cumbersome with broad delegations.[19]

Another problem with forcing Congress to legislate only in narrow terms is that it may be impossible to specify in advance the appropriate course of action.[20] This is particularly true "when a new field of regulation is undertaken,"[21] and in policy areas characterized by rapidly changing technologies or scientific uncertainty. Indeed, "Congress's creation of statutory rules to govern future conduct, when it lacks the ability to foresee the uncertain future, may be more irresponsible than delegating broad authority to make rules."[22] By contrast, an administrative agency can "develop policy gradually over time" as new infor-

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[15] *See, e.g.*, Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987).

[16] *See* Stewart, *supra* note 15, at 325 (arguing that "the difficulties in devising a satisfactory juridical answer" to the question of "[h]ow much delegation is too much" are "virtually insurmountable"); Pierce, *supra* note 15, at 393–403 (reviewing and critiquing various judicial tests that have been proposed); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 (1975) [hereinafter Stewart, *Reformation of American Administrative Law*].

[17] Mashaw, *supra* note 15, at 95–96.

[18] *Id.* at 96.

[19] *Id. But see* Schoenbrod, *Goals Statutes or Rules Statutes*, *supra* note 2, at 813 (noting that administratively determined standards can take just as long to change as legislatively determined standards).

[20] *See* Stewart, *Reformation of American Administrative Law*, *supra* note 16, at 1695.

[21] *Id.*

[22] Pierce, *supra* note 15, at 405.

mation is acquired and adjust standards to meet changing circumstances.[23]

Finally, there are reasons to question whether Congress as an institution is well-suited to design complex regulatory policies.[24] First, Congress is unlikely to have the same degree of information and expertise as the regulatory agencies that normally establish regulatory standards.[25] Although the force of this objection has diminished somewhat as Congress has accumulated an expanding array of staff resources, it retains some validity. Second, and more importantly, Congress is an "overtly political" institution that makes policy through a process of coalition formation involving disparate regional, economic, and ideological interests.[26] Policies that emerge from this process are more likely to reflect self-interested legislative deals than coherent approaches to regulatory problems.[27] Third, Congress is essentially "reactive" in that a salient event or crisis is often necessary to move an issue to the top of the legislative agenda.[28] To the extent that risk-regulation issues are considered in a crisis atmosphere, legislative solutions are likely to be based on exaggerated assessments of the relevant risks and to call for costly policies that yield only minimal benefits. Fourth, given the difficulty of obtaining new legislation, specific statutory enactments are likely to prove inflexible over time.[29] For example, the Delaney Clause[30] of the Federal Food, Drug, and Cosmetic Act, has persisted for more than three decades, despite significant technological advances that have rendered it problematic as a means for regulating the risks of carcinogenic food additives.[31]

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[23] *Id.*; *see also* James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351, 379–80 (1986) (noting that agencies may "modify . . . rules in response to changes in technology and problems encountered in implementation").

[24] *See* Stewart, *Reformation of American Administrative Law*, *supra* note 16, at 1695.

[25] *See* Florio, *supra* note 23, at 379.

[26] *Id.*; *see also* Stewart, *Reformation of American Administrative Law*, *supra* note 16, at 1695.

[27] *See, e.g.*, ACKERMAN & HASSLER, *supra* note 13, at 36–38 (describing the formation of a coalition between eastern high-sulfur coal interests and environmentalists to support restrictions on low-sulfur western coal in the Clean Air Act).

[28] Florio, *supra* note 23, at 380; *see also* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 99–105 (1984).

[29] *See* Florio, *supra* note 23, at 379 (noting that "detailed statutes lack the flexibility provided by agency rules"); Mashaw, *supra* note 15, at 96 (noting the high transaction costs of obtaining new legislation).

[30] 21 U.S.C. §§ 348(c)(3)(A), 376(b)(5)(B) (1988).

[31] *See* Richard A. Merrill, *FDA's Implementation of the Delaney Clause: Repudiation*

B. *The Rise of Specificity in Regulatory Statutes*

At the same time the debate over the nondelegation doctrine has intensified, Congress has increasingly used narrow statutory enactments to limit the discretion of regulatory agencies.[32] Although this trend began in the 1970s,[33] the use of detailed statutory mandates accelerated in the 1980s[34] and shows no sign of abating in the 1990s.[35] Motivations for this growing congressional "micromanagement"[36] can be traced to institutional strains engendered by divided party control over the Presidency and Congress, increasing presidential assertiveness over the regulatory bureaucracy, and changing judicial approaches to separation of powers and review of agency action.

During the 1980s and into the 1990s, the disparate regulatory policy goals of a Democratic Congress and Republican presidential administrations have prompted increased statutory detail. For the most part, the Democratic majority in Congress has continued to emphasize the environmental, worker, and consumer protection goals that prevailed during the late 1960s and 1970s. By contrast, Republican presidents have placed relatively greater emphasis on the costs that regulation imposes on

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of Congressional Choice or Reasoned Adaptation to Scientific Progress?, 5 YALE J. ON REG. 1, 88 (1988). The Delaney Clause provides that food additives "shall not be deemed to be safe" by the Food and Drug Administration if they are "found to induce cancer when ingested by man or animal." 21 U.S.C. § 348(c)(3)(A) (1988). As Merrill illustrates, since the Clause was passed into law in 1958 and extended to cover color additives in 1960, improvements in analytic chemistry and toxicology have vastly increased both the number of additives subject to regulation and the "ability to identify substances capable of producing tumors." Merrill, *supra*, at 2, 12–21.

[32] *See generally* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819.

[33] *See* ACKERMAN & HASSLER, *supra* note 13, *passim* (discussing the statutory specificity embodied in the Clean Air Act and its 1977 Amendments); Allen Schick, *Politics through Law: Congressional Limitations on Executive Discretion*, *in* BOTH ENDS OF THE AVENUE: THE PRESIDENCY, THE EXECUTIVE BRANCH, AND CONGRESS IN THE 1980s 154, 166–70 (Anthony King ed., 1983) (arguing that institutional distrust of the Executive Branch after Vietnam and Watergate, along with a growing perception that regulatory policy has "costs, not just benefits," produced a "new congressional assertiveness" in the 1970s); *see, e.g.*, Toxic Substances Control Act of 1976, Pub. L. No. 94-469, § 6(e), 90 Stat. 2003, 2025 (codified at 15 U.S.C. § 2605(e) (1988)) (providing detailed provisions for regulating the manufacture and use of polychlorinated biphenyls (PCBs)).

[34] *See* Shapiro & Glicksman, *supra* note 32, at 820.

[35] *See, e.g.*, Oil Pollution Act of 1990, Pub. L. No. 101-380, §§ 4101–4118, 104 Stat. 484 (codified in scattered sections of 26, 33, 43 and 46 U.S.C.) (establishing detailed standards for the licensing, operation, and design of oil tankers, including a requirement of double hulls and maximum working hours for seamen).

[36] The term is taken from JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 241 (1989).

private industry. The Reagan administration, for example, was elected on a platform of "getting the government off people's backs" and sought to reduce significantly the federal government's regulatory role.[37]

The tensions that are naturally to be expected from partisan divisions between the President and Congress were exacerbated during the 1980s by increasing executive assertiveness over regulatory policy. During the Reagan administration, a number of steps were taken to centralize control over regulatory administration. For example, the Administration exercised an unprecedented level of control over political appointments to insure ideological consistency not only at the cabinet level, but also at the sub-cabinet and lower levels.[38] The Administration also sought to promote centralized oversight of administrative rulemaking in the Office of Management and Budget ("OMB") by promulgating Executive Orders 12,291[39] and 12,498.[40] Under Executive Order 12,291, all proposed and final rules are subject to pre-promulgation OMB review.[41] In addition, "to the extent permitted by law," agencies may issue rules only when the estimated benefits exceed the costs, and all rules must represent the lowest-cost alternative for achieving the desired regulatory objectives.[42] To ensure compliance with these requirements, cost-benefit Regulatory Impact Analyses ("RIAs") must be prepared for all major rules.[43] Executive Order 12,498 extends control even further by requiring that OMB receive notification of and approve all planned agency rulemaking and information-gathering activities.[44]

From the perspective of critics and many Democratic members of Congress, presidential hostility toward existing regula-

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[37] *See* Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062 (1986) (arguing that "the aim of [the Reagan] Administration is to cut back significantly, if not actually to destroy the regulatory system established by Congress"); *see also id.* at 1070.

[38] *See* Peter M. Benda & Charles H. Levine, *Reagan and the Bureaucracy: The Bequest, the Promise, and the Legacy*, *in* THE REAGAN LEGACY: PROMISE AND PERFORMANCE 102, 107–08 (Charles O. Jones ed., 1988).

[39] Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988).

[40] Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988).

[41] 3 C.F.R. 127, 128–29 (1981).

[42] *Id.* at 128.

[43] Major rules are rules having an annual cost to the economy of $100 million or more, rules likely to result in a significant increase in costs and prices, and rules likely to have significant adverse effects on competition, employment, investment, productivity, innovation, or international trade. *Id.* at 127–30.

[44] 3 C.F.R. 323 (1985).

tory objectives and increased presidential control over administrative agencies have produced at least two deleterious effects. First, the process of issuing regulations to implement statutory requirements has increasingly been characterized by pervasive delay.[45] Second, when regulations are ultimately issued, they have often been perceived as designed to "distort or even thwart the intent of Congress."[46]

In order to counteract these effects and reassert control, Congress has increasingly turned to narrowly drawn statutory mandates. Legislation is not, of course, the only instrument available to Congress for influencing agency action. Nevertheless, other, less formal tools for ensuring congressional control, such as curtailing agency budgets or imposing additional procedures to govern agency behavior, are unlikely to be useful for confronting an Executive Branch bent on *not* regulating. In particular, these alternatives confer only asymmetric power: they are useful for blocking undesirable agency action, but they are relatively ineffective for stimulating action from an agency with little or no desire to undertake new regulatory initiatives.[47] For example, cutting agency budgets as a penalty only serves to reduce the capacity for agency action and thus is ill-suited for coaxing agencies into regulating more aggressively.[48] Similarly, imposing additional procedures to prevent deviations from intended policies[49] makes agency action more cumbersome,[50] thereby exacerbating the delay Congress seeks to avoid.

In contrast to these informal instruments of congressional control, statutory specificity has distinct advantages for eliciting action from a recalcitrant Executive Branch. In particular, spe-

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[45] *See* Morrison, *supra* note 37, at 1064–65 (arguing that review under Executive Orders 12,291 and 12,498 has "imposed a significant price on the public resulting from the delay it causes in adoption of needed protections").

[46] Robert Pear, *U.S. Laws Delayed by Complex Rules and Partisanship*, N.Y. TIMES, Mar. 31, 1991, at A1, A18.

[47] *Cf.* Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989). The authors present a game-theory model of policy execution involving a chief executive, a legislature, and bureaucratic agents. While the authors do not directly make this asymmetric power argument, their focus on legislative control through "veto power" and their brief discussion of direct legislation is suggestive.

[48] *See* Florio, *supra* note 23, at 377 & n.115 (noting that "[d]uring the Reagan era . . . when agency heads have often sought to contract or even abolish their own agencies, the congressional influence derived from the power of the purse has been greatly diminished").

[49] *See* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

[50] *See id.* at 443.

cific statutory mandates create definite obligations that are readily enforceable by the courts.[51] Moreover, specific provisions in narrowly drawn statutes can serve as benchmarks against which agency performance can be measured, thereby facilitating congressional oversight. Thus, even when identifying optimal policies in advance is difficult, congressional majorities may prefer specific legislation with uncertain effects to the prospect of little or no action from the Executive Branch under a broad statutory mandate.[52]

The incentives for Congress to use specific statutory language have also been increased by recent developments in the courts. First, recent separation-of-powers decisions by the Supreme Court have limited the ability of Congress to influence regulatory policy by means other than direct legislation.[53] Most prominently, in *Immigration and Naturalization Service v. Chadha*,[54] the Court invalidated the legislative veto as a violation of the constitutional requirement that all laws be presented to the President for approval.[55] Other decisions have established that Congress may not appoint or remove officers charged with execution of the laws.[56]

Second, a number of recent administrative law decisions have "communicated the message that broad congressional delegations cede policymaking power to the executive."[57] For example, in *Chevron, U.S.A. v. Natural Resources Defense Council*,[58] the Supreme Court mandated judicial deference to "reasonable" agency interpretations of statutory terms in cases in which Congress had "not directly addressed the precise ques-

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[51] *See* Shapiro & Glicksman, *supra* note 32, at 838.

[52] This process could be modeled explicitly as a decision under risk. *Cf.* Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 49 (1986) (providing a model of legislator decision-making in which "a perception of increasing bias in the administrative process" reduces Congress' willingness to choose administrative over judicial enforcement of regulatory statutes).

[53] *See* Pierce, *supra* note 15, at 407, 411.

[54] 462 U.S. 919 (1983).

[55] U.S. CONST. art I, § 7, cl. 2.

[56] *See* Bowsher v. Synar, 478 U.S. 714 (1986) (holding that Congress may not have power of removal over an official exercising executive powers); Buckley v. Valeo, 424 U.S. 1 (1976) (holding that Congress could not allocate to itself the power to appoint members of the Federal Election Commission). *See generally* Pierce, *supra* note 15, at 407 n.100.

[57] Pierce, *supra* note 15, at 411; *see also* Shapiro & Glicksman, *supra* note 32, at 845–63 (noting the growth of "restraint-oriented" review emphasizing the values of "agency flexibility and executive autonomy").

[58] 467 U.S. 837 (1984).

tion at issue."[59] Similarly, the Court has limited the ability of groups to challenge agency actions both by adopting more restrictive standing requirements and by broadening the exclusions from judicial review under the Administrative Procedure Act.[60] These and other actions[61] have promoted a level of executive flexibility in the implementation of broad statutory provisions that Congress may not be willing to tolerate, particularly in an era of divided government.

Finally, the Supreme Court has demonstrated increasing reluctance to rely upon legislative history as a tool of statutory interpretation.[62] This trend has also been evident among certain judges on the Court of Appeals for the District of Columbia Circuit,[63] the court with primary responsibility for reviewing agency rulemaking. To the extent that this trend continues, it limits the opportunities for members of Congress to shape regulatory policy informally through floor speeches or committee reports.[64] Such limitations on the ability of Congress to influence regulatory policy informally increase the incentives to employ the formal approach of detailed legislation.

II. HSWA: Background and Land-Disposal Provisions

The 1984 HSWA amendments, which reauthorized the Resource Conservation and Recovery Act ("RCRA") through 1988, provide an "extreme"[65] example of Congress legislating in detail to circumscribe the discretion of a regulatory agency. By the EPA's own admission, "HSWA modified EPA's role as an ad-

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[59] *Id.* at 843.

[60] *See* Shapiro & Glicksman, *supra* note 32, at 852–56.

[61] *See generally id.* at 845–63.

[62] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 627 (1990) (demonstrating that the Supreme Court "has become somewhat more reluctant to use legislative history"); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 298 (1990) (noting the growing number of cases in which the Supreme Court interpreted statutes "without any recourse at all to legislative history").

[63] *See* Eskridge, *supra* note 62, at 647 & nn.95–97; Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 Geo. Wash. L. Rev. 718, 724–25 (1987).

[64] For an example of how legislative history may be consciously used to influence the implementation of regulatory statutes, see Ackerman & Hassler, *supra* note 13, at 48–54. *See also* R. Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act 375–78 (1983).

[65] 3 William H. Rodgers, Jr., Environmental Law: Pesticides and Toxic Substances § 7.1, at 510 (1988).

ministrative agency."[66] Rather than relying on the EPA to use its expertise to design and to implement a regulatory program, "Congress itself . . . assume[d] the role of regulator, making some of the detailed technical and administrative determinations typically left to the implementing agency."[67] The purpose of this Part is to review the history of HSWA, and then to describe in some detail the framework it established for regulating land disposal of hazardous waste.

A. *Background of HSWA*

Congress' decision to incorporate a high level of specificity in HSWA is attributable to four factors: (1) general frustration with the slow progress of RCRA implementation, (2) profound distrust of the EPA during the early years of the Reagan administration, (3) a high level of public concern regarding hazardous waste, and (4) new information that highlighted the risks of existing practices.[68]

The Resource Conservation and Recovery Act of 1976[69] was initially enacted to establish a "cradle to grave" system for the management of hazardous waste. Under Subtitle C of RCRA, the EPA was to identify and list hazardous wastes;[70] develop a recordkeeping, tracking, and labeling system;[71] establish standards for the hazardous-waste generators,[72] transporters,[73] and

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[66] U.S. ENVIRONMENTAL PROTECTION AGENCY, THE NATION'S HAZARDOUS WASTE MANAGEMENT PROGRAM AT A CROSSROADS: THE RCRA IMPLEMENTATION STUDY (1990) [hereinafter THE NATION'S HAZARDOUS WASTE PROGRAM].

[67] Florio, *supra* note 23, at 351; *see also* Walter E. Mugdan & Bruce R. Adler, *The 1984 RCRA Amendments: Congress as a Regulatory Agency*, 10 COLUM. J. ENVTL. L. 215, 216 (1985) (noting that "[i]n the breadth of their coverage, and their extraordinary detail, [the HSWA] revisions read in many places more like a package of new regulations issued by an executive agency than a piece of legislation"); William L. Rosbe & Robert L. Gulley, *The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way America Manages Its Hazardous Waste*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10458, 10467 (Dec. 1984) (commenting that "the Amendments have the specificity and detail of regulations and confer only limited discretion on the EPA for implementing those regulations").

[68] For more extensive summaries of HSWA's legislative and political history, see RICHARD C. FORTUNA & DAVID J. LENNETT, HAZARDOUS WASTE REGULATION: THE NEW ERA 7–15 (1987) and Florio, *supra* note 23, at 358–63.

[69] Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901–6987 (1988)).

[70] 42 U.S.C. § 6921 (1988).

[71] *Id.* §§ 6922–6924.

[72] *Id.* § 6922.

[73] *Id.* § 6923.

those operating treatment, storage, and disposal facilities ("TSDFs");[74] institute a permitting program for TSDFs to assure compliance with regulatory standards;[75] and authorize states to implement and enforce their own programs in lieu of the EPA regulations.[76] The EPA was granted broad discretion to accomplish these goals. For example, in setting standards for generators, transporters, and TSDFs, the only substantive requirement was that these standards be designed "to protect human health and the environment."[77]

Nevertheless, progress in implementing the RCRA program was painstakingly slow. Despite deadlines requiring the EPA to issue regulations to implement Subtitle C programs within eighteen months of enactment,[78] the first meaningful regulations did not emerge until early 1980, and then only under court order.[79] This delay resulted from low levels of program funding during the Carter administration, along with a high degree of uncertainty regarding the risks and management of hazardous waste.[80]

While the Carter administration approach to RCRA produced frustration and delay, events during the early years of the Reagan administration truly laid the groundwork for the dramatic changes that occurred in 1984. From the outset, it appeared that "the [Reagan] Administration's philosophy was . . . fundamentally at odds with the statute."[81] The Administration began in late 1981 and 1982 by rescinding or deferring a number of the regulatory requirements that had been established to implement the RCRA program.[82] While courts subsequently overturned the most prominent of these deregulatory efforts,[83] these actions

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[74] *Id.* § 6924.
[75] *Id.* § 6925.
[76] *Id.* § 6926.
[77] *Id.* §§ 6922–6924; *see also* OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGIES AND MANAGEMENT STRATEGIES FOR HAZARDOUS WASTE CONTROL 269 (1983) [hereinafter TECHNOLOGIES AND MANAGEMENT STRATEGIES] (describing RCRA as "one of the simplest environmental laws enacted" during the 1970s); FORTUNA & LENNETT, *supra* note 68, at 10 (noting that RCRA "provid[ed] EPA with wide latitude in designing the particulars of the regulatory program").
[78] 42 U.S.C. §§ 6922–6924 (1988).
[79] FORTUNA & LENNETT, *supra* note 68, at 11.
[80] TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 270; FORTUNA & LENNETT, *supra* note 68, at 10.
[81] Florio, *supra* note 23, at 359.
[82] *See* FORTUNA & LENNETT, *supra* note 68, at 12.
[83] *See* Environmental Defense Fund v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983); FORTUNA & LENNETT, *supra* note 68, at 13.

aroused suspicion and further delayed implementation of the program.

Having failed in its attempt at deregulation, the Reagan EPA turned to an approach widely viewed as characterized by foot-dragging and subversion. For example, court action was once again required to induce the EPA to issue the final permit standards for land-disposal facilities, perhaps the most important set of regulations to be promulgated under RCRA.[84] When these regulations were issued, they were widely regarded as deficient and contained significant loopholes.[85] Moreover, following promulgation of the regulations, the EPA was extremely slow in moving forward with the permitting process;[86] in the meantime, facilities operating under "interim status" remained essentially unregulated. To add to the difficulties, the "EPA's enforcement program was anemic."[87] As a result of these actions, the goal of a complete, workable RCRA program was unlikely to be achieved in the near future. Indeed, in 1983, the EPA estimated that "full implementation of RCRA through issuance of detailed technical standards, permitting of all existing facilities, and final approval of state programs likely will take an additional five to seven years."[88]

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[84] *See* Illinois v. Gorusch, 530 F. Supp. 340 (D.D.C. 1981); FORTUNA & LENNETT, *supra* note 68, at 13.

[85] For example, the Office of Technology Assessment criticized the performance standards for being "very general" and placing "a very significant burden on the permit writer to determine whether a particular facility provides adequate protection of human health and the environment." TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 371–72. Moreover, the regulations allowed "waivers and exemptions from certain performance standards . . . if there is a lower potential for exposure to hazardous wastes or their constituents," but did not require "more stringent permit conditions . . . for management of more hazardous materials or for those situations with potentially high risk . . . ." *Id.* Another prominent loophole in the RCRA regulations was the exemption of small quantity generator wastes from the regulatory scheme. *See* H.R. REP. NO. 198, 98th Cong., 2d Sess. 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5578. *See generally* Dennis E. Eckart, *Introduction to* CHRISTOPHER HARRIS ET AL., HAZARDOUS WASTE: CONFRONTING THE CHALLENGE xvi (1987) (listing "the litany of loopholes" in the RCRA regulations as of 1983).

[86] *See* Florio, *supra* note 23, at 360 n.47 (noting that by mid-1983, "only one landfill had been issued a final permit and only 10 final permit decisions were planned for such facilities in fiscal year 1984").

[87] FORTUNA & LENNETT, *supra* note 68, at 13; *see also* Joel A. Mintz, *Agencies, Congress and Regulatory Enforcement: A Review of EPA's Hazardous Waste Enforcement Effort, 1970–1987*, 18 ENVTL. L. 683, 715–34, 749 (1988) (describing the decline in EPA enforcement actions and the organizational disarray of the EPA's enforcement staff during the early years of the Reagan administration).

[88] TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 270.

The Reagan administration's credibility on hazardous-waste issues was also undermined by the EPA's mismanagement of the Superfund[89] program. Charges against the EPA included the misspending of Superfund resources, "sweetheart" deals with Superfund defendants, and the targeting of Superfund cleanups to promote political goals.[90] These charges led to an institutional battle between Congress and the EPA that further decreased Congress' willingness to accept a high degree of executive discretion.[91]

At the same time institutional distrust was growing, information emerged in the early 1980s that increased concerns about the risks of hazardous waste. First, new volume estimates indicated that the scope of the hazardous-waste problem was far greater than originally believed. At the time RCRA was first enacted in 1976, the amount of hazardous waste generated annually in the United States was estimated to be between 27.5 and 41.25 million metric tons.[92] By the early 1980s, however, estimates had risen to more than 250 million metric tons.[93]

Second, studies showed that land disposal, the most inexpensive and widely used[94] approach to hazardous-waste management, has severe limitations as a means of controlling the risks of hazardous wastes.[95] For example, one study of four state-of-the-art landfills in New Jersey found that leakage through landfill liners occurred within a relatively short period of time after construction.[96] In another study, the Office of Technology As-

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[89] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 26 U.S.C. §§ 4611–4612, 4661–4662 (1988), 42 U.S.C. §§ 6911, 9601–9657 (1988)).

[90] *See Burford Resigns From EPA Post Under Fire*, 1983 CONG. Q. ALMANAC 332.

[91] *Id.* at 334–35 (noting that "one apparent legislative effect of the charges against EPA was that the authors of the new hazardous waste legislation [HSWA] spelled out requirements in extensive detail"). *See generally* Mintz, *supra* note 87, at 734–43 (discussing the congressional investigations of the EPA's RCRA and Superfund enforcement programs).

[92] 3 RODGERS, *supra* note 65, § 7.2(A)(1), at 519.

[93] TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 3 (finding that "[a]bout 255 million to 275 million metric tons of hazardous waste under Federal and State regulation are generated annually"); 3 RODGERS, *supra* note 65, § 7.2(A)(1), at 519 (reporting that the estimate of hazardous waste generated annually in the early 1980s was 260 million metric tons).

[94] The Office of Technology Assessment estimated that land disposal was used for as much as 80% of regulated hazardous waste. TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 3.

[95] *See generally* FORTUNA & LENNETT, *supra* note 68, at 199–202.

[96] *Resource Conservation and Recovery Act Reauthorization: Hearings before the Subcommitteee on Commerce, Transportation, and Tourism of the House Committee*

sessment concluded that "complete prevention of migration even during the operating life [of a landfill] is probably unattainable."[97] The EPA's seeming indifference to this information and its insistence that land disposal remained the most desirable form of hazardous-waste management only heightened the tension between Congress and the EPA.[98]

Third, experience with the Superfund program indicated that cleanups of improperly designed and improperly managed hazardous-waste sites could easily cost millions of dollars.[99] Because half-hearted implementation of RCRA would lead to creation of new Superfund sites, the costs of continued foot-dragging by the EPA were seen to rise.[100]

A final factor underlying the passage of HSWA was increasing public concern about hazardous-waste risks. A number of highly salient incidents, most prominently the evacuations of Love Canal and Times Beach, Missouri, fueled public fear regarding hazardous wastes.[101] As a result of these incidents, public perceptions of risks associated with existing hazardous-waste management practices, particularly land disposal, came to exceed the actual risks,[102] and produced significant political pressure on members of Congress.[103]

Despite the development of these various forces for change, the reauthorization of RCRA, which began in 1982, took almost two years. By the time of its passage, however, HSWA had broad bipartisan support, although the high level of statutory specificity was not without its critics.[104] Significantly, President

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on Energy and Commerce, 97th Cong., 2d Sess. 68 (1982) (testimony of Peter Montague, Ph.D., Lawrenceville, N.J.); *see also* Florio, *supra* note 23, at 361 n.54.

[97] TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 184; *see also* Florio, *supra* note 23, at 361–62 n.54.

[98] *See* FORTUNA & LENNETT, *supra* note 68, at 201–02; Florio, *supra* note 23, at 361.

[99] *See* TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 5 (noting that "cleaning up a site from which there are hazardous releases, and compensating victims, might cost *10 to 100 times* the additional costs incurred today to prevent releases of hazardous materials").

[100] *See* HARRIS ET AL., *supra* note 85, at 9.

[101] *See id.* at 15–16.

[102] *See* 3 RODGERS, *supra* note 65, § 7.2(A)(1), at 520 (noting that "[m]edia disclosures . . . may have contributed to divergencies between public, legal, and expert assessments of [hazardous-waste] risks"); Frederick W. Allen, *The Situation: What the Public Believes, How the Experts See It*, EPA J., Nov./Dec. 1987, at 9.

[103] *See* HARRIS ET AL., *supra* note 85, at 16.

[104] *See, e.g.*, H.R. REP. NO. 198, 98th Cong., 2d Sess. 116 (1984) (minority views), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5633 (commenting that "[i]f th[e] [RCRA reauthorization] bill has a general weakness, it is that it is close to being a regulatory rather than a legislative document"); 130 CONG. REC. S13812 (daily ed. Oct. 5, 1984) (statement

Reagan waited until just after the 1984 election to sign the bill.

B. *The Statutory Framework and the Land-Disposal Provisions*

Reflecting Congress' unwillingness to leave the future direction of the program to the EPA, HSWA incorporated a variety of statutory techniques for limiting the EPA's discretion. Following the example of previous environmental legislation, HSWA included a dizzying array of deadlines, seventy-six in all, for promulgating regulations, issuing reports, and permitting facilities. Because experience indicated that simple deadlines could often be stretched and even ignored, Congress also included a series of restrictive default standards, or "hammers," that would take effect if the EPA failed to issue certain regulations by the assigned dates. The drafters designed these hammer provisions "to foreclose the administrative option of doing nothing."[105] These provisions were also seen as having the benefit of inducing the regulated community to direct its efforts toward devising a workable regulatory scheme, rather than opposing regulation entirely.[106] Finally, in certain areas, such as the design requirements for land-disposal facilities,[107] Congress simply set standards itself rather than wait for the EPA to do so.

The centerpiece of HSWA was an ambitious program to limit the land disposal of hazardous wastes.[108] The Amendments em-

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of Sen. Steve Symms (R-Idaho)) (arguing that "[t]he fundamental problem with this bill is that it attempts to write detailed regulations into the law. . . . I submit that making these kinds of technical judgments is the function of EPA, not the Congress"); 129 CONG. REC. H6503 (daily ed. Aug. 4, 1983) (statement of Rep. Don Ritter (R-Pa.)) (arguing that "we should not here in this Congress . . . be in the business of regulation . . . [because] [t]he means of accomplishing the goals set forth in the law should be left to the experts").

[105] 3 RODGERS, *supra* note 65, § 7.1, at 516. Since the passage of RCRA, hammers have also been included in other environmental statutes. *See* Shapiro & Glicksman, *supra* note 32, at 839 n.96 (noting inclusion of a hammer provision regarding the removal of asbestos from schools in the Toxic Substances Control Act of 1986, 15 U.S.C. § 2644 (1988)).

[106] *See infra* note 140 and accompanying text; Shapiro & Glicksman, *supra* note 32, at 840 n.98.

[107] *See infra* notes 123–127 and accompanying text.

[108] In addition to the land-disposal restrictions, other major provisions in HSWA required the EPA to set standards for (1) small quantity generators producing between 100 and 1000 kilograms per month of hazardous wastes, 42 U.S.C. § 6921(d) (1988), (2) underground storage tanks, *id.* § 6991(a)–(h), and (3) the burning and blending of

phasized that "land disposal . . . should be the least favored method for managing hazardous wastes . . . ."[109] To reduce land-disposal risks, HSWA called for the EPA to implement an aggressive series of land-disposal restrictions and imposed new technology-forcing design standards for land-disposal facilities. These provisions are detailed below.

1. Land-Disposal Restrictions

The program of land-disposal restrictions established in HSWA contrasts sharply with the broad discretionary rulemaking authority granted to the EPA in the initial RCRA statute. HSWA set out precisely what wastes the EPA was to regulate, when they were to be regulated, and how standards would be set. These requirements were backed up by hammer provisions prohibiting all land disposal of the wastes if the EPA failed to meet the assigned deadlines.

Under HSWA, land disposal[110] of various wastes was to be prohibited as of specified dates unless the EPA promulgated regulations in accordance with narrowly defined criteria established by Congress. For most wastes,[111] land disposal would be permitted only if one of two conditions was met. First, land disposal for a particular waste could continue if the EPA "determine[d] the prohibition on one or more methods of land disposal . . . [was] not required in order to protect human health and the environment . . . ."[112] In making such determinations, the EPA was to consider "the long-term uncertainties associated with land disposal, . . . the goal of managing hazardous waste in an appropriate manner in the first instance, and . . . the

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hazardous wastes. *Id.* § 6924(q)–(s). The Amendments also imposed a corrective-action requirement on facilities seeking new permits and broadened the citizen-suit provisions. Excellent summaries of the land-disposal restrictions and HSWA more generally can be found in FORTUNA & LENNETT, *supra* note 68; Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10254 (May 1991); Rosbe & Gulley, *supra* note 67, at 10463–64.

[109] 42 U.S.C. § 6901(b)(7) (1988).

[110] Land disposal was defined broadly to "include, but not be limited to, any placement . . . in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." *Id.* § 6924(k).

[111] In addition to the land-disposal provisions described in the text, HSWA also included special provisions dealing with liquid hazardous wastes, *id.* § 6924(c), as well as with specific types of land-disposal practices, such as disposal in deep injection wells, *id.* § 6924(f), and "salt dome formations, salt bed formations, underground mines and caves." *Id.* § 6924(b).

[112] *Id.* § 6924(d)(1).

persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous wastes and their hazardous constituents."[113] While these provisions appeared to leave the EPA some flexibility, the statute also provided:

> a method of land disposal may not be determined to be protective of human health and the environment . . . unless . . . it has been demonstrated . . . to a reasonable degree of certainty, that there will be *no migration* of hazardous constituents from the disposal unit . . . for as long as the wastes remain hazardous.[114]

Given the inadequacy of existing land-disposal technologies[115] and the persistent character of many hazardous wastes, this "no-migration" requirement was viewed by many as "virtually insurmountable."[116]

The second condition under which land disposal would be permitted was if the hazardous waste was treated in accordance with standards set by the EPA. Under the statute, the EPA was required to establish "levels or methods of treatment, if any, which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents . . . so that short-term and long-term threats to human health and the environment are minimized."[117]

The process for implementing the land-disposal prohibitions for individual wastes, and thus of devising treatment standards so that land disposal could continue in some form, was to occur in five stages. Within two years of the statute's enactment, the EPA was to set standards for solvents and dioxins;[118] other specified "California-list" wastes were to be regulated within thirty-two months.[119] HSWA required that all remaining wastes

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[113] *Id.* § 6924(d)(1)(A)–(C).

[114] *Id.* § 6924(d)(1) (emphasis added).

[115] See *supra* notes 94–97 and accompanying text.

[116] Rosbe & Gulley, *supra* note 67, at 10463.

[117] 42 U.S.C. § 6924(m)(1) (1988).

[118] *Id.* § 6924(e)(1). At least for the solvents, dioxins, and California-list wastes, Congress was highly specific in setting out the particular substances to be regulated. In the solvents and dioxins category, Congress referred to "dioxin-containing hazardous wastes numbered F020, F021, F022, and F023 . . ." and "hazardous wastes numbered F001, F002, F003, F004, and F005 . . . ." *Id.* § 6924(e)(2)(A)–(B). The numbers refer to the EPA's hazardous-waste lists.

[119] The California-list wastes referred to a group of wastes regulated under a land-disposal program in California. They included:

> (A) Liquid hazardous wastes . . . containing free cyanides at concentrations greater than or equal to 1,000 mg/l.

listed as hazardous by the EPA, a total of approximately 450 substances, be divided into three groups based on "their intrinsic hazard and their volume."[120] Standards for the three groups—which have come to be known as the first, second, and third "thirds"—were to be issued within 45, 55, and 66 months.[121] If the EPA failed to issue regulations by the designated time for any of these groups, all forms of land disposal would be prohibited (i.e., the hammer).[122]

2. Minimum Technological Requirements and Groundwater Monitoring

In addition to drastically limiting the availability of land disposal as a waste management option, Congress also established

(B) Liquid hazardous wastes . . . containing the following metals (or elements) or compounds of these metals (or elements) at concentrations greater than or equal to those specified below:
  (i) arsenic and/or compounds (as As) 500 mg/l;
  (ii) cadmium and/or compounds (as Cd) 100 mg/l;
  (iii) chromium (VI and/or compounds (as Cr VI)) 500 mg/l;
  (iv) lead and/or compounds (as Pb) 500 mg/l;
  (v) mercury and/or compounds (as Hg) 20 mg/l;
  (vi) nickel and/or compounds (as Ni) 134 mg/l;
  (vii) selenium and/or compounds (as Se) 100 mg/l; and
  (viii) thallium and/or compounds (as Th) 130 mg/l.
(C) Liquid hazardous wastes having a pH less than or equal to two (2.0).
(D) Liquid hazardous wastes containing polychlorinated biphenyls at concentrations greater than or equal to 50 ppm.
(E) Hazardous wastes containing halogenated organic compounds in total concentration greater than or equal to 1,000 mg/kg.

Id. § 6924(d)(2).

[120] *Id.* § 6924(g)(2).

[121] *Id.* § 6924(g)(4)(A)–(C).

[122] Actually, for wastes in the first and second thirds of the residual group, a failure of the EPA to issue standards by the designated time did not result in a complete prohibition of land disposal. Instead, disposal in landfills or surface impoundments could continue if the facility was in compliance with the minimum technological requirements, *see infra* notes 123–127 and accompanying text, and such disposal was "the only practical alternative to treatment currently available to the generator." *Id.* § 6924(g)(6)(B)(ii). This provision was the so-called "soft-hammer." Nevertheless, if standards were not issued by 66 months after the statute's enactment, all land disposal of these wastes would be prohibited. *Id.* § 6924(g)(6)(C).

It should also be noted that the EPA was granted a limited power to defer the land-disposal hammers if certain conditions were met. The EPA could grant variances of up to two years for particular wastes if "adequate alternative treatment, recovery, or disposal capacity" was not available. *Id.* § 6924(h)(2). In addition, the EPA could grant case-by-case exemptions of up to one year upon a showing by an applicant "that there is a binding contractual commitment to construct or otherwise provide . . . alternative capacity but due to circumstances beyond the control of such applicant such alternative capacity cannot reasonably be made available by such effective date." *Id.* § 6924(h)(3). These case-by-case exemptions could be renewed "once for no more than one additional year." *Id.*

in HSWA design standards for landfills and surface impoundments. To be eligible to receive a permit, all new landfills and expansions or replacements of existing landfills were required, at a minimum, to have two or more liners, along with a leachate collection system.[123] Although the EPA was directed to issue guidance concerning these standards, Congress went into great detail as to what was required in the interim:

> Until the effective date of . . . regulations or guidance documents, the requirement for the installation of two or more liners may be satisfied by the installation of a top liner designed, operated, and constructed of materials to prevent the migration of any constituent into such liner during the period such facility remains in operation . . . . [A] lower liner shall be deemed to satisfy such requirement if it is constructed of at least a 3-foot thick layer of recompacted clay or other natural material with a permeability of no more than 1×10^{-7} centimeter per second.[124]

An exemption to these requirements would be permitted only if the facility owner could demonstrate that his "alternative design and operating practices, together with location characteristics" would prove at least as effective as the system mandated by Congress.[125]

In addition to the landfill-design requirements, HSWA also required all land-disposal units to institute a groundwater-monitoring program to test for migration of hazardous constituents.[126] Case-by-case exceptions to this requirement would be allowed, but only on a very limited basis.[127]

Compliance with the minimum technological standards, along with RCRA's corrective action[128] and financial responsibility[129]

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[123] 42 U.S.C. § 6924(o) (1988). A leachate collection system is "a series of perforated drainage pipes buried at the lowest points within a landfill. These pipes . . . collect liquids which flow under the influence of gravity to the low points. Once the collected liquids reach a predetermined level, they are pumped to the surface," where they can be treated or redisposed. TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 179.

Before HSWA was passed, the existing regulations required only one liner and offered an exemption from groundwater-monitoring requirements if two liners were installed.

[124] 42 U.S.C. § 6924(o)(5)(B) (1988).

[125] *Id.* § 6924(o)(2). A Senate report indicated that such exemptions would be difficult to obtain, stating that "there are currently a relatively few facilities located throughout the country which, because of their unique hydrogeological locations and type of operation, may successfully make this demonstration." HARRIS ET AL., *supra* note 85, at 102 (quoting S. REP. No. 131, 98th Cong., 1st Sess. 27–28 (1983)).

[126] 42 U.S.C. § 6924(p) (1988).

[127] *Id.*

[128] *Id.* § 6924(v).

[129] *Id.* § 6924(t).

provisions, was to be achieved through an aggressive permitting program. All operating land-disposal facilities were required to submit permit applications by November 1985 or lose their interim status to operate.[130] Final permit determinations for applications pending at the time of HSWA's passage in November 1984 were to be completed by November 1988.[131]

III. Implementation and Evaluation

The success of HSWA can be assessed at two levels. First, HSWA was clearly intended as an instrument of political control, a means by which Congress could ensure faithful implementation of the RCRA program in the face of an Executive Branch that seemed intent on subverting it. From this perspective, the relevant question is whether the prescriptive nature of the statute has successfully induced the EPA to comply with congressional demands. Second, HSWA is an instrument of regulatory policy. Thus, its success must be measured by whether it has promoted an intelligent approach to regulating the risks of hazardous wastes. This Part addresses each of these issues in turn.

A. *Effects of HSWA as an Instrument of Political Control*

As discussed above, HSWA employed a variety of statutory techniques—deadlines, hammers, and specific statutory language—to constrain the EPA's discretion. Given the sheer number of regulations, reports, and implementation actions the statute required, it was clear to most commentators at the time of HSWA's passage that all of the congressional mandates could not be met, at least not within any reasonable expectation about the EPA's resources for RCRA programs.[132] Indeed, like many environmental statutes, HSWA "is plagued by too many 'high' priorities, many of which are . . . unrealistic."[133] As was to be expected, the EPA has missed a large proportion of the dead-

[130] *Id.* § 6925(e)(2).

[131] *Id.* § 6925(c)(2)(A)(i).

[132] *See* James A. Rogers & Dorothy A. Darrah, *RCRA Amendments Indicate Hill Distrust of EPA*, Legal Times, Nov. 19, 1984, at 28, 33 (noting that "[t]he sheer volume of EPA studies and regulations mandated, and the unrealistic statutory deadlines, virtually guarantee that EPA will find itself in default on a number of acounts [sic]").

[133] The Nation's Hazardous Waste Program, *supra* note 66, at 1.

lines embodied in the statute,[134] and is once again subject to "deadlines litigation" initiated by environmental groups.[135]

The large number of missed deadlines could be viewed as a failure of congressional control. From a more realistic perspective, however, the picture that emerges from the past seven years of implementation is more positive. The coercive nature of HSWA appears to have been fairly successful in infusing life into what was previously a moribund and neglected program. Moreover, in those areas about which Congress was most concerned, particularly land disposal, the mandates contained in HSWA have produced a high level of responsiveness to congressional demands.

One technique that has been notably successful as an instrument of political control is the hammer provision. While the EPA has missed well over half the deadlines without hammer provisions,[136] it has complied with all eight of the deadlines enforced by hammers.[137] In addition to the obvious incentive that hammers provide for the EPA to act to avoid unpalatable consequences (e.g., a ban on all land disposal for specified wastes), hammers have had two more specific salutary effects for preventing delay in implementing regulatory requirements. First, they have ensured a degree of budgetary security for those programs to which they relate: "the principal basis for the es-

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[134] A July 1988 General Accounting Office ("GAO") report indicated that as of April 1988, the EPA had completed action on 27 of the 68 statutory deadlines that had passed. *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, HAZARDOUS WASTE: NEW APPROACH NEEDED TO MANAGE THE RESOURCE CONSERVATION AND RECOVERY ACT 25 (1988) [hereinafter NEW APPROACH NEEDED].

[135] *See Environmental Defense Fund Sues EPA For Failing To Meet Deadlines Set By RCRA*, 19 Env't Rep. (BNA) 2376 (Mar. 10, 1989).

[136] According to the GAO, the EPA had completed action on 24 of the 62 deadlines without hammer provisions as of April 1988. NEW APPROACH NEEDED, *supra* note 134, at 25. In many of these cases, however, action was completed only after the deadline had passed. For a listing of the EPA's action on the various deadlines, see *id.* at 74–75. *See also* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at A-1 to A-6.

[137] There is a slight discrepancy over whether all of the hammer deadlines have been met. The GAO reports that the EPA failed to meet the "temporary delisting grant exemption" deadline, *see* NEW APPROACH NEEDED, *supra* note 134, at 75, while the EPA lists this deadline as having been met. *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at A-3. In either case, the EPA has completed action on all of the deadlines enforced by hammers. *See Resource Conservation and Recovery Act Reauthorization, Hearing before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, Part I, 101st Cong., 2d Sess. 399 (1990) [hereinafter *1990 Reauthorization Hearings*] (statement of Richard C. Fortuna, Executive Director, Hazardous Waste Treatment Council) (noting that "the only deadlines that the Agency has met are . . . those for which Congress specified 'hammer' dates" and that "many other significant programs have been delayed or completely ignored where enforceable deadlines were absent").

tablishment of the RCRA budget by both the Agency and OMB is the number of court imposed and hammer deadlines that the Agency must meet . . . ."[138] Indeed, in the years following passage of HSWA, the EPA's RCRA budget increased dramatically.[139] Second, the hammers have succeeded in encouraging the regulated community to cooperate in program development rather than simply opposing the imposition of new requirements. For example, the hammers have "induced all of the regulated community to produce treatment data in volumes and in timeframes that the Agency could not have accomplished otherwise."[140]

Moreover, the specificity of the directives in HSWA has successfully influenced not only the timing, but also the substance of the EPA regulations. For example, the regulations governing design requirements for new and existing landfills essentially codify the statutory minimum technological requirements.[141] Similarly, the regulations identifying the conditions under which land disposal is available for untreated wastes also adopted the statutory language.[142]

Viewing the RCRA program more broadly, a number of indicia indicate that HSWA generated a high level of activity at the EPA. A 1990 EPA report indicates that the Office of Solid Waste and Emergency Response, which administers RCRA, now promulgates regulations faster than other EPA offices.[143] This speed is due to the numerous deadlines, both with and without hammers, imposed by the statute. Again prompted by deadlines, the EPA has also made significant strides forward in the permitting area: it had issued final permits to ninety-two percent of all operating land-disposal facilities by November 1988, and to ninety-three percent of all operating incinerators by November 1989.[144] The EPA's RCRA enforcement program

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[138] *1990 Reauthorization Hearings* (statement of Richard C. Fortuna), *supra* note 137, at 399.

[139] *See* NEW APPROACH NEEDED, *supra* note 134, at 15.

[140] *1990 Reauthorization Hearings* (statement of Richard C. Fortuna), *supra* note 137, at 399; *see also id.* at 395.

[141] *See* Hill, *supra* note 108, at 10267.

[142] *See infra* note 171 and accompanying text.

[143] The mean time from start to promulgation of final major rules for the Office of Solid Waste and Emergency Response is 777 days. By contrast, the means for other EPA offices are: 1073 days for the Office of Pesticides and Toxic Substances, 1472 days for the Office of Water, and 1475 days for the Office of Air and Radiation. *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 31.

[144] *See id.* at 43.

has also improved, and it now compares favorably with the programs of other EPA offices in the number and disposition of enforcement actions.[145] Each of these changes stands in stark contrast to the pattern of repeated delay that characterized the pre-HSWA years.

Finally, the specificity of the statutory provisions in HSWA appears to have facilitated congressional oversight. For example, it is likely that the detailed statutory language made it easier for members of Congress to intervene to block the EPA from adopting a risk-based approach to land disposal of untreated wastes.[146] The existence of the specific "no migration" statutory language provided a readily available benchmark against which the EPA's proposed approach could be tested for fidelity to congressional intent. By contrast, a broad statutory mandate would have made it more difficult for members of Congress to identify and agree upon EPA deviations from desired policies. Moreover, once congressional action had been triggered, members of Congress were able to argue in a letter to the EPA that their position was required by the specific terms of the statute. Such arguments are likely to appear more authoritative than arguments that an agency's chosen policy is not the most appropriate approach to implementing a broad public interest standard.

B. *Effects of HSWA as an Instrument of Regulatory Policy*

While HSWA appears to have been at least somewhat successful as a means of ensuring responsiveness by the EPA to congressional preferences, it has been less successful as an instrument of regulatory policy. In particular, the detailed terms of the statute and the rigid framework it established have not promoted an intelligent approach to managing the risks of hazardous waste. This is evident from (1) the demise of risk-based approaches to developing land-disposal and waste-treatment standards, (2) the problems engendered by implementation of the minimum technology requirements, and (3) the misplaced emphasis on waste management rather than waste reduction.

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[145] *Id.* at 62, G-2 to G-5.

[146] *See infra* notes 165–169 and accompanying text.

1. The Demise of Risk-Based Approaches to Land Disposal and Treatment

The EPA's ability to develop a rational risk-based approach to the management of hazardous wastes is, in the first instance, limited by the substantive requirement that standards be issued "as may be necessary to protect human health and the environment."[147] Although there is some controversy on this point,[148] it is generally believed that this statutory language, enacted in 1976, bars consideration of costs in developing RCRA rules.[149] As a result, while the EPA is required to compile cost-benefit RIAs[150] to comply with Executive Order 12,291, it admits that RIAs "are not currently used as an effective decision-making tool."[151] Nevertheless, even without considering costs, it is still possible to employ risk-assessment techniques to inform decision-making. As implementation of the HSWA land-disposal provisions has progressed, however, all attempts at risk assessment have been abandoned, largely due to the nature of the statutory mandate.

In its proposed rule for solvents and dioxins, the first of the five staggered rulemakings to implement the land-disposal ban, the EPA offered for comment a regulatory framework to be used in establishing treatment and disposal standards.[152] This regulatory framework employed risk-based approaches at three points in the process. First, to determine whether a given type of waste satisfied the "no-migration" standard so that land disposal without treatment would be permissible, the EPA pro-

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[147] 42 U.S.C. § 6922 (1988); *see supra* note 77 and accompanying text.

[148] THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 32 (noting that "[c]ontroversy currently exists both within and outside EPA about whether costs can explicitly be used as part of the decision-making process for RCRA rules").

[149] *See, e.g.*, TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 18, 227 (noting that "RCRA precludes balancing costs and risks"); FORTUNA & LENNETT, *supra* note 68, at 210 (commenting that "conspicuously absent is any consideration or factoring of *cost* in the imposing of land-disposal restrictions or choosing among management alternatives"). Indeed, even the EPA stated in a preamble to regulations issued in 1980 that "cost cannot be used to compromise 'protection of human health and the environment.'" *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 32.

[150] *See supra* note 43 and accompanying text.

[151] *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 32.

[152] 51 Fed. Reg. 1605 (1986). For an excellent discussion of the regulatory framework set out in this proposed rule, the congressional response, and the methodological changes in the final rule and the California-list rule, see George W. Bilicic, Jr., Note, *An Analysis of the Land Disposal Ban in the 1984 Amendments to the Resource Conservation and Recovery Act*, 76 GEO. L.J. 1563, 1576–80 (1988).

posed that the term "no migration" not be read literally.[153] Instead, the EPA would develop a screening-level system under which migration of hazardous constituents would be allowed, so long as "such migration occurs at concentrations that do not pose threats to human health and the environment."[154] The screening levels would be determined through the use of "constituent fate and transport models . . . designed to assess the attenuative processes . . . that occur during transport (migration) of contaminants from the point of their release from a land disposal unit . . . to points of potential human exposure at a specified distance downwind, downgradient, or downstream from the disposal unit."[155]

Second, the EPA proposed to use comparative risk assessment in determining what treatment technologies could be used as a basis for setting treatment standards for individual wastes.[156] Recognizing the possibility that treatment technologies might shift hazardous-waste risks to different media,[157] the EPA would "compare the risks of managing wastes in land disposal units with the risks of managing wastes in alternative treatment technologies."[158] If a particular treatment technology posed "greater total risks than those posed by direct land disposal," that technology would be "classified as 'unavailable' for purposes of establishing . . . treatment standard[s] for that waste."[159]

Third, the EPA proposed to use risk-based screening levels to place limits on the amount of treatment required for individual wastes.[160] These screening levels would "identify the maximum concentration below which the Agency believes there is no regulatory concern for the land disposal program and which is protective of human health and the environment."[161] Even if the best demonstrated available technology ("BDAT") was capable of achieving lower concentrations, treatment of wastes beyond the screening level would merely be "treatment for treatment's

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[153] 51 Fed. Reg. at 1616.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 1611.
[157] *See infra* notes 196–197 and accompanying text.
[158] 51 Fed. Reg. at 1611.
[159] *Id.*
[160] *Id.*
[161] *Id.*

sake,"[162] and would not be required prior to land disposal.[163] While the risk-based approach was clearly favored by the EPA, it also solicited comments on an alternative approach: setting treatment standards solely with reference to the BDAT, and avoiding excessive treatment through petitions demonstrating that, in individual cases, less treatment would still be protective of human health and the environment.[164]

This proposed regulatory framework provoked a strong reaction from Congress,[165] as well as from environmental groups. In response to the proposal, eleven members of Congress, all of whom sat on committees with jurisdiction over RCRA,[166] submitted a letter to the EPA objecting to the EPA's loose reading of the no-migration standard.[167] In their view, this approach was contrary to the "clear congressional intent" that the standard be absolute.[168] They also objected to the use of screening levels to cap treatment of individual wastes.[169]

As a result of congressional and other criticism, the EPA significantly modified the proposed regulatory framework in the final solvent and dioxin rule.[170] With only minimal explanation, the EPA dropped the screening-level approach to implementing the no-migration standard. Instead, the final rule simply adopted the statutory language: to permit land disposal without treatment, a petitioner must demonstrate "to a reasonable degree of certainty that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous."[171] The Agency admitted "that there will be relatively few cases in which this demonstration can be made."[172]

In addition, the final rule also dropped the use of screening levels to cap waste treatment. Although insisting that it retained

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[162] *Id.*

[163] The EPA noted the economic benefit of such an approach: "inclusion of these protective caps ensures that limited resources . . . are not expended needlessly in meeting treatment standards in excess of what is required to protect human health and the environment." *Id.* at 1612.

[164] *Id.* at 1613.

[165] Bilicic, *supra* note 152, at 1576.

[166] *Id.* at 1578 n.94.

[167] *Id.* at 1577–78.

[168] *Id.* at 1578.

[169] *See id.*

[170] 51 Fed. Reg. 40573 (1986).

[171] *Id.* at 40578; *see also* Bilicic, *supra* note 152, at 1589 (commenting that, in effect, "the EPA declared that no migration . . . means no migration whatsoever").

[172] 51 Fed. Reg. at 40578.

the authority to set risk-based standards,[173] the EPA instead adopted the technology-based approach after noting the congressional comments. Under the technology-based approach, treatment standards would be "based exclusively on levels achievable by BDAT."[174] Such levels would "generally be protective of human health and the environment," even though "[l]evels less stringent than BDAT may also be protective."[175]

The EPA's adoption of a technology-based approach for establishing treatment standards was challenged in *Hazardous Waste Treatment Council v. EPA*.[176] In that case, the Court of Appeals for the District of Columbia Circuit held that adoption of technology-based standards was a "reasonable" interpretation of the statute in light of the numerous uncertainties involved in setting screening levels.[177] The court noted, however, that the statute could also support a risk-based approach.[178] Despite the fact that technology-based standards were deemed reasonable, the court declined to affirm the EPA's approach, holding that the EPA had inadequately explained its decision. Specifically, the preamble to the rule indicated that the EPA had adopted the technology-based approach because it "best-respond[ed]" to the letter from Congress, even though the EPA simultaneously rejected the congressional contention that technology-based standards were required by the statute.[179] This reasoning was internally inconsistent and left no support for the EPA's position.[180]

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[173] *Id.* (claiming that "[t]he . . . statute does not compel the Agency to set treatment standards based exclusively on the capabilities of existing technologies").

[174] *Id.*

[175] *Id.*

[176] 886 F.2d 355 (D.C. Cir. 1989), *cert. denied*, 111 S.Ct. 139 (1990). The EPA's adoption of a literal reading of "no migration" was not challenged in the *Hazardous Waste Treatment Council* case. The precise meaning of the no-migration standard, however, was elaborated by the EPA in its regulations regarding the disposal of hazardous wastes in deep-injection wells, *see* 53 Fed. Reg. 28118, 28125–30, 28155–56 (1988), and was litigated in Natural Resources Defense Council v. EPA, 907 F.2d 1146, 1156–63 (D.C. Cir. 1990).

[177] *Hazardous Waste Treatment Council*, 886 F.2d at 363. Among these uncertainties, the court identified

> the lack of any safe level of exposure to carcinogenic solvents; the extent to which reference dose levels . . . understate the dangers that hazardous solvents pose to particularly sensitive members of the population; the necessarily artifical assumptions that accompany any attempt to model the migration of hazardous wastes from a disposal site; and the lack of dependable data on the effects that solvents have on the liners that bound disposal facilities.

Id. at 362 (citing 51 Fed. Reg. 1627–28, 1642–53, 1714–15 (1986)).

[178] *Id.* at 364.

[179] *Id.* at 365.

[180] *Id.* at 365–66.

On remand, the EPA reinstated its technology-based approach, providing a fuller explanation that the court accepted.[181] The EPA again emphasized that both technology-based and risk-based approaches are acceptable under the statute, but noted that it was "presently unable" to develop risk-based screening levels due to pervasive uncertainty.[182] As a result, while the EPA's "eventual intention" was to use "threshold levels . . . to cap . . . treatment standards," the EPA would adopt the BDAT standards to keep the hammer from falling.[183] According to the EPA:

> If no treatment standards are in effect, then the . . . [hammers] would take effect and most hazardous waste disposal would . . . be prohibited unless it occurs in a land disposal unit determined by EPA to satisfy the statutory no-migration test. Since this would leave most hazardous waste without a legal management option, EPA believes it imperative to have treatment standards in place . . . . [T]he soundest choice for the interim is to retain [the] original choice of technology based treatment standards based on performance of BDAT.[184]

In the final analysis, then, the detailed statutory language was found not to require abandonment of risk-based screening levels, but the same result was at least temporarily required by the coercive hammer provisions that were also designed to limit the EPA's discretion.

While the final rule on solvents and dioxins dropped screening levels for both migration and treatment, it retained the use of comparative risk assessment to determine whether the risks associated with particular treatment technologies outweighed the risk associated with land disposal. If a particular treatment technology was riskier than land disposal, it would not be considered available as a BDAT for purposes of setting treatment levels. Ironically, however, to the extent that treatment standards were expressed as concentration levels to be attained

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[181] 55 Fed. Reg. 6640 (1990).

[182] *Id.* at 6641.

[183] *Id.*

[184] *Id.* Note, however, that given the EPA's experience in defining which wastes are hazardous, the "EPA's statement that it is unable to set threshold levels is difficult to understand." Marcia E. Williams & Jonathan Z. Cannon, *Rethinking the Resource Conservation and Recovery Act for the 1990s*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10063, 10066 (Feb. 1991). To the extent that this account is correct, the Agency's revised explanation may be viewed as an *ex post* rationalization for a decision designed primarily to placate powerful members of Congress.

rather than specific methods of treatment,[185] riskier treatment technologies could still be used to meet the concentration levels.[186] The EPA continued this approach in its second major rulemaking, which set the standards for "California-list" wastes.[187]

Nevertheless, by the third major rulemaking, dealing with first-third wastes, the EPA abandoned comparative risk assessment altogether,[188] an action later upheld in *American Petroleum Institute v. EPA*.[189] The EPA provided two reasons for its discontinuance of comparative risk assessment. First, "if a comparative risk assessment resulted in ruling out all treatments as riskier than land disposal[,] . . . then treatment standards could not be set for a given waste *and* that waste could not be land disposed."[190] In other words, to the extent that comparative risk assessment identified wastes for which land disposal was actually less risky than existing treatment technologies, it could not be used to inform agency decisions. The EPA had to develop treatment standards for all wastes, regardless of the comparative risks, because the no-migration requirement would generally bar land disposal without treatment, and it was imperative that generators have at least one viable disposal option. Second, comparative risk assessment "had not proven to be particularly useful because it does not compare equally viable options since land disposal is presumptively disfavored by the RCRA."[191]

Thus, all three of the risk-based approaches included in the proposed solvent and dioxin rule have now been abandoned. Although the idea of capping treatment for some wastes has returned in a somewhat altered form in the third-third rule,[192]

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[185] Where possible, the EPA has tried to express treatment standards as concentration levels, rather than as specific technologies, to avoid freezing technological innovation. *See* 51 Fed. Reg. 40580 (1986).

[186] The EPA intended to deal with this problem by adopting a separate set of standards to govern these riskier forms of treatment. By contrast, where treatment standards mandated specific methods of treatment, riskier technologies could not be used. *See* 52 Fed. Reg. 25760, 25776 (1987).

[187] *Id.* at 25776–77. A challenge to the California-list rule by the Hazardous Waste Treatment Council was dismissed for lack of standing. *See* Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918 (D.C. Cir. 1989).

[188] *See* 53 Fed. Reg. 31138, 31144 (1988).

[189] 906 F.2d 729 (D.C. Cir. 1990).

[190] *Id.* at 738 (citing 53 Fed. Reg. 31190 (1988)).

[191] *Id.*

[192] Under the EPA regulations, a waste is considered hazardous if it is listed as hazardous by the EPA or if it exhibits one or more of the characteristics of a hazardous waste. *See* Williams & Cannon, *supra* note 184, at 10064. The four basic characteristics of a hazardous waste are: ignitability, corrosivity, reactivity, and toxicity. *Id.* at 10065.

this rule is currently subject to challenge in the courts.[193] The reason for the abandonment of risk-based approaches can be found in the structure of the HSWA statute. In particular, the specific no-migration language ruled out a risk-based approach to land disposal of untreated wastes. Combined with the rigidity of the hammers designed to prod the EPA into action, the limitations imposed by this no-migration standard have in turn been responsible for the abandonment of risk-based screening levels and comparative risk assessment in setting treatment standards.

The demise of risk-based approaches in the HSWA mandated rulemakings has had at least two important deleterious effects. First, the inability to consider costs and a reasoned approach to risk has meant that the United States is incurring unnecessarily high costs for the management of hazardous waste. In several areas, resources are expended for activities that produce few compensating benefits. For example, wastes must be treated prior to land disposal even if disposal without treatment would pose no significant risk of adverse health or environmental effects. Moreover, because treatment levels are technology-based, the extent of the treatment required can be excessive.[194] Indeed, in some cases, the BDAT standards are so stringent that they require wastes to be treated beyond the point at which they would initially be classified as hazardous.[195]

Second, at least in some areas, environmental risks may actually have increased. Under the current regime, treatment may be required even when it poses greater risks than land disposal of untreated wastes. Most prominently, implementation of the land-disposal program has led to "widespread incineration" of hazardous wastes "despite the unknown environmental risk that may follow."[196] In particular, incineration generates airborne emissions, which in some cases may be more harmful than the

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The rule for third-third wastes allows treatment for some, but not all, wastes to be capped at the level at which they lose the characteristics and thus would no longer be considered hazardous. *See* 55 Fed. Reg. 22520, 22530, 22542 (1990). It should be noted that capping treatment at characteristic levels is not necessarily the same as capping treatment at levels considered "protective." It is entirely possible that a waste could retain some of the characteristics, yet still pose only minimal risks.

[193] *See Groups Ask Court To Overturn Land Ban Rule, Claim It Ignores RCRA's Disposal Requirements*, 21 Env't Rep. (BNA) 190 (May 18, 1990).

[194] *See supra* notes 162–163 and accompanying text.

[195] *See* Hill, *supra* note 108 , at 10269; Williams & Cannon, *supra* note 184, at 10069.

[196] OFFICE OF TECHNOLOGY ASSESSMENT, FROM POLLUTION TO PREVENTION: A PROGRESS REPORT ON WASTE REDUCTION 42 (1987) [hereinafter FROM POLLUTION TO PREVENTION].

potential for migration of hazardous constituents from land-disposal facilities.[197]

2. The Minimum Technological Requirements

In addition to limiting land disposal and requiring the EPA to establish waste-treatment standards, HSWA imposed new design and operation requirements for land-disposal facilities.[198] Implementation of the permitting program to enforce these standards produced "one major unanticipated effect."[199] Specifically, fewer than twenty percent of the 1650 existing land-disposal facilities actually submitted permit applications by the November 1985 deadline.[200] The remainder chose to shut down rather than meet the new, more stringent requirements.[201] In addition, according to the EPA's figures, almost one-third of those facilities that did apply were ultimately denied a final permit.[202]

As a result of the permitting process, it is undoubtedly true that hazardous wastes and treatment residuals that continue to be land disposed are managed in more secure facilities. Nevertheless, the number of facility closures, along with the difficulty of siting new facilities,[203] has raised important concerns about

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[197] The American Petroleum Institute has noted that "[f]or several of the listed petroleum wastes, incineration was found to pose a greater risk to the general population in close to 50% of the instances when it was compared to land disposal of the untreated waste or surface impoundment." James Bovard, *Some Waste Cleanup Rules Are a Waste of Resources*, WALL ST. J., Feb. 15, 1989, at 14; *see also* Bilicic, *supra* note 152, at 1582 (noting that "incineration creates its own environmental problems through air emissions and the problems of ash residue").

Interestingly, the EPA admits that insufficient attention has been paid to cross-media conflicts, and has recognized the possibility that "one of the unintentional effects of the RCRA regulations was to encourage a shift of pollution from land to the air or water." THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 10.

[198] *See supra* notes 123–127 and accompanying text.

[199] CONGRESSIONAL RESEARCH SERVICE, HAZARDOUS WASTE MANAGEMENT: RCRA OVERSIGHT IN THE 101ST CONGRESS 4 (1988) [hereinafter HAZARDOUS WASTE MANAGEMENT].

[200] *Id.* The EPA's figures indicate a slightly lower number of existing facilities (1467) but provide approximately the same percentage figure for the proportion of facilities submitting permit applications. *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 43.

[201] *See* HAZARDOUS WASTE MANAGEMENT, *supra* note 199, at 4.

[202] *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 43.

[203] One important obstacle to siting new facilities is public concern over the risks such facilities pose to the local community. This obstacle is commonly referred to as the "not in my back yard," or "NIMBY," problem. Facility siting is also complicated by the EPA's standards governing the location of different types of facilities. *See* 40 C.F.R. § 264.18 (1991).

the potential for a shortage of disposal capacity.[204] Because treatment capacity is also limited,[205] one consequence of the closures is that the EPA has been reluctant to classify additional high-volume wastes as hazardous, "not because they are toxicologically different in all cases from wastes that are included [as hazardous], but because their volumes are so large that they would be unmanageable in the current hazardous waste system."[206] The failure to define such wastes as hazardous, combined with the lack of a well-developed regulatory framework for non-hazardous wastes, causes significant environmental risks to persist with little control.[207]

In light of these and other concerns raised by the facility closures,[208] it is important to question whether HSWA's inflexible approach to the minimum technological requirements is appropriate. These requirements apply to all landfill sites, even though the level of risk associated with a particular site is determined not only by technology, but also by the site's hydrogeological characteristics,[209] operating practices,[210] and proximity to populated areas.[211] Because the minimum technological requirements apply uniformly to all sites, however, these other factors are not generally taken into account.[212]

Moreover, a study conducted by the Office of Technology Assessment in 1983 indicated the feasibility of establishing a classification system "to group wastes by degree of hazard and

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[204] *See, e.g., Potential Hazardous Waste Volume and Capacity Problems, Hearing before the Environment, Energy, and Natural Resources Subcommittee of the House Committee on Government Operations*, 99th Cong., 2d Sess. 1–3 (1986) (statement of Rep. Mike Synar (D-Okla.)).

[205] *See generally* U.S. GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE: FUTURE AVAILABILITY OF AND NEED FOR TREATMENT CAPACITY ARE UNCERTAIN (1988).

[206] Williams & Cannon, *supra* note 184, at 10068; *see also* NEW APPROACH NEEDED, *supra* note 134, at 17–19 (noting the slow progress of the EPA in listing additional hazardous wastes).

[207] *See* Williams & Cannon, *supra* note 184, at 10067.

[208] Another potentially harmful side effect of the treatment and disposal capacity limitations may be the increasing tendency to export hazardous wastes to developing nations that do not have "the technical or financial resources to adequately handle or dispose of such material." *1990 Reauthorization Hearings*, *supra* note 137, at 215 (statement of Rep. Mike Synar).

[209] *See* TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 181.

[210] *Id.* at 175.

[211] *See id.* at 180.

[212] The statute does leave some flexibility by allowing exemptions from the minimum technological requirements based in part on site-location characteristics. A Senate report, however, indicated that these exemptions were to be granted only sparingly. *See supra* note 125 and accompanying text. *See generally* STEPHEN G. BREYER, REGULATION AND ITS REFORM 263–65 (1982) (noting the problems of uniform standards).

management facilities by degree of risk."[213] Under such a system, "classes of waste and management facilities [could] be matched to minimize risks to human health and the environment."[214] The feasibility of this alternative suggests that some facilities not meeting the minimum technological requirements might have been retained and used for disposal of comparatively less hazardous wastes. To the extent that this form of matching was possible, however, it could only have been accomplished by providing the EPA with a high level of discretion, and this was inconsistent with the basic philosophy of HSWA.[215]

Even if the large number of closures can be justified, questions persist about whether the HSWA statutory framework has inhibited the development of an effective approach to these closures. The General Accounting Office has cited the experience with facility closures as an example of how the HSWA deadlines have prevented the EPA from "respond[ing] to changes in program priorities that arose after the deadlines were enacted . . . ."[216] In particular, all closing facilities are required to comply with regulatory requirements and obtain a post-closure permit. Prompt completion of these procedures "ensure[s] (1) that owners and operators of closed facilities . . . are held financially responsible for future site cleanups and (2) that facilities are closed in a manner that minimizes, for example, contamination of drinking water."[217] Nevertheless, because there is a statutory deadline for issuing permits to operating facilities, but no deadlines for post-closure activities, the EPA has given operating facilities priority in allocating program resources.[218] As a result, the EPA has fallen significantly behind in overseeing closures.[219] By contrast, a more flexible statutory framework would have enabled the EPA to allocate its resources in accordance with the level of environmental risk posed by particular sites, re-

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[213] TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 221; *see also id.* at 229–42.

[214] *Id.* at 221.

[215] It should be noted that the same study by the Office of Technology Assessment highlighted the technological superiority of the double liner/leachate collection system mandated by HSWA over the one-liner designs required by existing regulations. *Id.* at 186.

[216] NEW APPROACH NEEDED, *supra* note 134, at 27; *see also* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 44–46.

[217] NEW APPROACH NEEDED, *supra* note 134, at 27.

[218] *Id.*; *see also* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 44–46.

[219] *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 45 (indicating that almost 80% of closing facilities still require attention).

gardless of whether the site was an operating or closing facility.[220]

3. The Overemphasis on Waste Management and the Underemphasis on Waste Reduction

A final problem that has become increasingly apparent with HSWA is the statute's failure to promote waste reduction in any meaningful way. Recent studies indicate that reducing the generation of hazardous waste offers significant "environmental and economic benefits compared to management and regulatory options that deal with waste that is already generated."[221] From an economic perspective, waste reduction can often be less expensive than costly treatment or disposal options.[222] From an environmental standpoint, waste reduction avoids the tendency of treatment-oriented regulatory approaches to shift risks from one medium to another, as occurred with the HSWA-inspired move to incineration of hazardous wastes.[223] Moreover, these studies indicate that significant waste reduction can be achieved in the near term using existing technologies, assuming informational obstacles and management biases can be overcome.[224]

In HSWA, Congress adopted what was essentially an "end of the pipe" approach to the problem of hazardous wastes. This is not to say that HSWA was entirely devoid of references to the desirability of waste reduction. For example, HSWA declared "the national policy of the United States [to be] that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible."[225] Beyond this statement and similar incantations,[226] however, HSWA included few

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[220] The EPA has suggested just such a flexible approach in its recent review of RCRA implementation. *See id.*

[221] FROM POLLUTION TO PREVENTION, *supra* note 196, at 3. This report summarizes and compares the findings to two other studies: OFFICE OF TECHNOLOGY ASSESSMENT, SERIOUS REDUCTION OF HAZARDOUS WASTE (1986) and U.S. ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS: MINIMIZATION OF HAZARDOUS WASTE (1986).

[222] *See* FROM POLLUTION TO PREVENTION, *supra* note 196, at 1 (noting that command and control regulatory approaches to waste management "add[] to the competitive disadvantage of domestic manufacturing industries through high environmental spending" relative to other nations).

[223] *See supra* notes 196–197 and accompanying text.

[224] *See* FROM POLLUTION TO PREVENTION, *supra* note 196, at 3, 9.

[225] 42 U.S.C. § 6902(b) (1988).

[226] HSWA also listed "minimizing the generation of hazardous waste" as an "objective." *Id.* § 6902(a)(6).

specific provisions designed to make waste reduction a reality. HSWA called only for the EPA to submit a report to Congress on waste minimization,[227] and it required waste generators to certify that they were pursuing waste minimization programs.[228] The scant attention to waste reduction stands in sharp contrast to the detailed and self-enforcing provisions regarding waste treatment and disposal.[229] This contrast suggests that in addressing the hazardous-waste problem, Congress saw only part of the picture: it was preoccupied with the well-publicized land-disposal scandals that had stimulated public concern, ignoring the benefits that could be foreseen, even at the time, from a serious commitment to waste reduction.[230]

HSWA has certainly produced some indirect incentives for waste-reduction efforts by requiring treatment and increasing the costs of waste disposal. Nevertheless, the principal effect of HSWA has been to create a regime in which "with few exceptions, everybody in industry and government is so busy trying to manage wastes that are generated that they have little time and money to try to generate less."[231] The drive to comply with newly imposed regulatory restrictions has generally drawn investment into treatment rather than reduction efforts.[232] The marketing efforts of treatment technology vendors have also encouraged this trend.[233] Finally, given the nature of its statutory mandate, the EPA has itself spent only a small proportion of its budget on waste reduction; instead, the bulk of its resources has been directed to exploring alternatives to land disposal.[234]

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[227] *Id.* § 6982(r).

[228] *Id.* § 6922(b)(1).

[229] *See* FROM POLLUTION TO PREVENTION, *supra* note 196, at 11 (noting that "[c]ongressional actions in 1984 directed EPA to move the hazardous waste management system away from land disposal" but that "Congress did not give EPA specific instructions to move as forcefully toward waste reduction").

[230] In 1983 the Office of Technology Assessment found that "[s]everal technological approaches can be used to reduce the amount of waste requiring treatment or disposal," but that existing regulatory practices provided few incentives for waste reduction. TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 10–12.

[231] FROM POLLUTION TO PREVENTION, *supra* note 196, at 9; *see also 1990 Reauthorization Hearings* (testimony of William J. Mulligan on behalf of the American Petroleum Institute), *supra* note 137, at 425 ("In the past, the preoccupation with RCRA subtitle C hazardous waste regulations or management has unquestionably relegated recycling and pollution prevention to the regulatory back burner.")

[232] "Industry's attention and resources go chiefly to regulatory compliance. As the government presses companies to fix the mistakes of the past, it provides little help to prevent problems for the future." FROM POLLUTION TO PREVENTION, *supra* note 196, at 1.

[233] *Id.* at 11.

[234] *Id.* at 9.

The problem of encouraging meaningful waste reduction is exacerbated by the "feedstock" tax used to finance the cleanup of hazardous-waste sites under the Superfund program.[235] At the time Superfund was enacted, Congress considered but rejected a "waste-end" tax on hazardous-waste generators primarily because the large number of generators would make the tax "impossible to administer."[236] Instead, Congress chose to impose a tax on the "basic building blocks used to make all hazardous products and wastes."[237] This approach would significantly reduce the number of entities subject to the tax, while costs would be "evenly passed along to all industrial sectors which produce and consume hazardous substances and generate hazardous wastes."[238] Although the administrative concerns driving Congress' decision may have been reasonable,[239] the decision to tax inputs rather than outputs gives waste generators no incentive to alter their production processes to reduce wastes.[240]

IV. Implications of the HSWA Experience

In view of the costs imposed and the problems created by HSWA implementation, one could perhaps see the HSWA experience as an indication that Congress should "keep its hands out of" regulatory policy. Such an interpretation, however, would be too simple; it ignores both the deficiencies of alternatives to congressional involvement and the underlying sources of regulatory failure. Turning first to the alternatives, the idealized vision of broad statutory mandates being faithfully and competently administered by experienced agency officials is sel-

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[235] 26 U.S.C. §§ 4611–4612, 4661–4662 (1988 & Supp. I 1989).

[236] S. Rep. No. 848, 96th Cong., 2d Sess. 20 (1980).

[237] *Id.* at 19.

[238] *Id.* at 20.

[239] Note, however, that waste-end taxes have been used successfully in several states since enactment of the federal feedstock tax. *See* Office of Technology Assessment, Superfund Strategy 46–48 (1985).

[240] *See, e.g.*, Technologies and Management Strategies, *supra* note 77, at 30; From Pollution to Prevention, *supra* note 196, at 43; Roberta G. Gordon, Note, *Legal Incentives For Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Managment*, 95 Yale L.J. 810, 812 (1986).

dom, if ever, realized in practice.[241] Advocates favoring reinvigoration the nondelegation doctrine raise legitimate concerns when they point to the problems of capture and delay that plague regulatory administration under broad statutory mandates.[242]

Moreover, in an era characterized by both divided government and increasing executive control over regulatory policy, broad grants of authority may facilitate politically motivated distortions favoring members of the President's supporting coalition. For example, in the case of hazardous-waste policy, the Reagan administration sought to limit costs to the private sector, first by disassembling the RCRA regulatory program and then, when the courts blocked that strategy, by using tactics of obstruction and delay. The problem is illustrated even more clearly by administration of the Superfund program, in which cleanup activities were allegedly targeted to promote Republican political candidates. Given the politicization of hazardous-waste regulation in the early years of the Reagan administration, along with the enormous costs of cleaning up improperly managed hazardous-waste sites, the rigid and expensive framework established by HSWA may well be preferable to the regulatory program that would have evolved in its absence.[243]

In addition to the potential difficulties of alternatives to prescriptive statutes, it must be recognized that not all of the problems encountered in implementing HSWA can be attributed to the EPA's limited discretion. Instead, some of these problems are the product of the prevailing command-and-control approach to regulation that the statute embodies. As Professor Stewart points out, conventional standard-setting imposes "exorbitant information-gathering and decisionmaking costs."[244] The result

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[241] Ackerman and Hassler make this point in a somewhat ironic fashion in their superb study of the Clean Air Act. They demonstrate the irrationality of congressionally mandated forced scrubbing of coal-burning plant emissions, in part by comparing it to the policy that would have been developed by an "insulated and expert pollution control agency concerned with the cost-effective pursuit of health-related targets." ACKERMAN & HASSLER, *supra* note 13, at 118; *see id.* at 59–78. In a footnote, however, they make the following telling remark: "Not that we presently know how to design an expert agency of the kind hypothesized. Nor can we hope, in the present case study, to confront the fundamental questions of institutional design that must be resolved before our hypothetical agency could seem a credible reality." *Id.* at 118; *see also id.* at 122.

[242] *See supra* notes 13–14 and accompanying text.

[243] Similarly, Ackerman and Hassler conclude that, "[i]f faced with a choice between the the bastardized Clean Air Act of today or the pathetically weak legal regime prevailing before the first Earth Day, no doubt we would settle for what we have." ACKERMAN & HASSLER, *supra* note 13, at 117.

[244] Stewart, *supra* note 15, at 330; *see also* BREYER, *supra* note 212, at 265–67.

of these high information and decision costs is that centrally imposed standards are likely to be "relatively crude and uniform prescriptions" that are both inflexible and "irrational in many particular applications."[245] Such problems are likely to occur regardless of (1) whether Congress or the agency sets the standards (as with the technological requirements for landfills), and (2) the degree of specificity with which Congress structures the agency's decision process (as in the case of the treatment and disposal standards).[246]

With these caveats in mind, the HSWA experience does illustrate several significant problems with heavily prescriptive statutes in the risk-regulation area. First, because Congress is directly responsive to popular demands, the policies it develops are likely to be based more on public perceptions of risk than on actual risks.[247] In HSWA, Congress responded to public fears by establishing an aggressive, self-enforcing program to restrict severely land disposal of untreated wastes and develop stringent treatment standards, even though the actual risks of existing practices were less than the public believed. The result is a regulatory regime in which a high price is often paid for relatively small risk reductions,[248] thereby consuming resources that might otherwise be applied to more serious environmental prob-

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[245] Stewart, *supra* note 15, at 330.

[246] This is not to say that standard setting is entirely inappropriate as part of an overall strategy for regulating hazardous wastes. There are, for example, good reasons to impose some minimum requirements on land-disposal facilities. The use of economic incentives for waste reduction cannot eliminate all wastes requiring disposal, and for two reasons it is not possible to rely on the tort liability system to deter effectively improper practices by disposal facility operators. First, improper management of hazardous wastes may lead to large scale disasters that outstrip the ability of responsible parties to pay. Second, a variety of factors reduce the likelihood of, and prospects for, successful suits for damages caused by hazardous-waste releases. These factors include the following: (1) adverse health effects may emerge only after the passage of a long period of time; (2) much of the damage will be to natural resources; and (3) it may be difficult to prove that particular health effects are attributable to specific firms or hazardous agents. *See generally* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 370 (1984).

[247] *See* Raymond Loehr, *What Raised the Issue?*, EPA J., Mar./Apr. 1991, at 6, 12 ("Since public concerns tend to drive national legislation . . . EPA's budget and staff resources tend to be directed at those environmental problems perceived to be most serious by the general public."); *cf.* Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747 (1990) (arguing that the salience of low-probability catastrophic events will lead to more intense citizen demands for policies to deal with these risks).

[248] The high costs incurred as a result of HSWA belie the claims of nondelegation doctrine advocates, such as Schoenbrod, who argue that forcing Congress to legislate in detail will require more adequate consideration of the costs of regulatory policies and produce more reasonable compromises. *See* Schoenbrod, *Goals Statutes or Rules Statutes*, *supra* note 2, at 748, 789.

lems.[249] Similarly, because public attitudes dictated a focus on waste management, HSWA did not contain a coherent or meaningful approach to capturing the benefits achievable through waste minimization. By contrast, to the extent that agencies offer the potential for some insulation from public perceptions, leaving agencies broad discretion may encourage the development of policies that more accurately reflect actual risks.[250]

Second, Congress' designation of specific analytic processes may prevent agencies from using information in an effective manner.[251] In HSWA, Congress required the EPA to adhere to a rigid and unrealistic decision-making process for restricting land disposal and setting waste-treatment standards. The nature of this process precludes consideration of costs and has led the EPA to abandon the use of comparative risk assessment as a tool for identifying which treatment technologies pose greater risks than land disposal. As a result, the hazardous-waste regulations may be both economically and environmentally unsound.

Third, because Congress cannot possibly foresee all the consequences of the policies it adopts, prescriptive statutes are likely to prevent the implementing agency from responding effectively to new developments.[252] For example, the EPA was unable to develop a satisfactory approach to the high level of

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[249] *See* Loehr, *supra* note 247, at 8 (noting the "heavy costs involved if society fails to set environmental priorities based on risk").

[250] The foregoing discussion may appear anti-democratic in that it emphasizes the need to develop policies based on something other than public preferences. *See* 3 RODGERS, *supra* note 65, § 7.2(A)(1), at 520 (noting that "[a] perplexing question for the theory and practice of risk assessment is whether to honor public opinions that elevate risks above the rank established by scientific consensus"). Nevertheless, it is possible that an agency's role in formulating regulatory policy could be coupled with the informational role of educating the public as to the true nature of the risks. *But see* Thomas A.W. Miller & Edward B. Keller, *What the Public Thinks*, EPA J., Mar./Apr. 1991, at 40, 43 (arguing that it would be impractical "to bring public perceptions precisely into line with those of experts" and that "the basic objective should be to cultivate public confidence in . . . our scientific and environmental leadership, so that Americans willingly 'delegate' responsibility for specific risk assessments to those most capable of making them").

[251] *See* Merrill, *supra* note 31, at 87 (arguing that the Delaney Clause has created serious practical problems for the Food and Drug Administration, and that "[t]o prescribe a specific analytical approach for the resolution of food safety issues would be to repeat the error of Delaney").

[252] *See* Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 192 (1987) (noting that "[i]f an agency faces a statutory requirement to solve a particular problem by a date certain, it may be precluded from addressing directly related, far more socially significant problems—problems perhaps not even identified at the time the statute was passed").

facility closures because it was too busy meeting the statutory deadline for permitting operating facilities.

Fourth, an unwillingness or inability to legislate in broad terms may foreclose certain regulatory alternatives altogether. Because Congress can devote only a limited amount of time to particular problems, policy options involving a high level of precision and information may be abandoned in favor of more crude and simple solutions. In the case of the design requirements for land-disposal facilities, a system requiring that waste groups be matched with different types of facilities may have effectively reduced risks while minimizing the number of facility closures.[253] Congress, however, could not possibly devote the time necessary to develop such a system and was unwilling to provide the EPA with the discretion to establish such a system on its own. Instead, Congress simply enacted into law what appeared to be the best available design features[254] and required that all hazardous wastes be disposed in facilities meeting those specifications.

Finally, highly specific statutes may prove impervious to change. Ideally, the rigidities of the current regulatory framework should be relaxed to allow a broader role for risk-based approaches to setting treatment and disposal standards.[255] As discussed above, the enactment of RCRA in 1976 and HSWA in 1984 has produced a statutory regime in which cost is ignored and risk assessment is discarded in setting regulatory standards. Arguably, pervasive uncertainty concerning the effects of hazardous substances, along with the difficulty of valuing human health and natural resource damages, justifies the inability of the EPA to weigh benefits against costs. This view, however, is questionable in light of the high price being paid for risk reduction.[256]

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[253] *See supra* notes 213–215 and accompanying text.

[254] *See* TECHNOLOGIES AND MANAGEMENT STRATEGIES, *supra* note 77, at 229–42.

[255] *See* Bilicic, *supra* note 152, at 1585–88 (advocating relaxation of the no-migration standard, but arguing that the EPA has established a "sound approach" to setting treatment standards).

[256] For example, the cost-benefit RIA published with the final solvent and dioxin rule indicated that the regulations for solvent wastes would generate annual costs of $147 million despite reducing the number of cancer cases by only 1.66 cases per year, an average of $88.7 million per cancer case avoided. *See* 51 Fed. Reg. at 40633–34. The regulations for dioxins were found to generate annual costs of $3.2 million for non-soil sources of dioxin wastes, plus an additional $2.2 million for management of existing dioxin-contaminated soil, despite having essentially no impact on the number of cancer

Even if cost remains an impermissible consideration, the use of risk-assessment techniques should be encouraged if reasonable standards are to be developed. The *Hazardous Waste Treatment Council* decision and the EPA's response[257] demonstrate that the EPA retains authority to develop risk-based screening levels to cap treatment and that it intends to do so. As for other aspects of the standard-setting process, statutory revisions are required for the EPA to incorporate explicitly risk analyses into its decision-making process. For example, analysis to determine which wastes could safely be landfilled without treatment is not pursued because the no-migration language in HSWA effectively prohibits land disposal of almost all untreated hazardous wastes.[258] Similarly, comparative risk assessment cannot be used effectively as a decision-making tool because (1) the no-migration standard rules out land disposal of untreated wastes, regardless of whether such disposal is less risky than treatment, and (2) land disposal is presumptively disfavored relative to treatment alternatives.

Despite the advantages of risk-based analyses, these and other rigidities in the current statutory framework are unlikely to be relaxed.[259] Members of Congress are unlikely to vote for statutory revisions that could be perceived as "going soft" on hazardous waste, particularly in view of the fact that public concern regarding hazardous waste remains high.[260] In this respect, restrictive hazardous-waste policies may be analogized to the Delaney Clause, which has shown considerable staying power despite its impracticalities as a tool for regulating carcinogens in food additives.[261]

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cases. *Id.* at 40634–35. The EPA cautioned, however, that for a variety of reasons the benefits of these rules may have been underestimated. *See id.* at 40634; *see also* Bilicic, *supra* note 152, at 1584 (arguing that "there is a strong need to consider cost limitations in devising standards for hazardous waste treatment and disposal").

[257] *See supra* notes 176–184 and accompanying text.

[258] *See* Bilicic, *supra* note 152, at 1587 (arguing that "[i]t makes little sense to preclude land disposal if it can be shown to a reasonable degree of certainty that hazardous constituents will not migrate at dangerous levels").

[259] Indeed, in the current deliberations over reauthorization of RCRA there has been little, if any, mention of the prospects for lessening the burdens imposed by HSWA. Instead, attention has been focused largely on the need for new statutory requirements. *See generally 1990 Reauthorization Hearings*, *supra* note 137.

[260] *See* THE NATION'S HAZARDOUS WASTE PROGRAM, *supra* note 66, at 5 (providing poll results indicating that the "public ranks hazardous waste as a top environmental concern").

[261] *See* Merrill, *supra* note 31, at 88 (noting Congress' inability to revise the Delaney Clause).

V. CONCLUSION

This Note has studied implementation of the HSWA land-disposal provisions as a means of assessing the appropriate scope of agency discretion in the risk-regulation area. HSWA was selected for study because it provides an extreme example of the increasing tendency of Congress to limit agency discretion by using narrow statutory enactments. Review of the HSWA experience indicates that the high level of statutory detail, and particularly the hammer provisions, have proven effective as instruments of political control. By ensuring agency responsiveness to congressional demands, these statutory techniques have enabled Congress to wrest control of the RCRA program from an Executive Branch that appeared to have little interest in regulating.

The price of heightened political control has been an inability to develop a reasoned approach to the regulation of hazardous-waste risks. HSWA has fostered the development of a regulatory program in which high costs are incurred, often for relatively small or even non-existent risk reductions. Moreover, in some areas, risks have simply been shifted to different media and may have increased. These failings illustrate some of the potential problems of narrowly drawn statutes. Such statutes are likely to reflect public perceptions of risks rather than actual risks. They may also prevent the effective use of information and inhibit development of adequate responses to unforeseen developments. Finally, narrowly drawn statutes may be difficult to change, particularly when reforms require relaxing excessively restrictive standards that are inappropriate for controlling the relevant risks.

Thus, there are clearly costs associated with a regime in which Congress specifies in detail both the means and the ends of regulatory policy. These costs call into question the views of those who have advocated revival of the nondelegation doctrine. Moreover, from an institutional perspective, these costs must be viewed as among the hidden costs of divided government. Indeed, to the extent that divided government continues, Congress is likely to continue the use of prescriptive statutes to block executive influence over agency decisions despite the significant problems these statutes entail.

RECENT DEVELOPMENTS

THE PRESIDENTIAL DEBATES ACT OF 1992

As the candidates prepare for the 1992 presidential election campaign, few voters will have forgotten the campaign of 1988. Instead of substantive discussion of important issues, voters were informed largely through negative television advertisements and brief sound bites on the evening news.[1] Indeed, while "Willie Horton"[2] became a household name, it is difficult to recall any in-depth discussion of the candidates' views on crime or any proposals that were offered to address this serious problem.

Televised presidential debates provide the best opportunity for informing and educating the electorate. Televised debates attract large audiences, force the candidates to address specific concerns, and allow sufficient time for the candidates to present their views. Current law allows the candidates to decide whether or not to participate in the debates. Consequently, presidential debates are scheduled only when campaign managers find them beneficial to their candidates' campaign strategies, rather than when they would be most helpful for the voters.

The debates in 1988 reflected the problems inherent in the current ad hoc system. Since the candidates had the power to decide whether or not they would debate, they were able to dictate the terms of the debate. As a result, much of the informational value of the debates was lost. Although the debates could have been an effective medium for educating voters on the issues and defining the candidates' positions, many commentators agree that this goal was not achieved. Bernard Shaw, of CNN, stated, "'88 was a charade, these were not debates," and Walter Cronkite, of CBS, described the debates as "phony, part of an unconscionable fraud."[3]

An ideal system of presidential debates would not only provide some assurance that the voters will be able to hear debates, but would also guarantee that the debates themselves will be

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[1] BRUCE BUCHANAN, ELECTING A PRESIDENT 8 (1991).

[2] Willie Horton is a black man who had brutally raped a white woman and beaten her fiance while on a weekend furlough from a Massachusetts prison during Democratic candidate Michael Dukakis' term as Governor of Massachusetts. George Bush featured Horton in a campaign ad. *See* Elizabeth Kolbert, *Political Ads May Wound, But Not Win Races*, N.Y. TIMES, Mar. 22, 1992, § 4, at 4.

[3] JOHN ELLIS, NINE SUNDAYS: A PROPOSAL FOR BETTER PRESIDENTIAL CAMPAIGN COVERAGE 22 (1991).

both educational and informative. The Presidential Debates Act of 1992[4] ("the Bill") attempts to create such an ideal system. It provides two methods of reforming the current debating system. First, given that the debate forum has an enormous potential for educating voters, the Bill guarantees that debates will be held by stipulating that all presidential candidates who receive public funding from the federal matching funds program must participate in debates. In so doing, the Bill recognizes that the candidates have an obligation to inform and educate the voters because the voters' tax dollars subsidize the candidates' campaigns. Under the current system, the candidates are able to use public funds to present their views—and their opponent's views—in any manner they choose. In 1988 the Democratic and Republican candidates together spent a record fifty million dollars on television ad campaigns which allowed the candidates to shield themselves from any meaningful discussion of the issues.[5]

Second, the Bill attempts to resolve the problem of lack of substance in presidential debates by mandating nonpartisan sponsorship and allowing independent and third-party candidates who meet certain objective criteria to participate in the debates. The current debating system is under the authority of the bipartisan Commission on Presidential Debates which has demonstrated its unwillingness to allow third-party candidates to participate.[6] By taking control of the debates from the two major parties and allowing participation by other candidates, the Bill would open up the debates to a broader spectrum of views and provoke more meaningful discussion of the issues.

Part I of this Recent Development describes the brief history of televised presidential debates and the uncertainty surrounding them which inspired the Bill. Part II describes the Bill and its purposes. Parts III and IV then examine the constitutionality of requiring candidates to debate, balancing the federal govern-

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[4] S. 2213, 102d Cong., 2d Sess. (1992). This is the companion bill to the Democracy in Presidential Debates Act introduced last year by Representative Timothy Penny (D-Minn.). H.R. 791, 102d Cong., 1st Sess. (1991).

[5] Kolbert, *supra* note 2, at 4.

[6] In 1988 the Commission refused to allow third-party candidates to participate unless they could demonstrate a "realistic chance of being elected." Letter from Janet H. Brown, Executive Director of the Commission on Presidential Debates, to Gary Sinawski, Counsel to Lenora Fulani's Committee for Fair Elections 1 (Sept. 13, 1988) (on file with the *Harvard Journal on Legislation*). By looking only at a candidate's potential for being elected, the Commission ignores several important reasons for including third-party candidates. *See infra* notes 83–101 and accompanying text.

ment's interest in an informed electorate against the candidates' right to remain silent. Part V focuses on the potential for including third-party candidates in the debates to strengthen the government's interest in the constitutional balance. Finally, Part VI provides a brief summary and conclusion.

I. THE HISTORY OF TELEVISED PRESIDENTIAL DEBATES

Although televised presidential debates have come to be expected by the American voters, there is no guarantee that the candidates will agree to participate in them.[7] Indeed, while many believed that the Kennedy-Nixon debates in 1960 were the sign of a "brave new age in presidential elections," sixteen years passed before there was another presidential debate.[8] In 1964, President Johnson refused to debate; similarly, in 1968 and 1972, President Nixon declined to debate. Both candidates proceeded to win their elections.

Not only is it up to the candidates to decide whether or not to debate, but because they have this power, they can virtually dictate the conditions surrounding the debates. For example, former President Carter refused to participate in the first presidential debate in the 1980 election because the sponsor had decided to include John Anderson, the Independent Party candidate. The debate proceeded between Reagan and Anderson; the second debate in that election did not include Anderson.[9]

In 1985 the Chairmen of the Democratic and Republican parties declared their determination to make televised debates "a permanent and integral part of the presidential election process."[10] In announcing the formation of the bipartisan Commission on Presidential Debates ("CPD"), Co-chairmen Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr. stated, "It is our bipartisan view that a primary responsibility of each major political party is to educate and inform the American electorate of its

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[7] *See* COMMISSION ON NATIONAL ELECTIONS, GEORGETOWN UNIVERSITY, ELECTING THE PRESIDENT: A PROGRAM FOR REFORM 41–42 (Robert E. Hunter ed., 1986); Jack W. Germond & Jules Witcover, *Are Presidential Debates Inevitable?* 22 NAT'L J. 1244. A Democratic consultant who was involved in each of the past three elections said that debates "are not at all inevitable in presidential campaigns." *Id.* at 1244.

[8] NEWTON N. MINOW & CLIFFORD M. SLOAN, FOR GREAT DEBATES 3 (1987).

[9] *See* JOEL L. SWERDLOW, BEYOND DEBATE 5–9 (1984).

[10] Paul G. Kirk, Jr. & Frank J. Fahrenkopf, Jr., Memorandum of Agreement on Presidential Candidate Joint Appearances (1985), *reprinted in* COMMISSION ON NATIONAL ELECTIONS, *supra* note 7, at 14.

fundamental philosophy and policies as well as its candidates' positions on critical issues."[11] The chairmen acknowledged the efforts of the League of Women Voters in sponsoring past debates but stated that future debates should be conducted jointly by the Democratic and Republican National Committees. They further stated that the Democratic and Republican nominees would be allowed to negotiate the "details" of the debate format with the chairmen and left to each party's nominee the decision of whether to participate.[12]

With a bipartisan commission controlling the debates, there is a greater likelihood that the nominees of the two major parties will agree to participate. However, under the CPD proposal a candidate who does not believe he or she stands to gain from participating in a debate may still choose to decline any challenges to debate and simply focus attention on other aspects of the campaign. A statement by a senior aide to then-Vice President Bush regarding the debates in the 1988 campaign demonstrates that even CPD-sponsored debates are by no means guaranteed: "We don't want to have Dukakis on the same stage, in effect on par, with the Vice President. That makes them equal in the public's eye. We believe that tough speeches and a good program of TV commercials can win us the Presidency and debates just distract you from that task."[13] Simply put, the decision to debate is a tactical decision left to the candidates whose main concern is winning the election and not necessarily informing the voters.

Even if having the two major parties organize and control the debates makes it more likely that the candidates of these two parties will agree to participate, it provides no guarantee that the debates will be worthwhile and informative. In fact, the League of Women Voters, which had sponsored the debates in the three previous elections, refused to host one of the debates in 1988 because the CPD conditioned the candidates' participation on the League's acceptance of guidelines for the debates described in a sixteen-page "Memorandum of Understanding."[14] The Memorandum was the result of private negotiations be-

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[11] *Id.*

[12] *Id.*

[13] 135 CONG. REC. E1117-02 (1989) (statement of Rep. Edward J. Markey (D-Minn.), introducing the Presidential Debates Act of 1989) (quoting Bush senior aide).

[14] Mary McGrory, *The League Puts Its Foot Down*, WASH. POST, Oct. 6, 1988, at A2.

tween Bush and Dukakis representatives and detailed an exhaustive list of conditions under which the candidates of the two parties would agree to debate.[15] These conditions included a procedure by which the candidates would pick the questioners, provided for a partisan audience, and limited press access.[16]

The President of the League, in withdrawing the League's support for the last debate, stated that "[T]he candidates' organizations aim to add debates to their list of campaign-trail charades devoid of substance, spontaneity and honest answers to tough questions."[17] The League further protested that the voters' interests had been ignored by the CPD and stated that the League would not become "an accessory to the hoodwinking of the American public."[18] A political commentator later compared the CPD-controlled debates to a "glorified press conference" whose format was essentially a "security blanket" for the two candidates.[19] Although the CPD stated that its goals were to "educate and inform" the voters,[20] the fact that it is controlled by the two major parties essentially guarantees that the interests of the candidates will supersede those of the voters. Indeed, it would be poor campaign strategy for the parties to do anything that would put their own candidates at risk.

The status of the 1992 debates is uncertain. The four major news networks—ABC, NBC, CBS, and CNN—have expressed concern over allowing the party-controlled CPD to repeat its sponsorship and have announced plans to sponsor the debates themselves.[21] The networks' plan proposes a new format in which the candidates would confront each other head-on, exchanging views with one another on the issues, with the moderator playing only a limited role.[22] Furthermore, there would be no studio audience or any complex rules monitoring the

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[15] James A. Baker III & Paul P. Brountas, Memorandum of Understanding (1988) (on file with the *Harvard Journal on Legislation*); *see also* ELLIS, *supra* note 3, at 21–23.

[16] Baker & Brountas, *supra* note 15, at 7–8, 12–13.

[17] Walter V. Robinson, *League Quits as Sponsor of Debate in L.A.*, BOSTON GLOBE, Oct. 4, 1988, at 14.

[18] Lloyd Grove, *League of Women Voters Yanks Support of Debate; 'Manipulations' by Campaigns Blamed*, WASH. POST, Oct. 4, 1988, at A15.

[19] *Bipartisan Panel Rejects Debate Proposal by Networks*, WASH. POST, Sept. 26, 1991, at A14.

[20] Kirk & Fahrenkopf, *supra* note 10, at 14.

[21] B. Drummond Ayres, Jr., *Networks Seek Presidential Debate Overhaul*, N.Y. TIMES, Sept. 26, 1991, at A22.

[22] Martin Plissner, *Debates: You Can Trust the Networks*, WASH. POST, Nov. 5, 1991, at A21.

candidates' responses.[23] However, while these proposals may go far to improve the quality of the debates, once again there would be no guarantee that the candidates would agree to participate. In fact, a more innovative format increases the risk to the candidates, and thus lessens the likelihood that the candidates will agree to debate.

Thus the problem remains. Allowing the CPD to maintain control of the debates results in the greater likelihood that the candidates will agree to participate. But, as evidenced in 1988, allowing the two major parties to dictate the terms by which the candidates will debate provides no guarantee that the debates will be worthwhile or informative. On the other hand, while an outside, neutral sponsor may provide a better forum for substantive discussion, there is no guarantee that the candidates will even show up.

II. Reform Proposal: The Presidential Debates Act of 1992

The Presidential Debates Act proposes to solve these dilemmas by requiring the candidates to participate in debates as a condition to receiving federal matching funds and by opening up the debates to qualified third-party candidates to provoke more serious discussion of substantive issues. By taking control of the debates away from the major parties and requiring debate participation, the Bill seeks to provide some guarantee that the taxpayers will receive the informative discussion to which they are entitled.

The idea of requiring presidential candidates to debate as a condition to receiving federal campaign funds is not new. Former presidential candidate John Anderson made this very suggestion after the 1980 campaign,[24] and the Markle Foundation recently published its recommendation for mandatory debates after concluding its research on the 1988 campaign.[25] In addition, several bills have been introduced in both houses which would condition public campaign funds on participation in the de-

[23] *Debates in '92*, Wash. Post, Oct. 14, 1991, at A24.

[24] John B. Anderson, *The Third Party Candidate's View of the System*, *in* Presidential Selection 29, 31 (Franklin J. Havelick ed., 1982).

[25] Buchanan, *supra* note 1, at 165–66.

bates.[26] The Presidential Debates Act of 1992, however, takes these proposals a step further by addressing not only the problem of participation but also the substantive quality of the debates.

The Bill implements its proposals by amending the Internal Revenue Code of 1986 and establishing additional eligibility requirements for candidates in order to receive matching funds under § 9037. Presidential candidates[27] must agree in writing to participate in not fewer than three presidential general election debates, each lasting at least ninety minutes, with at least thirty minutes devoted to direct questions and answers between the candidates.[28]

The Bill further requires that the debates be sponsored by a nonpartisan organization[29] to guarantee that the debates are structured to serve the voters' best interests rather than those of the candidates. The Bill does not name a specific sponsor, nor does it outline a procedure by which to select one. However, an organization like the League of Women Voters, which has sponsored several debates in the past, would satisfy the nonpartisan criterion.

The most innovative aspect of the Bill is its requirement that the presidential candidates debate with all other candidates who meet certain objective criteria for significance.[30] The candidates must demonstrate their significance by qualifying to be on the election ballot in not fewer than forty states.[31] Further, each candidate must be eligible to receive matching funds under § 9033 of the Internal Revenue Code of 1986 or raise not less than $500,000 on or after January 1 of the calendar year immediately preceding the calendar year of the presidential election.[32] This final provision was included in recognition of the fact that certain parties, such as the Libertarian Party, choose not to apply for federal matching funds on ideological grounds.

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[26] H.R. 60, 102d Cong., 1st Sess. (1991); H.R. 1112, 102d Cong., 1st Sess. (1991); S. 491, 102d Cong., 1st Sess. (1991); H.R. 1733, 101st Cong., 1st Sess. (1989); S. 725, 101st Cong., 1st Sess. (1989); H.R. 95, 101st Cong., 1st Sess. (1989).

[27] The Bill also requires the vice-presidential candidates to participate in at least one debate. S. 2213, 102d Cong., 2d Sess. § 3(e)(1)(B).

[28] *Id.* § 3(e)(1)(A), (2)(A)(iii).

[29] *Id.* § 3(e)(2)(A)(i).

[30] *Id.* § 3(e)(2)(A)(ii).

[31] *Id.* § 3(e)(3)(A).

[32] *Id.* § 3(e)(3)(B), (C).

Introducing the companion bill in the House, Representative Timothy Penny (D-Minn.) stressed the importance of including independent and third-party candidates in the debates:

> Historically, such candidates have been fertile sources of new ideas and new programs, and provide opportunities for the American public to enter into a diverse and open dialog on the critical issues of the day. These candidates often represent views held by large segments of the disenfranchised of our population, and their inclusion will surely stimulate discussion of substantive issues. In the interests of fairness and free and open dialog, all significant candidates . . . must be included in the debates.[33]

Senator Paul Wellstone (D-Minn.), sponsor of the Senate Bill, also stated the importance of including third-party candidates in the debates and urged the Senate to "act now to reclaim the faith and interest of a cynical electorate."[34]

III. The Constitutional Implications of the Bill

Because the Bill would require presidential candidates to participate in the debates, it creates the potential for a claim that it impermissibly infringes on the candidates' First Amendment right to "remain silent."[35] While the government cannot directly impose restraints on the candidates' fundamental rights, the Bill attempts to avoid this problem by making the requirement to debate a condition of receiving federal matching funds—funds for which the candidate may choose not to apply. This implicates the doctrine of "unconstitutional conditions," which states that the "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[36] While at first glance this doctrine may appear clearly to forbid granting matching funds on the condition that the candidates forego their con-

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[33] 137 Cong. Rec. E397-02 (1991).

[34] 138 Cong. Rec. S1362 (daily ed. Feb. 7, 1992).

[35] See *infra* notes 69–80 and accompanying text. For a general discussion, see Michael Kovaka & Arthur R. Block, Statement in Support of the Democracy in Presidential Debates Act (H.R. 791) and the Presidential Debates Act of 1992 (S. 2213): The First Amendment Issues (prepared for the Rainbow Lobby, Inc., Washington, D.C.) (May 1, 1992) (on file with the *Harvard Journal on Legislation*).

[36] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1415 (1989).

stitutional right to remain silent, upon further examination it is uncertain how this condition would be interpreted by the courts.

A. *Unconstitutional Conditions: Contradictory Supreme Court Precedent*

The Supreme Court in *Perry v. Sinderman*[37] stated that a public university "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[38] In *Perry*, the Court declared unconstitutional a state college's attempt to condition a professor's continued employment on the professor's promise to refrain from exercising his First Amendment right to criticize the school's administration. In *FCC v. League of Women Voters of California*[39] the Supreme Court again invoked the doctrine of unconstitutional conditions by striking down a congressional act that denied eligibility for federal funding to those broadcasters who chose to editorialize. Because the government could not directly infringe on a citizen's constitutionally protected right, it could not do so indirectly by attaching a condition to federal funds.[40] Following this logic, it would appear that withholding funds from those candidates who choose not to debate would impose an unconstitutional condition, thereby making the Bill unconstitutional.

The Supreme Court, however, has not been consistent in its application of this doctrine. As Professor Sullivan has noted, "the doctrine of unconstitutional conditions is riven with inconsistencies."[41] For example, in *Harris v. McRae*,[42] the Court upheld the Hyde Amendment to the Social Security Act, which allowed subsidies for medical expenses relating to childbirth but not to abortion, even though the right to abortion is constitutionally protected. Moreover, in *Regan v. Taxation with Representation*,[43] the Court held that it was not unconstitutional to deny tax benefits to nonprofit organizations that exercised their First Amendment right to lobby. The Court, in these cases,

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[37] 408 U.S. 593 (1972).
[38] *Id.* at 597.
[39] 468 U.S. 364 (1984).
[40] *See* Sullivan, *supra* note 36, at 1415.
[41] *Id.* at 1416.
[42] 448 U.S. 297 (1980).
[43] 461 U.S. 540 (1983).

upheld the government's right to choose the kinds of activities it wished to subsidize. Following the implication of these cases, it is possible that the Bill could be construed as a legitimate tool by which the government could encourage participation in presidential debates by choosing to support those candidates who agreed to debate, and choosing not to support those candidates who refused.

The most recent application of the doctrine of unconstitutional conditions came last term in the abortion counseling case, *Rust v. Sullivan*.[44] In a five-four decision, the Court stated that it was constitutional to condition federal funding for family planning clinics on a restriction of the employees' First Amendment rights to give information regarding abortion. It is unclear if this represents the Court's current attitude toward the doctrine of unconstitutional conditions or merely its desire to curtail abortion rights. If *Rust* does in fact demonstrate the former, the Bill could pass constitutional muster as a permissible legislative decision to use federal funding to encourage debate participation.

B. *The Doctrine of Unconstitutional Conditions and Federal Matching Funds*

Given the difficulty of satisfactorily distinguishing the conflicting lines of Supreme Court precedent on unconstitutional conditions, it may be helpful to examine two cases that, like the Bill, involve conditions imposed on candidates who receive campaign matching funds.[45] In *Buckley v. Valeo*[46] the Supreme Court upheld the constitutionality of certain provisions of the Federal Election Campaign Act of 1971, one of which conditioned a candidate's receipt of federal matching funds on an agreement to accept certain expenditure limitations.[47] Although the Court recognized that a candidate's expenditures qualified as political expression protected by the First Amendment,[48] it held that Congress could place certain conditions on this right

[44] 111 S. Ct. 1759 (1991).

[45] *See* Scott M. Matheson, Jr., *Federal Legislation to Elevate and Enlighten Political Debate: A Letter and Report to the 102d Congress About Constitutional Policy*, 7 J.L. & POLITICS 73, 112–13 (1990).

[46] 424 U.S. 1 (1976).

[47] *Id.* at 95, 107–08.

[48] *Id.* at 19–20, 23.

if the candidate chose to accept public funds.[49] Indeed, even a "significant interference" with a candidate's rights would be permissible if the government demonstrated "a sufficiently important interest" in imposing a particular restriction.[50] Although the expenditure limitation may infringe on a candidate's First Amendment right, the Court noted that the overriding purpose of the matching funds provision was "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[51]

In *Republican National Committee v. Federal Election Commission*,[52] the court held that conditioning the eligibility for matching funds upon a candidate's agreement to accept expenditure limitations did not violate the candidate's First Amendment rights. Furthermore, the court held that even if it did infringe on the candidate's First Amendment rights, it was "fully justified by the compelling state interests" in establishing reasonable limits on expenditures so as not to defeat the purposes behind the matching fund provision.[53] The court noted that one of Congress' purposes in providing federal matching funds was to relieve candidates of the burden on their time involved in raising funds which occurred "'at the expense of providing competitive debate of the issues for the electorate.'"[54] The court stressed the necessity of allowing certain conditions to be attached to the receipt of matching funds, or else these important "public interest purposes" would not be served.[55]

In sum, deciding whether the Bill imposes an unconstitutional condition on the receipt of campaign matching funds requires a balancing of the burden imposed on the candidates' First Amendment right against the magnitude of the government's interest in requiring the candidates' participation in the debates. Further, a condition may permissibly infringe on the candidate's First Amendment interest only if the government "employs means closely drawn to avoid unnecessary abridgment" of that interest.[56]

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[49] *Id.* at 95.
[50] *Id.* at 25.
[51] *Id.* at 92–93.
[52] 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).
[53] *Id.* at 285.
[54] *Id.* at 284 (quoting S. REP. No. 689, 93d Cong., 2d Sess. (1974), at 5–6, *reprinted in* 1974 U.S.C.C.A.N. 5587, 5591–92).
[55] *Id.* at 285.
[56] *Buckley*, 424 U.S. at 25.

IV. Applying the Constitutional Balance

A. *The Government Interest*

The government has a significant interest in requiring the candidates' participation in the debates to assure that the American voter is well informed. Facilitating the voters' ability to receive information about the candidates was recognized as an important government interest by the Supreme Court in *Buckley*.[57] The Court stressed the necessity of providing information to the voters during an election: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."[58] The Court further declared that our system of government depends on providing the voters with "[d]iscussion of public issues and debate on the qualifications of candidates."[59]

The Court in *Buckley* not only required that the condition placed on the funds serve a significant state interest, but also that the condition be narrowly tailored to accomplish that express purpose.[60] The Bill's proposal to require debates arguably satisfies this requirement because debates appear to be the most direct and effective means of educating and informing the voters. The Markle Commission's report on the 1988 election estimates that as many as eighty million people may have watched the presidential debates, making them "the single most important class of campaign events, and the most significant opportunities to learn about the candidates."[61] Presidential debates not only attract large audiences, but also provide a unique means for acquainting the voters with the candidates and informing the voters about the issues: debates give voters "the opportunity to watch the candidates' minds at work in circumstances that are less scripted and controlled than usual . . . [and] offer voters a

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[57] *See supra* note 51 and accompanying text.

[58] *Buckley*, 424 U.S. at 14–15.

[59] *Id.* at 14.

[60] *See supra* note 56 and accompanying text.

[61] Buchanan, *supra* note 1, at 10; *see also* Thomas E. Patterson, *Television and Presidential Politics: A Proposal to Restructure Television Communication in Election Campaigns*, *in* Presidential Selection 302, 303 (Alexander Heard & Michael Nelson eds., 1987).

level of contact with candidates unmatched in spot ads and news segments."[62]

Some commentators, however, have questioned the usefulness of debates. The typical criticism is that the debates "emphasize image over substance and add little to the public's knowledge either of the issues or of the candidates. Moreover, the skills needed to do well in a televised debate have little to do with being a good president."[63] Indeed, debates have often been criticized as being superficial, focusing on the candidate's personality rather than on his or her ideas.[64]

Considering the alternative means of informing the electorate, however, debates do seem to offer the best chance for providing voters with a serious discussion of the issues. Because most Americans rely on television as their primary source of information, without debates voters would be left with only news clips and television ads as their means of learning about the candidates and the issues.[65] The average length of time a candidate speaks without interruption on the network evening news has declined from 43.1 seconds in 1968 to a mere 8.9 seconds in 1988, necessarily limiting the potential educational value of that medium.[66] The length of the debates alone assures that the viewers will get a more substantial view of the candidates. Furthermore, anyone concerned about disadvantaging those candidates who do not perform well on television or in a debate format[67] must consider the fact that such skills are relevant in modern politics. As one commentator noted,

> [i]t is foolish to say that the way a candidate responds, his glibness, his ability to think on his feet, are not important qualities for anyone who is trying to be president. If a president is not prepared to appear on television two or three times a week, in one form or another—then he is not going to make it.[68]

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[62] BUCHANAN, *supra* note 1, at 109; *see also* KATHLEEN H. JAMIESON & DAVID S. BIRDSELL, PRESIDENTIAL DEBATES: THE CHALLENGE OF CREATING AN INFORMED ELECTORATE 126 (1988).

[63] SWERDLOW, *supra* note 9, at 11.

[64] See MINOW & SLOAN, *supra* note 8, at 36.

[65] James Karayn, *The Case for Permanent Presidential Debates in* THE PAST AND FUTURE OF PRESIDENTIAL DEBATES 155, 159 (Austin Ranney ed., 1979).

[66] *Sound Bites Become Smaller Mouthfuls*, N.Y. TIMES, Jan. 23, 1992, at A1.

[67] *See, e.g.*, Matheson, *supra* note 45, at 118.

[68] Karayn, *supra* note 65, at 174.

B. *The Candidates' Rights*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[69] This freedom of speech includes the right to "remain silent."[70] The Bill would require the candidate to "appear and participate in a regulated exchange of questions and answers on political, social, economic, and other issues."[71] This provision appears to infringe on the candidates' First Amendment rights, as it requires the candidate not merely to make an appearance, but to actively engage in debate. To be declared unconstitutional, however, it is not sufficient that the condition imposed by the Bill infringes on a fundamental right. Rather, to determine the constitutionality of the condition one must consider the magnitude of the harm caused by the infringement as balanced against the strength of the government's interest.[72]

While the Bill does require the candidate to participate in debates, it establishes no restrictions on what views the candidate can express. The court in *Dickinson v. Bell*[73] found this distinction important.[74] In that case, the court upheld a provision of the Higher Education Act of 1965 which required students to fill out and sign a statement of compliance with the selective service registration requirements as a condition to receiving financial aid.[75] The fact that the students were not "being asked to prescribe [sic] to a particular view or belief as a condition of receiving a governmental benefit"[76] distinguished the case from those involving forced speech worthy of protection like *Wooley v. Maynard*,[77] in which the Supreme Court struck down the requirement that New Hampshire's state motto, "live free, or die," be displayed on all license plates.[78] The *Dickinson* court

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[69] U.S. CONST. amend. I.

[70] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

[71] S. 2213, 102d Cong., 2d Sess. § 3(e)(2)(A)(ii).

[72] *See supra* notes 46–56 and accompanying text.

[73] 580 F. Supp. 432 (D.D.C. 1984).

[74] *See* Kovaka & Block, *supra* note 35.

[75] *Id.* at 435–36.

[76] *Id.* at 434–35.

[77] 430 U.S. 705 (1977).

[78] *Id.* at 435.

noted that the students were free to state their own views regarding selective service in the margins of the form.[79]

Like the statute in *Dickinson*, the Bill would not compel the candidates to adopt any particular view. On the contrary, the very purpose of the Bill is to allow the candidates to express the issues that they find most important in defining their own candidacy. Furthermore, like the students in *Dickinson*, the candidates, upon agreeing to participate in the debates, would be free to respond to questions in any manner they chose, including voicing a protest against forced debate.

Viewed in this way, the candidates' First Amendment right to remain silent, especially when balanced against the significant state interest in informing the electorate, does not appear to support a challenge to the Bill. Moreover, the candidates are not required to apply for matching funds, and a candidate not wishing to debate may simply decline to accept federal money. As the Supreme Court stated in *Buckley*, candidates are always free to avoid the conditions attached to the acceptance of federal funds by choosing to finance their campaigns through private contributions.[80]

V. Strengthening the Government's Interest: The Inclusion of Third-Party Candidates

The strength of the government's interest in the First Amendment balancing test lies in the educational value of the debates. However, as stated above,[81] while the idea of televised presidential debates as an educational service is attractive, "the reality has often been disappointing . . . [because debates] have been too rehearsed, too shallow, and too lacking in useful information."[82] In addition to requiring nonpartisan debate sponsorship, the Bill proposes to address this problem further by requiring the inclusion of significant third-party candidates in the debates.

Regardless of their chance of winning, third-party candidates serve an important educational function. The court in *Common*

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[79] *Id.*

[80] *Buckley*, 424 U.S. at 101.

[81] *See supra* notes 3, 14–20 and accompanying text.

[82] Joel L. Swerdlow, *The U.S. Congress Should Sponsor Debates*, *in* Presidential Debates: 1988 and Beyond 82 (Joel L. Swerdlow ed., 1987).

Cause v. Bolger[83] recognized this role, stating, "[Campaigns] are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election."[84] Likewise, the Supreme Court in *Anderson v. Celebrezze*[85] stressed the importance of not excluding third parties when it struck down an overly restrictive ballot-access rule that "threaten[ed] to reduce diversity and competition in the marketplace of ideas."[86] In *Buckley*, the Supreme Court acknowledged the importance of allowing the voters to have access to the "'widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.'"[87]

The traditional arguments against including third-party candidates in the debates, however, tend to discount the potential for voter education, painting pictures of a "free-for-all" that would only confuse the voters.[88] Third-party candidates are often labelled "fringe" candidates, candidates who possess no chance of being elected and are therefore rightfully excluded.[89] Even those people who believe that our system should "encourage broad public debates and a wide range of views" often concede nonetheless that it would be impossible to establish objective criteria to determine which candidates are "serious."[90]

However, according to the Bill's criteria, only two third-party candidates would have qualified to participate in the 1988 presidential debates—certainly a manageable number. Furthermore, the Supreme Court has declared that the potential for confusion among voters is not a valid excuse for restricting a third-party candidate's access in presidential elections, declaring that "[a] state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."[91]

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[83] 512 F. Supp. 26 (D.D.C. 1980).
[84] *Id.* at 32.
[85] 460 U.S. 780 (1983).
[86] *Id.* at 794.
[87] *Buckley*, 424 U.S. at 49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945), and Roth v. United States, 354 U.S. 476, 484 (1957))).
[88] Fulani v. Brady, 729 F. Supp. 158, 163 (D.D.C. 1990), *aff'd*, 935 F.2d 1324 (D.C. Cir. 1991).
[89] *Id.*
[90] MINOW & SLOAN, *supra* note 8, at 41–42.
[91] *Anderson*, 460 U.S. at 798.

Third-party candidates have the potential for improving the informational and educational quality of the debates in two ways. First, third-party candidates could raise issues often avoided by the major-party candidates and force discussion of the various candidates' positions on these issues.[92] Second, allowing the participation of candidates outside the two major parties would expose the voters to a broader spectrum of views. From this broader spectrum, voters whose interests may often be ignored by the major parties will have the opportunity to discover a candidate who may better represent their concerns.

Consideration of how the Bill would have impacted the 1988 presidential debates illustrates how the inclusion of third-party candidates could contribute significantly to the quality and substance of the debates. In 1988 two candidates, Ron Paul of the Libertarian Party and Lenora Fulani of the New Alliance Party, would have qualified under the Bill's criteria to participate in the debates. Each had the potential to provoke discussion on substantive issues and to raise concerns often avoided by the major-party candidates. Paul justified his interest in having third-party candidates included in the debates, stating, "The Libertarians, with their principled stand on liberty, and the New Alliance Party, with its principled stand for a socialist agenda, have a lot to offer to spice up the debate and arouse the American people's interest."[93] Because these independent candidates take strong stands on certain issues, they could provide an effective means for forcing the major-party candidates to better explain their own positions and to state them more concretely.

Forcing major-party candidates to state concrete positions is important because candidates may often find it to their advantage to avoid specificity in their proposals, not wanting to alienate any potential support.[94] For example, President Reagan's 1980 campaign needed the support of both moderates and conservatives to construct a majority coalition. A senior staff member revealed his strategy:

> We were in a delicate position . . . . His position on the issues . . . was not going to help us any more than it already

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[92] Bernard C. Barmann, *Third-Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Elections*, 23 COLUM. J.L. & SOC. PROBS. 442 (1990).

[93] Ron Paul, *TV Debates Need Third Party Candidates*, N.Y. TIMES, Mar. 22, 1990, at A26 (letter to the editor).

[94] JAMIESON & BIRDSELL, *supra* note 62, at 129.

> had . . . . What we did *not* need were lengthy position papers, rigid commitments, long policy commentaries. Our problem was keeping him from getting too specific or too detailed about the issues . . . . [O]ur basic thrust . . . was the same—stress his warm and self-assured leadership, keep the organization going, *ignore but not antagonize the Far Right.*[95]

Likewise, the candidates in 1988 often avoided discussion of specific agendas, hiding behind rhetoric and ad campaigns. The Markle Commission Report on the 1988 election found that the candidates "offered voters little of substance concerning plans or agendas, concentrating instead on a barrage of misleading, largely negative televison advertising, repeated so relentlessly as to be almost impossible to ignore."[96] This lack of specificity offers the voter little in the way of education on the issues. Forcing the candidate to participate in a debate that included significant third-party candidates is one way to ensure that the voters will have the opportunity to compare concrete positions among the candidates.

In addition to enhancing the depth of the discussion and the specificity of the proposals offered by the candidates, including third-party candidates would also improve the educational value of the debates by exposing the voters to new and different viewpoints. Third parties have the "capacity to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have ignored."[97] While third-party candidates may not have a realistic chance of winning, they may effect change on a different level. Indeed, if a third-party candidate, by adopting a particular viewpoint, is successful in appealing to a large enough segment of voters, the major parties may find it to their advantage to adopt that position in their own platform and thus will increase the major parties' representativeness.[98] In fact, women's suffrage, the graduated income tax, and the direct election of senators are all policies first advanced by third parties.[99] The Supreme Court in *Anderson* recognized the importance of this role: "Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many

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[95] *Id.* (quoting JEFF FISHEL, PRESIDENTS AND PROMISES 124 (1985)).

[96] BUCHANAN, *supra* note 1, at 8.

[97] STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE 8 (1984).

[98] *Id.*

[99] *Id.*

of their challenges to the status quo have in time made their way into the political mainstream."[100]

It is important to provide information on these other candidates and their positions so that voters can make not only a more informed choice but a more effective one. Allowing the electorate to learn about a candidate outside the two major parties will enable the voters to voice their concerns effectively to the major parties by voting for the candidate who best represents their ideas. Without this information, a voter dissatisfied with the two major parties will not be aware of a viable alternative and may simply decide not to vote, "sending only a vague message at best to the major parties which is unlikely to produce any policy changes."[101]

Because the inclusion of third-party candidates could significantly improve the educational value of the debates, the government's interest in forcing the candidates to debate would be strengthened by their inclusion. The *Buckley* test for permissible conditions on constitutionally protected activities would therefore seem to be satisfied because the government's interest would outweigh a candidate's interest in "remaining silent."

VI. Conclusion

Although subsidizing the presidential candidates' campaigns with federal funds ostensibly allows the candidates to spend less time soliciting private contributions and more time informing and educating the voters, the candidates are not restricted in the way they choose to spend this money to present their views to the voters. As a consequence, candidates spend a significant amount of money on television ad campaigns that often have as their purpose shielding the candidates from discussion of substantive issues. The Presidential Debates Act of 1992 provides a sensible solution by offering much-needed reform for the current debating system. While the candidates may continue to spend funds on negative advertising campaigns, this Bill would

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[100] 460 U.S. at 794.

[101] Barmann, *supra* note 92, at 445.

at least provide assurance that the voters could rely on televised debates for a more substantive view of the candidates and their proposals. Furthermore, it would assure that the voters will receive information on significant third-party candidates that may better represent their concerns.

Susan E. Spotts

BOOK REVIEWS

WE THE PEOPLE: FOUNDATIONS. By *Bruce Ackerman.* Cambridge, Mass.: Harvard University Press, 1991. Pp. 369, notes, index. $24.95, cloth.

In *We the People: Foundations*, Professor Ackerman[1] articulates a theory of constitutional interpretation that attempts to explain how courts historically have interpreted the Constitution. Ackerman presents this theory as a model to guide modern courts in their efforts at constitutional interpretation. His theory is a type of dualism under which the American people may mobilize, demonstrate their support for change, and pressure the Supreme Court to recognize this mobilization as the equivalent of a constitutional amendment. Because Ackerman's model relies on determining when this mobilized support is sufficient to warrant change, his analysis requires an examination of how the Executive and Legislative Branches have attempted to speak for the People during historical periods of constitutional reform. He evaluates the changes that occurred during the Founding, Reconstruction and New Deal eras, focusing on the role each branch of government played in recognizing and reacting to the will of the People. This evaluation involves an analysis of the relationship among the branches during these periods and of the Supreme Court's interpretation of the Constitution from one period to the next. Ackerman provides his analysis of this history to illustrate the operation of his model of interpretation.

Although *We the People* attempts to convey the history of constitutional interpretation at work, Ackerman's evaluation of history should not be confused with his interpretive theory. His dualist theory is susceptible to various criticisms, but few theories of constitutional interpretation are without flaws, and many of Ackerman's ideas are important contributions to the never-ending search for the best way to interpret the Constitution.

Ackerman introduces his dualist theory by contrasting two of the most popular schools of constitutional thought: monism and rights foundationalism. Monists believe that electoral victory gives the Executive and Legislative Branches power to speak

[1] Bruce Ackerman is Sterling Professor of Law and Political Science at Yale University.

in the name of the People when making law (p. 8). "[A]ll institutional checks upon the electoral victors are presumptively antidemocratic" (p. 8). In other words, when the President or Congress is elected in a fair election, action by the Judicial Branch in opposition to the policies of either is deemed to be in opposition to the will of the People.

While monism allows the People to determine policy through their elected representatives, it does little to insure that the promulgated policies represent the "considered judgment of a mobilized majority of American citizens" (p. 9). In addition, monism leaves little room for enforcing any constitutional rights through judicial review. Instead, it envisions the Supreme Court as a hands-off institution, existing only to enforce and interpret federal legislation.

At the opposite extreme of constitutional thought are the rights foundationalists. Rights foundationalists are committed to enforcing certain fundamental rights, even if this means striking down laws enacted by Congress (p. 11). In contrast to monism, rights foundationlism holds the Supreme Court paramount in this system designed to protect fundamental rights. The Court's job is to intervene when fundamental rights are threatened, "despite the [possible] breach of democratic principles" (p. 12).

Rights foundationalism recognizes a judicial role that is necessary in our system of government, but carries that role too far. Rights foundationalists do not agree on which rights are fundamental. For instance, "[c]onservatives like Richard Epstein [may] emphasize the foundational role of property rights . . . [while] liberals like Ronald Dworkin emphasize the right to equal concern and respect" (p. 11). Thus, in attempting to check the actions of elected officials, rights foundationalists place an arbitrary power in the hands of unelected judges.

Ackerman introduces his system of "dualism" as a compromise between monism and rights foundationalism (p. 12). The dualist system envisions two tracks of lawmaking: normal politics by the government and higher lawmaking by mandate from the American people (p. 6). Normal politics is conducted by the government on a daily basis when major constitutional reform is not taking place. Higher lawmaking, by contrast, occurs only when a mobilized majority of Americans support one side of an issue and clearly make their support known to their elected representatives (p. 6).

Ackerman introduces four stages that are necessary for periods of normal politics to evolve into periods of higher lawmaking. First, there is a "signaling" stage in which it becomes apparent that elected representatives have deep, broad, and decisive support from the citizens (pp. 272–77). The second stage is "proposal," when these representatives pass a series of statutes that would be found unconstitutional under the existing interpretation of the Constitution. The Supreme Court's role in dualism is to inform the people how this legislation passed by their representatives differs from the existing interpretation of the Constitution (pp. 280–85). Therefore, the Court holds these statutes unconstitutional. In the resulting third stage, the proponents of change must mobilize the support of private citizens against the supporters of the status quo, dissolving "the softness of normal public opinion" (p. 287). Finally, the Supreme Court will concede that the People have spoken and modify its interpretation of the Constitution to recognize the People's will for change (p. 289). The Court then embarks on the final stage of codification in order to "explain how preexisting doctrine must be revolutionized to accommodate the new innovations that have won the support of the People" (p. 290).

Ackerman's dualist system allows rights foundationalists to mobilize and effect constitutional reform to protect the rights they view as fundamental. Once this constitutional reform has been accomplished, the Supreme Court will uphold these rights against legislation passed in times of normal politics. At the same time, by requiring that these reforms be accomplished through clear mandates from the People, dualism also respects the monist's commitment to democratic processes (pp. 12–13).

Interpretation of the Constitution for Ackerman requires the Court to recognize the historical periods of "higher lawmaking"; the meaning of the Constitution is determined by synthesizing the People's mandates from various periods of constitutional reform (p. 23). Because it is necessary for his interpretive process, Ackerman examines our present version of constitutional history and proposes sweeping revisions.

Ackerman explains that the Founding has been called both substantively and procedurally original. The Founders not only changed the substance of the law that was included in the Articles of Confederation, they ignored the procedural requirements wherein all thirteen states would approve any amendment

to the Articles. The Articles were entirely abandoned and the Constitution was written to include a new procedure for amendment.[2] Similarly, our present version of constitutional history views the Reconstruction Amendments as substantively original, affording new rights to newly recognized citizens, but procedurally unoriginal; the Reconstruction Republicans are seen as continuing the traditional process of constitutional amendment. Finally, our present version of constitutional history denies that the New Deal involved substantive or procedural changes (pp. 41–43).

While Ackerman agrees that the Founding was procedurally and substantively original, he considers our present version of constitutional history to be inconsistent with the history of the Reconstruction and New Deal eras (p. 44). According to him, a more accurate reading of history shows each era to be one of constitutional refinement. During Reconstruction, Congressional efforts at reform were opposed by conservative President Andrew Johnson. After "the reformers returned to Washington with a clear victory at the polls," threats of impeachment encouraged the President to cease his opposition to the Reconstruction Amendments (p. 48). Similar problems were faced by President Roosevelt when he attempted to lead the reform movement during the New Deal era. A conservative Supreme Court was initially loathe to depart from its traditional interpretation of the Constitution. After feeling pressure from the President's proposed court-packing plan, however, the Court, like President Johnson during Reconstruction, changed its constitutional interpretation to make it consistent with the policies of the reformists (p. 48).

An essential task in Ackerman's system is incorporating constitutional reforms into the pre-existing constitutional interpretation, a process he calls "multigenerational synthesis" (p. 88). The Court first synthesized the Reconstruction reforms with the existing constitutional interpretation from the Founding. According to Ackerman, the Court initially limited the application of the Reconstruction Amendments to the specific factual situations to which they were intended to apply—discrimination against blacks (p. 98). The Reconstruction Court then slowly integrated the principles contained in the amendments into their overall process of constitutional interpretation, using them to

[2] U.S. CONST. art. V.

broadly transform the original principles in the Bill of Rights (p. 92).

The New Deal Court faced an even greater task than the Court confronted during Reconstruction (pp. 116–19). After the people demonstrated their support for President Roosevelt's policies, the Court had to reconcile the principles behind these policies with principles from the Founding and the Reconstruction. The Court had "to restate the meaning of Reconstruction's guarantee of 'equal protection' and 'due process of law' in a post-New Deal world in which the ownership and exchange of private property were less central" (p. 117). This involved redefining the rationale underlying application of existing constitutional rights. Protection for these rights would have to come from an activist New Deal government; reliance could no longer be placed on the Founding and Reconstruction's emphasis on individual freedom of contract and ownership of property.

To provide an example of the Court engaging in the synthesis process, Professor Ackerman examines *Brown v. Board of Education*.[3] According to Ackerman, the *Brown* decision involved an effort to synthesize the Equal Protection rationale in *Plessy v. Ferguson*[4] with the New Deal principle of activist government (pp. 143–45). In *Plessy* the Court had held that the Fourteenth Amendment's Equal Protection Clause applied to political, not social, equality and was satisfied by separate but equal public facilities for different races. The New Deal, however, altered the Court's interpretation of the Constitution; after the New Deal, the government was constitutionally responsible for influencing social as well as political equality (p. 146). Because public schools were "symbol[s] of the modern republic's activist commitment to the general welfare" (p. 149), the government's new responsibility for social equality included its operation of public schools. Chief Justice Earl Warren traced the transformation of the public school system, recognizing that segregated educational facilities created inherently inequitable opportunities for education. As a result, the Court's post-New Deal constitutional interpretation placed responsibility on the government not to maintain segregated schools (p. 147). Thus, while

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[3] 347 U.S. 483 (1954) (finding that segregation of students in public schools on the basis of race deprived black children of equal protection of the laws guaranteed by the Fourteenth Amendment).

[4] 163 U.S. 537 (1896).

Plessy was correctly decided in 1896, the constitutional reformation during the New Deal era required the result in *Brown*.

Before concluding his analysis of the dualist system, Professor Ackerman looks to the future, proposing a restructuring of the Bill of Rights to "give new substance to each American's right to pursue life, liberty, and the pursuit of happiness" (p. 319), and a "guarantee of equal opportunity . . . that commits the American people to secure each citizen against the vagaries of unemployment, disability, sickness, and old age" (p. 319). He argues that this new Bill of Rights should be entrenched in the Constitution, free from amendment, "recognizing that there are some individual rights that a majority of the citizenry, however mobilized and deliberate, can never legitimately suppress" (p. 321). One wonders why the "majority of the citizenry" who would contribute to the determination of these specific rights would later be unable to change their minds. This seems to hamper the will of the People, providing one generation with the ability to make mistakes that can never be corrected by later generations.

Ackerman raises but does not address extensively the difficulties inherent in a system that requires the Court to determine when the People's support for the President or Congress is sufficient to warrant an abandonment of traditional principles in favor of newer ones. For example, one would expect that the mobilization of citizenry during the civil rights movement would qualify as a demand for constitutional reform from the People. Yet, Ackerman does not seem to recognize the Civil Rights era as a constitutional reformation equal to the New Deal and Reconstruction eras. The reader is left to ponder the extent and quality of support needed to afford an era the same status afforded the Founding, New Deal and Reconstruction eras.

Also, Professor Ackerman and the dualist interpretation he offers leave one puzzled about why the People should be allowed to resort to the more convenient process of influencing the President and Congress to informally amend the Constitution through strategic pressure on the Supreme Court when they can simply amend the Constitution according to Article Five. While he accurately presents instances in which the People have demanded constitutional reform by means other than Article Five, he does not persuade the reader that these instances were justified or that the process used is preferable to the process for amendment enumerated in Article Five.

We the People presents the foundation and application of dualist ideals to our country's history. Application of the dualist system presents a comprehensive account of how the Supreme Court has interpreted the Constitution throughout our history. The dualist system of constitutional interpretation does have inherent weaknesses. Even though Ackerman seems to provide an accurate account of most of our constitutional history, dualism's heavy reliance on evaluation of history leaves the interpretive process open to an insertion of personal biases and assumptions by future scholars and Justices. For instance, it seems tenuous to suggest that synthesis rather than a recognition of fairness or morality was guiding the Warren Court's decision to provide educational equality for black children in *Brown*. Perhaps the Court's goal was simply to characterize *Plessy* as bad law rather than to synthesize the principles in *Plessy* with the reforms of the New Deal.

We the People is an interesting account of the history behind our system of democracy and an engaging exercise in constitutional interpretation. Professor Ackerman gives himself a worthy challenge: to tear away previous myths about the Founding, Reconstruction, and New Deal eras and to open a dialogue between the constitutional past and present in order to work toward a more perfect future. Whether one agrees with Ackerman's account of history or his interpretive ideas, *We the People* is a valuable contribution to constitutional discourse.[5]

—*Kevin E. Broyles*

[5] This book is the first of a proposed series of three. The books to follow are *We the People: Transformations* and *We the People: Interpretations*.

THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? By *Gerald N. Rosenberg*. Chicago, Ill.: University of Chicago Press, 1991. Pp. 425, appendices, references, index. $29.95, cloth.

Contemporary conservative and liberal legal scholars describe a federal judiciary that has at critical moments potently influenced the direction, momentum, and reification of social change in the United States. Certain Supreme Court decisions, such as *Roe v. Wade*[1] and *Brown v. Board of Education*,[2] inspire in some legal scholars profound admiration of the Court's use of its moral stature and legal power to achieve social progress by broadening constitutional rights. Those same decisions cause others to disparage an unelected and imperial judiciary which invents rights in order to impose judges' own political agendas. In *The Hollow Hope: Can Courts Bring About Social Change?*, Gerald N. Rosenberg[3] asserts that proponents of both perspectives premise their views of the judiciary on its capability to influence social policy and societal attitudes. Leaving aside normative questions about courts' actions, Rosenberg argues that this premise is incorrect, and he supports his thesis with detailed analyses of five social movements whose successes have been traditionally attributed in part to the judiciary (p. 2). If courts cannot affect social policy, then the debate over whether they should do so becomes moot.

Before presenting his case studies, Rosenberg describes two contrasting views of the potential for the courts to cause significant social reform, and he crafts a compromise theory. He labels the two basic views the "Constrained Court" theory (p. 3) and the "Dynamic Court" theory (p. 2). According to the Constrained Court theory, courts cannot effectuate significant social reform for three major reasons. First, the legal system provides a finite number of legal rights. Legal rights are limited by the beliefs and norms of contemporary legal culture, by the conservatism of the judicial system, by restrictions on standing for reform groups, and by the limited effectiveness of legal arguments for attaining specific political purposes or for sustaining grass roots involvement (pp. 10–13). Second, the interdepend-

[1] 410 U.S. 113 (1973).
[2] 347 U.S. 483 (1954).
[3] Gerald N. Rosenberg is Assistant Professor of Political Science and Instructor in Law at the University of Chicago.

ence of the federal judiciary, the Congress, and the Executive Branch restrains the judiciary from straying too far from the views of the other branches. The Executive Branch's influence arises from the President's power to nominate judges and from the deference granted by the Court to the Solicitor General. Congress derives its influence from its ability to override statutory decisions and to alter the judicial process by such means as limiting jurisdiction (pp. 13–15). Third, courts lack the means to develop and implement appropriate policies for social reform and cannot sufficiently enforce their remedies. They are unable to cut necessary political deals, control their docket, spend money, or overcome resistance from complex institutions (pp. 15–21).

Under the Dynamic Court view, the judiciary can effectuate significant social reform for reasons discounted by the Constrained Court view. First, the judiciary exists politically and economically independent from the other branches of government, enabling it to act when other government institutions compromise constitutional rights due to political pressure or bureaucratic self-interest. This ability to act derives from several sources. Once appointed, judges sit for life with irreducible salaries. Courts also avoid the pitfalls of entrenched, self-serving bureaucracy and, unlike Congress, provide equality of access to interested parties, regardless of power or money. The adversarial process forces full disclosure of the facts, and the requirement of judicial opinions ensures open decisions based on law (pp. 22–25). Second, the courts can catalyze non-judicial action by politicizing issues and focusing public attention on them (pp. 25–26). Third, the courts are presently evolving a variety of procedures to grapple with complex social issues and remedies. These include the appointment of special masters or monitoring commissions and the retention of jurisdiction while remediation occurs (pp. 26–27). Fourth, proponents of the Dynamic Court perspective cite several empirical studies supporting a court's ability to create significant social reform (pp. 27–28). Rosenberg criticizes two of these studies, however, for choosing to study unrepresentatively easy cases and challenges the findings of the others (pp. 28–30).

After describing the Dynamic and Constrained Court views as polar extremes, Rosenberg rejects both as overstating their cases and opts for a compromise theory. He favors the Constraint theory but asserts that the presence of certain indepen-

dent conditions can overcome the constraints on a court, enabling it to impact social reform. With sufficient precedent, a court can eliminate the problem of finite legal claims and expand rights. Thus, pro-reform plaintiffs should gradually build a series of precedents which expand on each other to broaden rights (p. 31), as did the plaintiffs in *Brown v. Board of Education* (pp. 72–73) and *Roe v. Wade* (pp. 181–82). Additionally, independent political support for reform will minimize the constraint of judicial dependence on the other branches of government (p. 31). Lastly, Rosenberg suggests two paths to implementation. First, a court, the market, or other actors can impose costs and incentives to encourage acceptance of the remedial decree. Second, a court can free a pro-reform defendant, such as an institution's administrator, to act by shielding her from adverse political forces. Rosenberg believes, however, that these conditions are the exception, not the rule, and contends that courts will rarely achieve or significantly impact major social reform. Because of its powerlessness absent independent support, "[a] court's contribution . . . is akin to officially recognizing the evolving state of affairs, more like the cutting off of the ribbon on a new project than its construction" (p. 338).

To test his hypothesis, Rosenberg studies the legal and extra-legal effects of the Supreme Court on five historical, socio-legal movements. In great detail, he explores the civil rights and women's rights movements. In lesser detail he examines reapportionment, environmental protection, and defendants' rights in criminal law. Each case study begins with a history of the social movement, followed by an analysis of the legal and then extra-legal, or influential, impact of the Court. Several of the studies end with a discussion of alternative, non-legal causes of the social movement.

The first case study explores the civil rights movement and, particularly, the impact of *Brown v. Board of Education*. The civil rights litigators, primarily the National Association for the Advancement of Colored People ("NAACP"), carefully dispatched the constraint of limited rights by developing a series of precedents culminating in *Brown* and its progeny (pp. 72–73). According to Rosenberg, the judiciary failed to overcome any other constraint until independent political pressure allied the Executive Branch and the Congress with the Court in the mid-1960's (pp. 74–78). At that time, Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Following

the Civil Rights Act of 1964, which required desegregation, the Department of Health, Education, and Welfare ("HEW") promulgated regulations requiring local school districts to desegregate before they could receive federal funds newly allocated by Congress (pp. 97–100). Concurrently, a decade after *Brown*, the Justice Department began actively initiating desegregation lawsuits (pp. 94–95). In the post-*Brown* early 1960's, only one percent of black schoolchildren attended integrated schools, but, beginning in 1964, integration increased sharply (pp. 50–51). Thus, not until all three branches acted in concert to enforce *Brown* and the Civil Rights Act did significant desegregation occur.

According to Rosenberg, once political support developed for the Court's legal actions, it overcame the interdependence and the implementation constraints and its decisions played a significant role. The other branches acted to parallel and support the judiciary's efforts, and the business community recognized the need for quality, integrated schools to attract and keep national businesses operating locally. Of one thousand school districts surveyed that had been desegregated by 1975, 34 percent cited the courts as the primary cause of desegregation, 25 percent cited HEW, and 41 percent cited state and local pressures (p. 53).

Even if *Brown v. Board of Education* had only a limited, direct remedial effect, it could have advanced civil rights by its influential impact. It and later decisions may have galvanized political elites or civil rights proponents and influenced public thought. While Rosenberg sets out to refute the Court's inspirational impact on either the political elites or the populace, he acknowledges the difficulty of proof or disproof of such diffuse, ethereal, and complex interrelated causality (pp. 108–09). Nonetheless, he attempts to quantify the causal connection, relying in part on the number of newspaper articles published annually on civil rights (pp. 111–17) and on the number of sit-ins and demonstrations occurring each year (pp. 134–35). He also examines particularly significant events such as the Montgomery bus boycott, the freedom rides, and the passage of civil rights statutes. He attempts to disprove any causal relation between these and *Brown*, in part by forcefully describing a failure by many civil rights leaders to cite *Brown* as an inspiration (p. 144). Further, he describes the failure by political leaders to cite *Brown* as precedent for the Civil Rights Acts of 1957, 1960, and

1964 (pp. 118–21). Rosenberg acknowledges that *Brown* inspired the NAACP, but he suggests that significant strategic disagreements among civil rights groups over the emphasis of direct action or litigation limited this impact (pp. 145–55). He concludes, "[w]hile it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to the battle for civil rights" (p. 156). Indeed, he asserts that *Brown* stiffened resistance in the South to any integration or voting reform and documents an increase in segregation statutes after *Brown* (pp. 155–56).

With abortion rights, Rosenberg concludes that the Court had a greater but still limited impact. Supreme Court precedents created rights to privacy in the procreation area which enabled it to overcome the limited rights constraint (p. 181). Also, the existence of private and legislative support minimized the constraint of political dependence. When the Court promulgated *Roe v. Wade* in 1973, pro-abortion rights sentiment existed in significant portions of the relevant private elites, such as the American Medical Association, and in the general public (pp. 182–84). By 1973, four states had repealed their abortion bans,[4] fourteen others had eased restrictions, and almost all had or were considering legal reform (p. 184). Also, the number of abortions rose each year from 1969 to 1980 and then remained constant (p. 179). Despite this trend, Rosenberg aptly notes that pro-abortion rights advocates in 1973 could not rely on continued liberalization of abortion laws or even maintenance of the *status quo* (pp. 179–80). Their lobbying and political agitation had succeeded before anti-abortion rights forces had cohered, and their successes were concentrated in many of the states most amenable to reform (p. 179). Further, as discussed in the book in another context, almost all states had debated liberalization or repeal; thus, those which had rejected reform were less likely to act in the near future (p. 184). Lastly, estimates of undiminished illegal abortions until *Roe* further prove that legislative reform had limited results (pp. 353–54). With external political support, the Court overcame the constraint of interdependence and acted not simply to confirm an existing trend but to effectuate direct social change.

To affect social reform, the Court still needed to overcome the implementation constraint, and, Rosenberg asserts, it has

[4] These states were New York, Alaska, Hawaii, and Washington (p. 184).

partly succeeded by shielding physicians willing for philosophical or market-based reasons to perform abortions. While most hospitals have refused to perform abortions (pp. 189–90), abortion clinics and specialists have partially filled the medical service gap (pp. 195–98). However, opposition to abortions continues to limit significantly their availability in certain regions (pp. 191–95).

As with *Brown v. Board of Education*, Rosenberg attempts to determine the extra-legal influence of *Roe*. He examines data including numbers of magazine stories published annually (pp. 229–34), public opinion polls (pp. 235–41), and women's rights organizations' financial and membership strength (pp. 242–45), and concludes that the Court failed to catalyze significant, indirect change (pp. 245–46).

The three shorter case studies on reapportionment, the environmental movement, and criminal defendants' rights mirror generally the strengths and weaknesses of the larger case studies. Rosenberg states that proponents of reapportionment hoped to correct the underrepresentation of urban areas in Congress and state legislatures and to improve federal handling of urban issues (p. 294). As a result of Supreme Court and lower court victories requiring states to equalize voting district populations[5] (pp. 294–95), states reapportioned congressional and state legislative districts. According to the study, the proponents succeeded in attaining reapportionment because the necessary conditions for effective social impact existed. The Court had promulgated sufficient precedent, and pressure from non-Congressional political and private elites ensured implementation. Rosenberg determines, however, that despite achieving the process changes sought, no significant pro-urban policy shift resulted (pp. 296–98).

Regarding the environmental movement, Rosenberg asserts that the litigation effort failed to constitutionalize a right to a non-hazardous environment due to a failure to build strong precedent gradually.[6] Also, as a watchdog over regulatory agencies, the courts have had limited success. They have deferred heavily to the agencies' technical expertise (p. 280), and state and federal agencies have successfully delayed implementation of un-

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[5] *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962) and its progeny (p. 294).

[6] Interestingly, the environmental litigators cited *Brown* as their inspiration (p. 272), exemplifying the difficulty in measuring the full, dispersed impact of a landmark case.

popular rulings (pp. 281–82). Moreover, industry has utilized its right of equal access to the courts to mount frequent legal efforts designed to overturn regulations or at least delay their implementation (p. 281). The courts have exerted a modest extralegal influence by shielding activist agencies and preserving political victories in Congress from agency resistance (pp. 284–85).

Rosenberg's final case study explores the criminal defendants' rights revolution of the 1960's. The study briefly surveys prison reform, juvenile defendants' due process rights, the exclusionary rule, the Miranda warnings, and the right to counsel, reaching conclusions consistent with those from the other case studies. In each of these areas, Rosenberg writes that implementation either failed to achieve the desired goals, as with the right to effective counsel (pp. 331–34) and the Miranda warnings (pp. 325–26), or succeeded unevenly, depending on the intent of the particular police department (pp. 322–23), prison administrator (pp. 308–13), or juvenile court judge (pp. 314–15) involved.

Taken in total, Rosenberg produces a well-written, broadly researched, and thoughtful contribution to an important debate on the ability of courts to impact social reform. He writes in a clear though dry style, and the interest of the case studies and the book's well-crafted organization renders it eminently readable. Despite the myriad of facts, studies, and statistics presented, the reader only rarely bogs down, and the case studies inform the reader about the social movements themselves as well as support Rosenberg's thesis. Examples of Rosenberg's effective use of data are his chronicle of civil rights leaders' indifference or animosity toward developing a litigation strategy, his use of integration statistics to show a remarkable lack of integration post-*Brown* until the Congressional and Executive Branches acted, and his discussion of abortion availability.

Despite Rosenberg's successes, *The Hollow Hope* contains noteworthy problems, though this is almost inevitable in such an ambitious work. Specifically, weaknesses surface in Rosenberg's methodology, his interpretation of the data, and the probative value of some of the data.

Methodologically, there are two distinct problems. First, in the civil and abortion rights contexts, Rosenberg compares *Brown* and *Roe* with inaction by the Court, ignoring the fact that the Court could have granted certiorari and decided the

cases the other way. Decisions in *Brown* and *Roe* reaffirming the separate but equal doctrine or upholding state abortion bans would have had impacts distinct from silence on these issues by the Court. Two historical examples, *Plessy v. Ferguson*[7] and the *Dred Scott*[8] decision, stand clearly in the American conscience as decisions with strong impacts adverse to social progress or morality. Of course, Rosenberg might counter this criticism by arguing that *Plessy* and *Dred Scott* had no greater independent social impact than did *Roe* and *Brown*.

Second, Rosenberg concentrates almost exclusively on the impact of Supreme Court decisions, reasoning that it is the most significant and policy-oriented court (p. 7). Doing so excludes a relevant dimension of action by the lower courts. While he does at times refer to lower court decisions, Rosenberg fails to consider sufficiently the impact of the numerous social reform cases in the district courts, such as local institutional reforms. Many local or regional cases together may have significant, national impacts on social policy or awareness. With the civil rights movement, Rosenberg focuses mainly on the impact of *Brown v. Board of Education* in school desegregation, though he does briefly examine voting rights and desegregation of transportation, public accommodations, and housing. While *Brown* is frequently acclaimed as a benchmark of civil rights progress, Rosenberg ignores or undervalues the impact of lower court decisions protecting civil rights activists and ordering desegregation. Regarding abortion rights, Rosenberg analyzes *Roe v. Wade* but does not consider the many district court battles over abortion clinic picketing and other related political activity. Perhaps these lower court cases do not affect the social movements, but the issue requires analysis.

Rosenberg weakens the objectivity of his analysis by occasionally minimizing support for the Dynamic Court view or overemphasizing items that prove his theory. For example, he relegates to a footnote Martin Luther King's reference to *Brown* in his speech to the first mass meeting of Montgomery bus boycotters (pp. 136–37 n.21).[9] In another footnote one page later he states,

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[7] 163 U.S. 537 (1896) (upholding as constitutional the separate but equal doctrine).

[8] 60 U.S. 393 (1856) (declaring a slave to be property and denying him standing to sue).

[9] Rosenberg later argues that King rejected the legal strategy for desegregation and blamed it for draining funds and limiting involvement to a political and legal elite (pp. 139–40).

> [T]he Supreme Court may have played a vital role in the final victory [in Montgomery] by allowing the city a way out of a boycott that was costly and damaging. In *Gayle v. Browder* (1956),[10] the Supreme Court upheld a lower-court decision prohibiting enforcement of Montgomery's segregation law. As Condition IV [courts as shield for reformers] suggests, the Court's decision may have allowed the city to end segregation without "giving in" to the boycotters demands (p. 138 n.26).

While Rosenberg acknowledges King's mention of *Brown* and the importance of *Browder*, by relegating them to footnotes he downplays their significance. This problem is not limited to the civil rights study. In the abortion rights context, for example, Rosenberg concludes that the Court had a limited impact. Inexplicably, though, he defers to an appendix a discussion of the numbers of illegal abortions occurring historically and the health hazard they caused. The data presented are general estimates and show that illegal abortions continued unabated in the 1970's until the Court decided *Roe* (pp. 353–55). This is particularly significant in light of Rosenberg's discussion of legislative reform from 1970 to 1973 liberalizing or repealing abortion bans in eighteen states (p. 184).

Conversely, Rosenberg occasionally overstates support for his thesis, as in his discussion of voting rights. There he writes that "[s]triking is the large jump in the number and the percentage of blacks registered from just prior to the passage of the 1965 Act to just after it" (pp. 60–61), and he accompanies the text, as he frequently does, with a graph and chart (pp. 60–61). These figures show, however, that by the time of the passage of the Voting Rights Act of 1965 southern, black voter registration had already begun increasing rapidly. The registration boom began in 1962, with a modest increase in the already rapid registration rate in 1965.[11] Thus, the data indicate that Rosenberg overstates the role of the Voting Rights Act in comparison to other factors, including the judicial decisions.

In the abortion rights context as well, Rosenberg interprets a variety of data overly favorably to his thesis. Despite his claim to the contrary, the failure of *Roe* to produce an upsurge in

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[10] 352 U.S. 903.

[11] In 1960, 28.4% of blacks of voting age in the South had registered. From 1960 to 1962, that percentage rose in absolute terms 0.6% annually. From 1962 to 1964, registration increased 5.3% annually, and from 1964 to 1967 it increased 5.9% annually. Thus, by 1967, 57.6% of eligible Southern blacks had registered (pp. 60–61).

media stories on abortion (pp. 230–33) provides relatively ambiguous and indirect proof that political elites were unaffected by the decision. Also, though in 1973 the elite media ran fewer stories concerning abortion rights than they did in the previous several years, in 1973 they still printed far more stories than at any time before 1967 (pp. 230–33). The media data verify that *Roe* did not originate the attention given to the abortion rights debate but do not indicate whether *Roe* impacted that debate. Rosenberg also ignores the contemporary abortion rights debate, where attempts to limit *Roe* are a rallying cry for abortion rights groups.

Opinion polls show that the largest increases in public approval of abortion occurred between late 1969 and 1972, lending credence to the idea that the public had significantly formed their ideals prior to *Roe* (pp. 237–39). However, poll data measuring sentiment for or against abortion rights fail to measure potential subtle influences of *Roe* on the depth of people's conviction or the decision's long-term impact on general attitudes.

After *Roe*'s promulgation and then as restrictions on abortion rights reasserted themselves in the 1980's, membership in the National Abortion Rights Action League ("NARAL") and the National Organization for Women ("NOW") increased dramatically. NARAL membership surged from 10,000 in 1975 to 130,000 in 1981 to 250,000 in 1987 (p. 243). Rosenberg squarely presents the membership information about NOW and NARAL but minimizes the probable role of the Supreme Court and *Roe* (p. 245). For NARAL he cites more frequent membership drives as a cause of growth but omits to consider the motivation inspiring these drives or the responses to them. Instead, by downplaying the role of any "one act or one institution" in NARAL's growth (p. 245), Rosenberg implicitly acknowledges that social action and opinion result from complex causal interactions that limit his own ability to prove or rule out the Court's impact here or elsewhere.

Rosenberg also has several problems with his use of statistics and numerical data. Most generally, he overvalues "hard numbers" as compared to anecdotal, interview, or other evidence that offer glimmers of more opaque, perhaps longer-term or more diffused impacts of a decision or series of decisions. For example, examining the environmental movement, Rosenberg notes that environmentalists were inspired by *Brown* to seek Supreme Court protection, but ignores the implications of such

cross-movement influence in discussing *Brown*'s impact (p. 273). Further, *Roe* combined with *Griswold v. Connecticut*,[12] *Eisenstadt v. Baird*,[13] and other decisions may have influenced societal attitudes and policy towards privacy in sexual relations. Rosenberg fails to discuss this. While the case studies present a well-documented array of supporting data and studies, the danger looms of overvaluing these beguiling proxies. Hard numbers, even if not directly answering the question, are far easier to digest than a theory of complex, subtle causality.

Another problem is the difficulty of analyzing and interpreting statistics. In 1982, fifty-nine percent of respondents to a national survey answered "no" or "don't know" to the question, do you know "whether the Supreme Court forbids or permits a woman to obtain an abortion during the first three months of pregnancy?" (p. 236). Rosenberg treats these results as evidence against any extra-legal effects of *Roe*, but doing so stretches their probative value. Assuming that the converse of the results presented is true, i.e. that forty-one percent of those surveyed knew *Roe*'s outcome, forty-one percent can be emphasized as a significant portion of the population to know any Supreme Court holding. Also, by amalgamating the incorrect and "do not know" answers into one statistic, Rosenberg limits the reader's ability to check on the significance of the forty-one percent figure. If, for example, fifty-five percent of those surveyed answered incorrectly, perhaps the forty-one percent that answered correctly simply guessed; but if only two percent answered incorrectly, different implications arise. Further, public awareness may also have increased significantly since 1982, the survey year, as the abortion rights debate has continued to rage.

In addition to problems with Rosenberg's interpretation of the survey, the survey's wording renders it suspect even as a proxy. It queries not only whether people knew that *Roe* granted the right to an abortion but also whether they knew how long after inception abortion is protected. More people might have responded correctly if asked only whether *Roe*, or the Supreme Court, recognized the constitutional right to an abortion. Such knowledge alone would capture the respondents' awareness of the social importance of the decision.[14]

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[12] 381 U.S. 479 (1965).

[13] 405 U.S. 438 (1972).

[14] In another briefer but egregious example in the criminal defendants' rights study, Rosenberg discusses the impact of *Gideon v. Wainwright*, 372 U.S. 335 (1963), which

I have focused on a few examples to highlight a variety of problems which can arise from emphasizing statistical and numerical proxies to prove subtle, social impacts. To the extent Rosenberg relies upon such data to show the extra-legal influence of the Court, the evidence is problematic. To his credit, Rosenberg begins the two chapters discussing the Court's extra-legal influence with a disclaimer as to the difficulty of proving his thesis (pp. 107–10, 228). Despite his disclaimer, though, he reaches overly-strong conclusions. Regarding abortion rights and other women's rights issues, for example, he concludes that "no clear evidence" of significant influence exists (p. 246) and that "relying on [the Court's subtle influence] may not be the best use of scarce resources in important battles for significant social reform" (p. 246). NARAL and NOW membership strength and some of the other data are interpretable to show an influence or at least to call into question Rosenberg's conclusion. Further, even if the Supreme Court's impact is subtle, subtle does not mean trifling. *The Hollow Hope* pushes the empirical path to understanding powerfully and in part successfully, but problems and incompleteness exist, as Rosenberg himself at times acknowledges.

In addition to providing data himself, Rosenberg frequently cites findings from other studies to support his thesis, but these analyses may have their own flaws which remain unexposed in a short citation. One example of a problematic reference arises in the reapportionment study. To support his thesis that reapportionment failed to reach its ultimate substantive goal of helping the inner cities, Rosenberg quotes a study explaining post-reapportionment expansion in urban aid by the New Jersey legislature as based on a newfound "general commitment" by both parties. Why is it not equally or more plausible that this spontaneous bipartisan commitment resulted from competition by the Democrats and Republicans for the cities' more influential political vote? By failing to provide information about the New Jersey study, Rosenberg forces the reader to assume it is

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requires the availability of legal representation to defendants in criminal cases. He notes the increase in public defenders after *Gideon*, writing that public defender offices existed in "3 percent of counties" in 1961 and grew to "1,200 offices" in 1985 (p. 330). With no mention of how many counties are in the United States or how many offices exist per county, the reader cannot compare the two numbers which Rosenberg presents to prove growth.

based on significant thought, effort, and research, and reached a correct, counter-intuitive conclusion.

Whether the reader agrees or disagrees with its conclusions, *The Hollow Hope* presents an important and forceful thesis on the power of the Supreme Court to effect social change. It incorporates an impressive depth and array of data in its studies. While doing so, it provides highly readable and interesting analyses and histories of several of the most controversial and difficult social issues with which the United States has grappled in the post-World War II era. The argument suffers from problems in the efficacy and analysis of some of the empirical data and by focusing too closely on individual Supreme Court opinions rather than on the courts as a whole. Further, Rosenberg undervalues the "soft" impacts of the Court decisions in favor of the hard, though indirect, data available. He also fails to discuss potential, longer-term, broader social impacts of *Brown v. Board of Education* and *Roe v. Wade*. Despite these problems, *The Hollow Hope* provides a strong and thoughtful attempt to deal with a complex and important topic. Other researchers should grasp Rosenberg's Conditional Constrained Court thesis and subject it to further analysis, while district judges faced with institutional litigation should ponder how best to meet his conditions when designing their own remedies.

—Stephen J. Kastenberg

REFORMING PRODUCTS LIABILITY. By *W. Kip Viscusi.* Cambridge, Mass.: Harvard University Press, 1991. Pp. 270, appendices, notes, bibliography, index. $39.95, cloth.

Wild increases in liability insurance premiums and horror stories about the tort system's failure to provide prompt, consistent, and appropriate compensation for personal injuries resulted in furious efforts during the 1980s to reform the products liability system. W. Kip Viscusi,[1] in *Reforming Products Liability*, claims that most of the reform proposals have misunderstood the scope of the problem and have advocated changes, such as damage caps or the abolition of pain and suffering damages, that could undermine the deterrence and compensation functions of products liability. Viscusi further observes that existing reform proposals are informed by anecdote or driven "by legal theory or ideology" (pp. 3–5), rather than being supported by empirical research.

Viscusi distinguishes *Reforming Products Liability* from existing reform proposals by grounding his analysis in statistical data concerning long-term trends in liability insurance and litigation.[2] With this data, he seeks to demonstrate that past descriptions of the products liability crisis as a "mid-1980's phenomenon" (p. 28) caused by collusion among insurance companies or by the rise in strict liability are unsupported by the evidence. He suggests instead that the problem has been brewing since the 1960s and is primarily the result of the evolution and expansion of the design defect doctrine and the emergence of litigation concerning hazard warnings.[3] Packed into this slim book is a substantial body of information and a forceful statement calling for careful, deliberate, and fundamental products liability reform.

To counter the popular theories that strict liability or collusion among insurance companies caused the products liability crisis in the 1980s, Viscusi examines the trends in the cost of general liability insurance over the past several decades. He points out that the most troubling increases in premiums occurred in the

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[1] Viscusi is George C. Allen Professor of Economics at Duke University and Associate Reporter on the American Law Institute tort liability reform project.

[2] Viscusi relies heavily on the Insurance Services Office's 1977 Product Liability Closed Claims Survey and its 1980–84 ratemaking files (p. xii).

[3] Some blame must also go to increases in medical costs, which Viscusi shows to have increased at a rate higher than inflation during the 1970s and 1980s (pp. 97–99).

1970s and 1980s rather than the 1960s,[4] when strict liability was introduced, and concludes that the "adoption of strict liability is not the major source of the cost increase" (p. 7). Regardless of whether or not this statement is true, however, Viscusi seems to dismiss too quickly this widely-held theory about strict liability. Is it possible that the rise in strict liability to which he refers did not drastically affect rates until the 1970s?

To dispense with the idea that insurance companies colluded to raise general liability rates during the 1980s, Viscusi provides data showing relatively low profitability figures for insurers during those years (p. 30). In addition, Viscusi points out that the sharp increase in insurance premiums from 1985 to 1986, which was largely responsible for drawing public attention to the products liability crisis, was not the result of collusion, but was actually caused by a decline in interest rates that reduced insurers' ability to invest premiums for profit before paying out on claims (pp. 27–32).

After rejecting these traditional explanations for the crisis, Viscusi posits his own theory. "[A]t the root of the products liability crisis" (p. 41), he says, are two developments of the 1970s and 1980s: the expansion of the design defect doctrine and the emergence of "a new design defect," (p. 9) the inadequate hazard warning, by which the manufacturer may be held liable when product labels do not properly alert the consumer to the product's risks. Although Viscusi discusses other issues, such as mass toxic torts and workers' compensation, his proposals for change in the two previously neglected problem areas of design defects and inadequate hazard warnings are the most significant and distinctive features of *Reforming Products Liability*.

To modify the current design defect test, Viscusi proposes a three-step, cost-benefit measure for new products. First, given the best available information, would average people want the product at the expected market price? Second, if the product passes the first test, does the sum of the benefit to the consumer and the profit to the manufacturer outweigh the total costs of the product to those parties? Viscusi argues that this emphasis on consideration of the effects of new products on producers'

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[4] From 1958 to 1968 general liability premiums rose 4.6%. A more dramatic rise of 12.6% was experienced from 1968 to 1978. From 1978 to 1988, the premiums rose 5.3% (p. 27).

profits makes his test superior to current tests, particularly Dean Wade's seven-step, risk-utility analysis (p. 72), which fail to include such profits on the benefit side of the products-liability equation (p. 79). Finally, the "social" test (p. 79) asks if the total benefits to all affected parties outweigh total costs. Together, these tests will "function as a more tightly specified negligence standard" (p. 81) and help to limit the burden on producers to insure against the losses of consumers.

Viscusi claims his proposal would reduce court involvement and minimize cost by subjecting new products to this calculus prior to sale in the market. Moreover, he believes that much of the complicated cost-benefit analysis required by his design defect test should be performed by government regulators, rather than the courts, because government regulators are "better equipped to handle the necessary societal tradeoffs" (p. 212). One wonders, however, whether Viscusi's proposed reforms overestimate the ability of the federal government to regulate risk. While one might agree that Congress and the regulatory agencies have "resources of staff and expertise that juries lack" to determine whether a product should be on the market (p.85), it is unfortunate that Viscusi does not explore the possibility that, with some supervision, manufacturers themselves are best able to do cost-benefit calculation. This idea is suggested by his own position that, under his proposed system of increased regulation, producers must provide "to the regulatory agency on a continuing basis any available information relevant to setting the regulatory standard" (p. 149). If producers have the information and set prices, are regulators really best equipped to do the calculations most efficiently? And if so, why haven't the regulators already assumed this function? Perhaps Viscusi is too sanguine about the federal government's ability to set reasonable standards of care.

Among the most interesting of Viscusi's ideas is his claim that the current hazard warning doctrine has "simply given firms another test they can fail" (p. 9). Presently, the "junk science being propagated by self-proclaimed warnings experts" (p. 12) is increasing the burden on manufacturers to make products virtually foolproof. Viscusi stresses the importance of shifting more responsibility to the consumer to use necessarily dangerous products with caution and proposes a "national warnings policy" (p. 155) which would standardize the language in products' warning labels. Manufacturers adopting the standard lan-

guage in their warning labels would be relieved of liability for failure to warn properly. This is a worthwhile notion that would merit additional treatment.

Reforming Products Liability will be welcomed for Viscusi's thoughtful analysis of statistical data concerning long-term trends in liability insurance and litigation, as well as for his new interpretation of the products liability crisis, which characterizes the problem as a result of the expansion of the design defect doctrine and the emergence of hazard warnings litigation. This book offers substantial scientific ammunition to those interested in reform, but Viscusi's discussion of the pitfalls of prior hasty reform proposals represents its own compelling hazard warning: the "danger is not that reforms will not be adopted immediately but rather that we will embark on an ill-conceived plan" (p. 215).

—Jeff Patton