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ARTICLE

THE UNAMERICAN SPIRIT OF THE FEDERAL INCOME TAX

SENATOR PETE V. DOMENICI*

In this Article, Senator Domenici makes a powerful case against the "anti-saving, anti-growth" aspects of the current federal income tax and proposes replacing it with a progressive consumption tax, or "savings-exempt" income tax. Along with Senator Sam Nunn, Senator Domenici has developed a proposed consumption tax, which he discusses in detail in this Article, explaining the policy reasons behind the proposal and candidly highlighting unresolved issues. Senator Nunn and Senator Domenici have not reached final agreement on all topics discussed in this paper; this Article represents Senator Domenici's current thoughts on these unresolved issues. Senators Nunn and Domenici plan to hold a series of seminars and hearings about their proposal.

In 1984, with the publication of Treasury I, the movement for tax reform began in earnest. Today, Senator Domenici's Article illustrates continued Congressional pressure for tax reform and may provide a preview of the road ahead.

The American entrepreneurial spirit of risk-taking and investing in the future has been shackled by the American tax code. The tax code has become more a mechanism for redistributing wealth than an engine and incentive for creating wealth.

In 1986, Congress attempted to restore the entrepreneurial values of simplicity, fairness, and economic growth to the tax code. For those who supported the 1986 reform, our proposal completes the unfinished agenda of 1986. For those who thought the 1986 reform went astray, *this* is our opportunity to correct its fatal flaws. And for those who believe that the 1993 rate increases repudiated the 1986 tax reform covenant of lower rates in exchange for a broader base, we propose to begin the reform movement again. We propose to abolish the entire income tax system and replace it with a system that taxes only income that is consumed.

The way a country taxes its people deeply influences its potential for economic growth; therefore, reform is no small mat-

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* Senator (R-N.M.). B.A., University of New Mexico; J.D., University of Denver Law School, 1958. Senator Domenici has served in the U.S. Senate since 1973. He serves as ranking member of the following Congressional committees: the Senate Budget Committee; the Select Committee on the Organization of Congress; the Senate Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary; and the Senate Energy and Natural Resources Subcommittee on Energy Research and Development. He is also a member of the Senate Committee on Banking, Housing, and Urban Affairs.

ter. Long ago, the Supreme Court recognized the power to tax as the power to destroy.[1] As the federal income tax has grown from affecting slightly less than one percent of the population to affecting practically everyone and every productive endeavor, its destructive power has become unamerican in spirit and wrong in principle. As its top marginal tax rate has risen from the initial one percent (with a surcharge of up to six percent) to today's top rate of 39.6%,[2] it has become an impediment to entrepreneurship, industriousness, and thrift.

As Supreme Court Justice Potter Stewart noted nearly twenty years ago, "our economy is 'tax relevant' in almost every detail."[3] Today, taxes have become an increasingly important factor in investment decisions as other barriers to international capital flows have disappeared. As governments make unilateral, bilateral, and multilateral trade policy decisions to reduce investment restrictions and foreign exchange controls, differences in the way countries tax capital income generally, and corporate profits in particular, are among the few remaining barriers to efficient international allocation of capital. Therefore, each country's tax system is playing an increasingly prominent role in companies' decisions about where to invest and where and whether to finance investment with debt, new equity, or retained earnings.

The world economy has evolved, and in so doing, has changed our domestic economy. While other countries provide substantial tax deductions for savers, and even require citizens to save,[4] our tax code penalizes savers. Though the national savings rate is extremely important, most Americans do not understand the multifaceted role national savings plays in our economy or the damage done by our low national savings rate. Most observers agree

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[1] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

[2] *Compare* Pub. L. 16 (1913), 38 Stat. 114, 166, *with* I.R.C. § 1 (West Supp. 1994). In the early 1950s, the top marginal tax rate reached an all-time high of 91%. *See* Pub. L. 83-591, 68A Stat. 5, I.R.C. § 1 (1954). Although the Tax Reform Act of 1986 [hereinafter TRA] cut the top marginal rate to 28%, *see* Pub. L. 99-514, 100 Stat. 2096 (1986), the 1993 Act reversed this trend, raising the top marginal rate (including surtaxes) to 39.6%.

[3] United States v. Bisceglia, 420 U.S. 141, 154 (1975) (dissenting).

[4] For example, Singapore, Japan, and Malaysia have well-developed mandatory pension plans. Singapore's Central Provident Fund increased aggregate savings by about four percent of gross domestic product (GDP) during the 1970s and 1980s. Japan, Korea, Malaysia, Singapore, and the Republic of China (Taiwan) all have established government-run postal savings systems to attract small savers. These countries grant tax-exempt status to the interest income from these postal savings. *See* THE INTERNATIONAL BANK FOR RECONSTRUCTION AND REDEVELOPMENT, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 218–19 (1993) [hereinafter EAST ASIAN MIRACLE].

that if we could increase our savings rate we would benefit from higher investment, higher productivity growth, and a higher future standard of living. Unfortunately, our federal income tax system has not kept up with the increasing integration of the global economy or with the practices of our competitors.

Instead of changing to meet the global challenge, our tax code has become weighted down with outdated jargon and legal fictions. Left unchanged, it threatens our long-term economic growth and prosperity. The tax code is as close as this country comes to an enacted industrial policy, but most of our tax incentives encourage the wrong activities. The details of the federal income taxation system currently on the statute books are anti-growth, anti-savings, anti-investment, and anti-job.

I. WHERE DID IT ALL BEGIN?

Prior to the enactment of the federal income tax in 1913, the United States relied on a series of high tariffs and excise taxes at the federal level and property taxes at the state and local levels. By the end of the nineteenth century, this system had drawn fire from several quarters. Citizens from agrarian states felt they were paying more than their fair share of taxes in the form of high commodity prices generated by protectionism. These "invisible taxes" added their weight of misery to the plight of the poor. Because the tariffs and excise taxes were regressive, a poor man with a large family could pay more taxes than a rich man with a small family. Representatives from western and southern states called for a new income tax to mitigate that burden and lower the cost of living for the working class. Furthermore, during the 1880s, popular resentment of the swollen fortunes of the Vanderbilts, Whitneys, Morgans, and Rockefellers helped to stimulate egalitarian calls to "tax the rich." Finally, many believed that local property taxation was being evaded on a grand scale.[5]

Based on these concerns, a growing number of constituencies supported an income tax. The Taft Administration supported a constitutional amendment to allow an income tax because it wanted a secure revenue source adequate to finance a major war should the need arise. Populists wanted to end the special privi-

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[5] *See, e.g.*, 50 CONG. REC. 504 (1913) (statement of Rep. Hull).

leges of the giant industries and to punish corporations and the wealthy. The Progressives wanted government to do more, and businessmen wanted predictability.[6]

After the Supreme Court's decision in *Pollock v. Farmers Loan and Trust Company*[7] foiled early attempts to enact a federal income tax, ratification of the Sixteenth Amendment to the Constitution on February 25, 1913, permitted the federal government to tax income and removed the barriers to a federal income tax on individuals.

On October 13, 1913, President Woodrow Wilson signed the Underwood-Simmons tariff bill, enacting the first income tax under the authority of the Sixteenth Amendment. Slightly more than one percent of the population had incomes large enough to be subject to the new tax. Since the average American worker in 1913 made less than $1,000, and tax liability did not accrue until taxable income reached $3,000, the *New York Herald* predicted that many new taxpayers would proudly display their income tax receipt as evidence of their "value and standing in the commercial world."[8] In the beginning, it was a modest tax, with a rate of one percent on incomes between $3,000 and $20,000, less deductions and exemptions, and graduated surtaxes of up to six percent on higher incomes.[9]

The 1913 version of the 1040 form was four pages long, including one page of instruction. Unmarried individuals were allowed a deduction of $3,000 while married couples could deduct $4,000. Other authorized deductions included personal interest paid, business losses, losses from "fires, storms, or shipwreck" not compensated by insurance, all other taxes paid, bad debts, and "reasonable" depreciation of business property.

According to the Treasury Historical Association, when the first income tax was due throngs of newly initiated taxpayers crowded Internal Revenue Service offices to pay, and some of them were glad to be there.[10] At that time, Representative Cornell

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[6] *See* CAROLYN WEBBER & AARON WILDAVSKY, A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD 419–21 (1986); SIDNEY RATNER, TAXATION AND DEMOCRACY IN AMERICA 302 (1980).

[7] 157 U.S. 429 (1895). In *Pollock*, the Supreme Court held that taxing income violates the Constitutional requirement of Art. I, § 9, cl. 4 that taxes be uniform and in direct proportion to the census.

[8] Nancy Shepherdson, *The First 1040*, AMERICAN HERITAGE, Mar. 1989, at 101.

[9] WEBBER & WILDAVSKY, *supra* note 6, at 421.

[10] *See generally* INTERNAL REVENUE SERVICE, I.R.S. HISTORICAL FACT BOOK: A CHRONOLOGY 1646–1992 8 (for the first 25 years of the income tax, "income tax rates remained at levels that affected only the very wealthy. Essentially, payment of income

Hull, then chairman of the Ways and Means Committee, labeled the income tax "the fairest, most equitable system of taxation that has yet been devised."[11] "[A]mazingly . . . most Americans actually welcomed the tax."[12]

Perhaps those statements were true in 1913, but in 1994, they no longer reflect reality.

II. WHERE DID IT ALL GO WRONG? AN INDICTMENT OF THE CURRENT TAX CODE

The federal income tax code is unamerican in spirit and wrong in principle. Because it levies a double tax on dividends and taxes savings, it discourages risk-taking, entrepreneurship and the creation of jobs. It is hostile to savings and investment and tilted toward consumption. Savers are penalized and consumers are not—the tax favors debt financing over equity and hampers international competitiveness. Finally, it encourages corporate management to neglect long-term investment in favor of focusing on short term profits.

This lack of saving leads to a shortage of investment, which, in turn, leads to insufficient growth, stagnating incomes, and the loss of high-wage jobs. And the increased costs of capital created by the current tax system often affect the initial decision to invest, the decision to modernize, and the development of new products.[13]

A. *The Current Code Unfairly Increases the Cost of Capital*

Our current tax code adds to the cost of capital. Professor John B. Shoven of Stanford University estimates that taxes account for up to one-third of U.S. capital costs.[14] When other countries have lower costs of capital, investments can be made

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taxes in the years preceding World War II was a sign of affluence. Some citizens proudly reported that they had paid their taxes as evidence of their financial success.").

[11] *Id.* at 81.

[12] Shepherdson, *supra* note 8, at 101.

[13] The cost of capital includes the costs of borrowing, depreciation expenses, inflation, and taxes. Corporate and individual income taxes raise the cost of capital. This increase in capital costs reduces capital formation in the United States by reducing the number of investment projects that are potentially profitable and encourages investors to invest in overseas markets where the cost of capital is lower.

[14] *See* JOHN B. SHOVEN, ALTERNATIVE TAX POLICIES TO LOWER THE U.S. COST OF CAPITAL 13 (1990).

there that would not be profitable in the United States. In 1990, it was estimated that U.S. capital costs were approximately twice those of Japan, 60% higher than those of the United Kingdom, and 30% higher than those of the former West Germany. For a typical piece of equipment financed with equity and with an assumed five-year life, the cost of capital was 10.4% in the United States in 1988 compared with 4.1% in Japan—the cost of capital is 153% higher in the United States.[15]

The Tax Reform Act of 1986,[16] (TRA), was aimed at "leveling the playing field" on which alternative investments compete for capital. However, only part of the playing field was actually leveled by TRA. According to one prominent economist, "Eliminating the Investment Tax Credit (ITC) and lengthening the depreciation period actually widened the distortion between investments in tangible business capital and other forms of spending, thereby favoring spending on advertising, temporary price competition to enlarge market shares, and household spending on first and second homes and major consumer durables."[17] Indeed, some estimates indicate that repeal of the investment tax credit, longer depreciation periods, the comparatively high capital gains tax, and the stiff alternative minimum tax (AMT) make capital acquired in the United States the most expensive in the world.[18]

To make matters even worse, in 1986 Congress enacted a second system of corporate taxation, the AMT.[19] Under this new system, taxpayers are required to pay the higher of the regular tax or the AMT. The AMT is particularly harmful to companies that do the "right stuff"—namely, investing for the long-term, investing to modernize, and investing to compete. The more a company invests in productivity-enhancing equipment and new plants, the more likely it will get caught in the AMT tax trap.[20]

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[15] *Impact, Effectiveness, and Fairness of the Tax Reform Act of 1986: Hearings Before the Committee on Ways and Means*, 101st Cong., 2d Sess. (1990) (statement of Mark Bloomfield, American Council for Capital Formation).

[16] Pub. L. 96-514, 100 Stat. 2096 (1986).

[17] *Competitiveness and Long-Term Tax Policy, 1992: Hearings Before the Subcommittee on Taxation of the Senate Committee on Finance*, 102d Cong., 2d Sess. 8 (1992) [hereinafter *1992 Competitiveness Hearings*] (statement of Martin Feldstein, President and CEO, National Bureau of Economic Research).

[18] *Alternative Minimum Tax, 1992; Hearings Before the Subcommittee on Taxation of the Senate Committee on Finance*, 102d Cong., 2d Sess. 33 (1992) [hereinafter *AMT Hearing*] (statement of L.C. Heist, President and CEO, Champion International Corp.).

[19] I.R.C. § 55 (West Supp. 1994).

[20] *See AMT Hearing*, *supra* note 18, at 12 (statement of Andrew B. Lyon, Assistant Professor of Economics, University of Maryland).

For an example of the punitive effects of the AMT, compare the tax bills of Live for

Experience proves that the AMT is a perverse tax on capital that gets progressively more punitive the longer the taxpayer falls under it. Moreover, the AMT is most punitive when balance sheets are weakest. For example, the AMT burden gets heavier during recessionary periods, because as profits drop it is more likely that previously made investments or investments in new productive assets will trigger the AMT.

> Investments in new productive assets increase the total difference between regular depreciation (MACRS) and depreciation allowed under the AMT, thereby creating or aggravating the AMT liability. To relieve this situation and allow full utilization of accumulating Minimum Tax Credits (MTCs) corporations may have no choice but to reduce their level of investment.[21]

The ramifications of such a perverse investment policy for our world competitiveness are obvious and widespread. An estimated 40 to 60% of the largest U.S. corporations are paying tax under the AMT.[22] This tax-driven pressure to reduce the level of investment means that our economic recoveries will not be as strong as they would be absent the AMT.

B. *The Current Code Makes American Exports Less Competitive*

While the current tax system discriminates among various investment types and between regular and AMT-paying competi-

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the Day, Inc., and Tortoise Growth Company. Each is a hypothetical firm with annual gross revenues of $10 million and "ordinary" operating expenses of $8 million. Live for the Day pays its executives large bonuses totaling $1.5 million, pushing, but not exceeding, the bounds of "reasonable compensation." *See* I.R.C. § 162(a)(1) (West Supp. 1994). In contrast, Tortoise Growth reinvests all but $500,000 of its surplus in plant and equipment.

Under the current tax code, Live for the Day has $500,000 in taxable corporate income and cannot be subject to the AMT because its bonuses to corporate officers are not added back to the AMT tax base. It pays $175,000 in corporate income tax. *See* I.R.C. § 11(b) (West Supp. 1994). Tortoise Growth may be less fortunate. If Tortoise Growth's increased depreciation deductions on its new investments reduce its effective tax rate to less than 20%, it will lose some of those deductions under the AMT provisions. *See, e.g.*, I.R.C. § 56(a)(1) and § 56(g)(4)(A) (West Supp. 1994). Thus, after applying the AMT, its total tax bill could be as high as $400,000—more than twice what Live for the Day pays.

[21] Stephen R. Corrick & Gerald M. Godshaw, American Council for Capital Formation Center for Policy Research, Monograph Series on Tax and Environmental Policies & U.S. Economic Growth: AMT Depreciation: How Bad is Bad? Economic Effects of the Corporate Alternative Minimum Tax 4 (1991) (on file with the *Harvard Journal on Legislation*).

[22] *AMT Hearing*, *supra* note 18, at 12 (statement of Andrew B. Lyon, Assistant Professor of Economics, University of Maryland at College Park).

tors, it also hampers the ability of U.S. companies to sell abroad. Many of our international competitors understand that most consumption taxes are superior to income taxes for enhancing export competitiveness. For example, former Japanese Prime Minister Morihiro Hosokawa recently proposed reducing Japan's income tax and raising its consumption tax from 3% to 7%.[23]

Japan is neither alone nor ahead in this trend toward a greater reliance on consumption taxes. As we decide whether to change our tax system, we should bear in mind our competitors' increasing use of consumption taxes and, conversely, our greater reliance on income taxes. For example, in 1993 Germany obtained about 23% of its total revenues from consumption taxes. The comparable figures are 28% for France, 31% for the United Kingdom, and 17% for Japan. Only about 4% of our federal government's revenue comes from consumption taxes in the United States, mainly in the form of selective excise taxes and tariffs.[24]

Unlike our current income tax system, a greater reliance on consumption taxes would enhance our export competitiveness by allowing a border adjustment for goods we export. Under the General Agreement on Tariffs and Trade (GATT), a purchasing country that levies consumption taxes may make border adjustments so that the country where the product is purchased and used taxes it. Likewise, the country producing the product is allowed to make a border adjustment (usually in the form of a tax rebate) relieving the exported goods of the producing country's tax burden. Most of our competitors have border-adjustable tax systems. We do not. Such systems allow them to sell their products in the global market unburdened by domestic tax costs, while American exporters must pay domestic taxes before shipping their products abroad, and they get no rebate.

C. *The Current Code Penalizes Savings*

Another disturbing result of our federal income tax system is that our net domestic savings rate compares poorly with that of our competitors. In international comparisons, a country's net domestic savings rate correlates very strongly with that country's economic growth. Many of the economies that demonstrate high

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[23] *Mr. Hosakawa's Balancing Act*, FIN. TIMES, Feb. 4, 1994, at 17.

[24] INTERNATIONAL MONETARY FUND, GOVERNMENT FINANCE STATISTICS YEARBOOK: VOLUME XVII 42 (1993).

rates of net domestic savings have achieved higher rates of investment than those economies with low rates of domestic savings.[25]

Singapore has a domestic savings rate of over 42% of GDP; Malaysia's is almost 30%.[26] The World Bank has cited these countries as the "East Asian Economic Miracles," recognizing their extraordinary rates of economic growth.[27] The experience of these countries contrasts sharply with that of the United States, which, in 1992, managed a rate of net household savings as a percentage of disposable household income of 5%[28] and a modest economic growth rate of only 2.6%.[29] Even the more mature economies of Japan, Germany, Canada, and France have better savings rates than the United States.[30]

"Productivity isn't everything, but in the long run it is almost everything."[31] Therefore, we must increase our savings or suffer the consequences of low productivity growth.[32] Our low savings rate contributes to our relatively high cost of capital and our low level of investment. In turn, this dearth of capital investment dampens growth in productivity, incomes, and our standard of living.

As a matter of personal finance, most Americans are out of the savings habit and do not realize how financially "out of shape" they are. In particular, most Americans do not know how much they should be saving for their own retirement. A 1992 study commissioned by Merrill Lynch and prepared by Dr. B. Douglas Bernheim of Princeton University concluded that the oldest baby boomers—those born between 1946 and 1956—are saving barely one-third of what they need to maintain their pre-retirement lifestyle after they retire at age sixty-five.[33]

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[25] *Factors Affecting U.S. International Competitiveness, 1991: Hearings Before the House Committee on Ways and Means*, 102d Cong., 1st Sess. 518 (1991) [hereinafter *1991 Competitiveness Hearings*] (statement of Kenneth Gideon, Dep't of Treasury, Ass't Sec'y for Tax Policy).

[26] EAST ASIAN MIRACLE, *supra* note 4, at 210.

[27] *See generally id.*

[28] Organization for Economic Development and Cooperation, *OECD Economic Outlook: December 1993* 146.

[29] DEPARTMENT OF COMMERCE, SURVEY OF CURRENT BUSINESS 50 (Sept. 1993).

[30] Germany has a rate of net household saving as a percentage of disposable household income of 12.9%. The comparable rates for Canada and France are 10.8% and 12.8% respectively. *Id.*

[31] PAUL KRUGMAN, THE AGE OF DIMINISHED EXPECTATION, U.S. ECONOMIC POLICY IN THE 1990s 15 (1990).

[32] *1992 Competitiveness Hearings*, *supra* note 17, at 10 (statement of Martin Feldstein, President and CEO, National Bureau of Economic Research).

[33] *Retirement Income Security: Can the Baby Boomer Generation Afford to Retire?:*

Although many observers concur with Bernheim's view,[34] the Congressional Budget Office (CBO) paints a different picture.

> [B]aby boomers in general will have higher real retirement incomes than older people today for a variety of reasons. First, as long as real wage growth is positive on average during the next 20 to 40 years, boomers will have higher real preretirement earnings than today's older people had in their working years. With current law, this growth will increase the level of boomers' Social Security benefits. Pension benefits will be higher as well, and higher earnings now will enable boomers to save more for retirement. Second, increases in women's participation in the labor force imply that more boomers will have acquired additional years of work experiences before retirement . . . . Third, boomers will be more likely to receive income from pensions as a result of recent changes in the pension system. Finally, baby boomers may inherit substantial wealth from their parents.[35]

While CBO forecasts a potentially bright future for the well educated, it also forecasts a "distinctly gloomy" picture for those without many marketable skills.[36]

To most of our citizenry, economic growth sounds like an abstraction. But enhancing long-term economic growth is the key to ensuring America's future, and increasing the saving rate is the fundamental building block for achieving that growth.

> Our highest priority must be to address the low level of saving in America and improve the allocation of that saving to its most productive uses. Until we do that, talk of [indus-

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Hearing Before the Subcommittee on Social Security of the House Committee on Ways and Means, 103d Cong. 1st Sess. 41 (1993) (statement of B. Douglas Bernheim, Professor of Economics and Business Policy, Princeton University).

[34] *See, e.g., id.* at 126 (statement of Ray Crabtree, Senior Vice President for Pensions, Principal Financial Group, on behalf of the American Council of Life Insurance), 92 (statement of Martha Priddy Patterson, Director, Employee Benefits Policy and Analysis, KPMG Peat Marwick, Washington National Compensation and Benefits Practice).

[35] CONGRESSIONAL BUDGET OFFICE, BABY BOOMERS IN RETIREMENT: AN EARLY PERSPECTIVE, xii–xiii (1993). One should note the different standards of comparison used by Bernheim and by CBO. Bernheim's study assumes that the benchmark for retirement savings is maintaining the pre-retirement standard of living. Since most private pension plans and Social Security pay benefits based on a fraction of pre-retirement earnings, future retirees must save a substantial sum to bridge that gap. Bernheim's conclusion that people do not save enough to bridge that gap matches common intuitions. However, CBO's study assumes that the benchmark is the standard of living of today's retirees. With its assumptions of real wage growth and the continuation of the current Social Security benefit formula, CBO's conclusion that future retirees will have a higher standard of living than today's retirees is unsurprising.

Reading the two studies together, one can conclude that while future boomer retirees might be somewhat better off than current retirees, boomers are not saving enough to maintain their pre-retirement standard of living after they retire.

[36] *Id.* at xiii.

> trial policy] or even wider reforms is simply a waste of time for the same reason that you don't worry about tacking in a new direction if your sails are full of holes and the water is over the gunwales. First things must always be first.[37]

D. *The Current Code Imposes a Double Tax on Corporate Earnings*

Over the past twenty-five years, most of our trading partners have integrated their corporate and shareholder taxes to mitigate the impact of imposing two levels of tax on corporate profits distributed as dividends. Most typically, this has been accomplished by providing the shareholder-taxpayer with a full or partial credit for taxes paid at the corporate level.[38] Unlike our competitors, we continue the dividend double taxation habit.

Moreover, we seem unable to muster the political will to provide a meaningful capital gains differential which would enhance new investment by freeing up $1 trillion in currently locked-in investment. Although we have created a "back-door" capital gains differential by raising the top personal income tax rate to 39.6%, that differential is still subpar when compared to our competitors.

To understand why the U.S. treatment of capital gains is inadequate when compared to that of our competitors, consider their policies. Three of the ten foreign industrialized countries—Belgium, Italy, and the Netherlands—do not tax capital gains at all. In addition, Germany does not tax capital gains on assets held longer than six months. Canada, France, Japan, and Sweden tax capital gains at rates ranging from 16 to 20%. Hong Kong and four Pacific Basin countries—Malaysia, Singapore, South Korea, and Taiwan—do not tax capital gains. Given these policies, some economists suggest that the most efficient capital gains tax rate for the United States would be about 18%.[39]

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[37] CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, THE CSIS STRENGTHENING OF AMERICA COMMISSION FIRST REPORT 83–84 (1992) [hereinafter COMMISSION REPORT] (quoting Barry Rogstad, President, American Business Conference).

[38] DEPARTMENT OF TREASURY, INTEGRATION OF THE INDIVIDUAL AND CORPORATE TAX SYSTEMS 12 (1992). [hereinafter TREASURY INTEGRATION STUDY]

[39] SPICER & OPPENHEIM, INTERNATIONAL TAX COMPARISONS: TAXATION OF CAPITAL GAINS, DIVIDENDS AND INTEREST ON SECURITIES INVESTMENTS ON INDIVIDUALS IN THE UNITED STATES AND SIXTEEN FOREIGN COUNTRIES 6–8 (1989).

E. *The Current Code Suffers from Mind-Boggling Complexity Yet Still Fails to Collect $127 Billion Each Year in Owed Taxes*

Some observers have predicted that our tax system may die of its own complexity. Section 61 of the code defines the tax base, and answers the fundamental question: "What is income?"[40] Hundreds of sections set forth the exceptions and preferences. In 1953, Albert Einstein commented that "the hardest thing in the world to understand is the income tax."[41] Imagine how Einstein would have reacted to the enactment of the increasingly complex tax bills of the 1960s, 1970s, 1980s, and early 1990s.

The tax code's complexity costs Americans over $50 billion annually in compliance costs.[42] This is more than the GDPs of Iceland and Ireland *combined*.[43] And it appears that compliance costs are growing. For individual filers, "[t]he average real expenditure on fees to advisors rose by 47 percent between 1982 and 1989."[44]

Despite the tax code's complexity and far-reaching nature, the Internal Revenue Service calculates that up to $127 billion in owed taxes goes uncollected each year.[45] This growing tax gap is another count in the indictment against our current tax code.

F. *Summary of Indictment*

If we are to perform well in the competition among nations, we need to address our federal tax system's shortcomings. In

[40] I.R.C. § 61 (West 1988).

[41] THE MACMILLAN BOOK OF BUSINESS AND ECONOMIC QUOTATIONS 195 (Michael Jackman ed., 1984).

[42] For descriptions of the size of the tax industry, see JAMES PAINE, COSTLY RETURNS (1993); Marsha Blumenthal & Joel Slemrod, *The Compliance Cost of the U.S. Individual Income Tax System: A Second Look After Tax Reform*, 45 NAT'L TAX J. 185–88 (1992) [hereinafter *Compliance Cost*]; Arthur D. Little, Final Report to the Dep't of Treasury, Development of Methodology for Estimating the Taxpayer Paperwork Burden (June 1988); JOEL SLEMROD & MARSHA BLUMENTHAL, THE TAX FOUNDATION, THE INCOME TAX COMPLIANCE COST OF BIG BUSINESS (1993); TAX EXECUTIVE INSTITUTE, THE STRUCTURE AND SIZE OF THE CORPORATE TAX DEPARTMENT: AN EMPIRICAL ANALYSIS (1993); CHARLES ADAMS, FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION (1993).

"[T]he total bill for merely coping with the U.S. tax code tops $50 billion a year. That's nearly one percent of the nation's total output of goods and services . . . ." Rob Norton, *Our Screwed Up Tax Code*, FORTUNE, Sept. 16, 1993, at 35.

[43] Iceland's GDP in 1992 was $4.5 billion. Ireland's was $42.4 billion. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 179, 190 (1993).

[44] Blumenthal & Slemrod, *Compliance Cost*, *supra* note 42, at 188.

[45] INTERNAL REVENUE SERVICE, PUB. NO. 1415, INCOME TAX COMPLIANCE RESEARCH: NET TAX GAP AND REMITTANCE GAP ESTIMATES 2 (1990).

1913, when America adopted an income tax system, we followed the lead of fifty-two of our most significant competitors. However, our competitors have long since abandoned their heavy reliance on income taxes in favor of consumption taxes.

Before we enact another round of taxes to pay for health care reform, cobbling new taxes onto the old, anti-saving, loophole-encrusted system, Congress should engage in a little intellectual introspection to address the basic problems inherent in the income tax. Senator Nunn and I engaged in such an exercise when we agreed to co-chair the Strengthening of America Commission.[46] The Commission undertook a three-year assignment under the auspices of the Center for Strategic and International Studies (CSIS) to determine the right steps to put our fiscal house in order. Our commissioners, and the experts we consulted, were asked to put aside their individual agendas and act as statesmen, so that the Commission would adopt bipartisan recommendations that best serve the nation's long-term economic interest.

Commissions are not usually the forum for bold or unequivocating statements. However, one of the Commission's key recommendations was to "[a]bolish the current income tax system in favor of a new system that would stimulate greater savings, investment and jobs . . . [and create a] consumption-based income tax system that will gear the economy for growth and be both progressive and fair in its impact."[47] In reaching our recommendation to abolish the current income tax system we recognized that it must be replaced with something better; in doing so, we parted company with those who would repeal the federal income tax without replacing it.[48]

Over the years we have learned that the method of taxation is as important as the rate of taxation. As Henry George once observed, "As a small burden badly placed may distress a horse

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[46] For a summary of the Commission's work, see COMMISSION REPORT, *supra* note 37, at 14.

[47] *Id.* at 14.

[48] Some income tax critics have proposed repealing the Sixteenth Amendment by passing the "Liberty Amendment" to the Constitution. This proposal would preclude Congress from levying taxes on persons, incomes, estates, or gifts. The Liberty Amendment has been introduced several times over the past forty years. At one point, as many as 32 states had enacted resolutions calling for various versions of such an amendment. *See* JOINT ECONOMIC COMMITTEE, THE PROPOSED 23D AMENDMENT TO THE CONSTITUTION TO REPEAL THE 16TH AMENDMENT TO THE CONSTITUTION WHICH PROVIDES THAT CONGRESS SHALL HAVE THE POWER TO COLLECT TAXES ON INCOMES, S. Doc. No. 5, 87th Cong., 1st Sess. 1–9 (1961).

that could carry with ease a much larger one properly adjusted, so a people may be impoverished and their power of producing wealth destroyed by taxation, which if levied another way, could be borne with ease."[49]

Over the last eighty years, our tax system has become that "burden badly placed," diminishing, if not yet destroying, our power to produce wealth. It has evolved into everything an efficient tax system should not be. It is complicated, laden with excessive recordkeeping, internationally anti-competitive, and generally misguided.

Senator Nunn and I have a better idea. We believe taxing income that is consumed rather than income that is earned would produce a better-placed tax burden.

III. THE NUNN-DOMENICI PROPOSAL FOR A "SAVINGS-EXEMPT" TAX SYSTEM

We believe that it is more efficient and more equitable to tax income that is consumed than it is to tax income simply because it is earned. Consumed income is a good index of a citizen's ability to pay taxes as measured by what a person withdraws from society. What a citizen consumes provides prima facie evidence of well-being; in contrast, what is received as income ignores the citizen's contribution to society through his or her labor and investment choices. A person's ability to consume is a sophisticated and multi-faceted indication of his or her ability to pay taxes because it is determined by income, net worth, and prospects for the future, depending on whether earnings are expected to remain constant and secure or irregular and uncertain. At best, income provides only circumstantial evidence of well-being. Income is a one-dimensional, rough measure of what a person contributes to society through work and investment choices. Using that contribution as the tax base penalizes hard work and is wrong in principle.

In reasserting the equities of taxing consumption rather than income, we dispute traditional thinking that income is the best measure of a citizen's ability to pay taxes. Our assertion revives

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[49] 1 HENRY GEORGE, THE COMPLETE WORKS OF HENRY GEORGE, PROGRESS AND POVERTY 407 (AMS Press ed. 1973).

the consumption tax theory that first developed in the seventeenth century writings of Thomas Hobbes.[50]

Senator Nunn and I want a tax code that encourages the creation of greater wealth, not just the redistribution of existing wealth. Under the current income tax code, the most straightforward approach to tax minimization is simply to "consume leisure" rather than earned income. Non-economists might recognize this phenomenon as "slacking off." We think this is unamerican in spirit, yet it is the only audit-proof escape route from the basic philosophy of "ability to pay" based on what is earned. Our current system reduces the incentives to work, save, and invest. It is difficult to explain why we keep it on the books. Under the Nunn-Domenici proposal, the Congressionally blessed and IRS-approved method to minimize tax liability would be to save and invest more. Our proposal recognizes that savings and investment are at least as productive and useful to our society as paying taxes to the federal government.

The guiding principle behind our reform is that all income should be taxed once and only once. Under this proposal, no income would escape taxation permanently. To achieve this goal, the tax system could either tax the capitalized value of an income stream (seed capital) without taxing the income stream itself, or not tax the initial investment but tax all subsequent earnings and returns of capital. The former corresponds to what is sometimes called an "unlimited back-ended Individual Retirement Account (IRA)," while the latter corresponds to the front-loaded IRA available to some taxpayers under current law.[51] Regardless of the path taken, we want to create a tax code that is neutral and does not favor consumption over investment. Our goal is to eliminate all of the biases contained in the current Federal income tax law.

Senator Nunn and I could achieve our fundamental objective of taxing all income once by exempting savings and repealing either the individual or the corporate income tax. But we believe it would be difficult politically to raise all the revenue at the individual level and impossible to place the entire tax burden at the corporate level. The current corporate income tax raises only

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[50] *See* THOMAS HOBBES, LEVIATHAN OR MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL (Michael Oakeshott ed., 1946).

[51] I.R.C. § 219 (West Supp. 1994) allows qualified individuals to invest up to $2,250 each year into an Individual Retirement Account (IRA) and to deduct the amount invested in the IRA from gross income.

$100 billion per year, one-fifth of the revenues generated by the individual income tax. Putting the entire tax burden on corporations would be too radical a shift. Moreover, without two tiers, individuals could accumulate income in corporations in a virtually tax-free fashion for indefinite periods of time.

Since under the Nunn-Domenici proposal the tax system will continue to collect taxes in two tiers, the spotlight should be kept on our guiding principle—all income is always taxed once and no income escapes taxation. The business portion of our tax can be characterized as prepayment of individual income tax. Our proposal would abolish the current federal income tax code, which has long floundered in inefficiency and complexity. In its place, the Nunn-Domenici proposal would enact a progressive consumption-based income tax for individuals to replace the current personal income tax and alternative minimum tax (AMT), and a cash-flow tax for businesses to replace the current corporate tax, the corporate AMT, and the foreign tax code provisions.[52]

Our proposal is designed to maintain the distribution of the tax burden as currently shared between businesses and individuals, with individuals shouldering $5.50 for every dollar paid by corporations. It would maintain the progressivity of the current code, as measured by the distribution of tax burden among income quintiles. Some people within a quintile would pay more and some would pay less than they would under current law, but as a group, the quintile would pay the same amount under the current code and the proposal. Finally, it would be revenue-neutral, as compared to the current system.

A. *Features of the New "Savings-Exempt" Income Tax for Individuals*

The new system would have some familiar key concepts: gross income, adjustments to gross income, adjusted gross income, deductions, and a few tax credits, including the earned income tax credit. With respect to these durable features, the Nunn-Domenici proposal resembles the traditional income tax system. However, the proposed tax system is actually based on an indi-

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[52] For a more complete description of the proposed progressive consumption tax for individuals, see part III.A., *infra* notes 53–93. For a complete description of the proposed business tax, see part III.B., *infra* notes 94–129.

vidual's income that is consumed rather than on that which is merely earned.[53] Accordingly, the proposal would also have several new key concepts: net new savings deduction, family living allowance deduction, employer and employee payroll tax credits, financial income, previously acquired financial asset adjustment, compensation income, and college tuition allowance.

The following sections provide more detail about key features of the Nunn-Domenici progressive consumption tax for individuals.

1. The Tax Base

The tax base is Gross Domestic Product (GDP) excluding savings and investment and adjusted for net exports. Economists define our tax base as all factor income. Tax lawyers define it as all income, regardless of its source. On the surface, the tax base definition resembles that in the current tax code; however, there are significant differences. There are no permanent exclusions, no double taxation, no phantom income, no capital gains differentials, no depreciation, and no uniform capitalization rules.

The Nunn-Domenici proposal does not differentiate among income sources. Wages and salaries are treated the same as interest income, capital gains, and dividends. Each is taxed if and when the income is consumed. The income stream is taxed only once, and nothing escapes taxation.

The definition of a taxable event also distinguishes the Nunn-Domenici tax base from the current tax base. Both the individual and the business tax would be based on cash-flow principles.[54] Under the Nunn-Domenici proposal, businesses would not pay income taxes on their financial receipts.[55] Having been excluded

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[53] "Since the income concept generally taken as the starting point for taxation is defined to be the sum of consumption and change in net worth, the term 'consumed income' as descriptive of a tax base is something of a contradiction in terms. The term has been popularized by Henry Aaron and Harvey Galper (1985)." David F. Bradford, Discussion Paper No. 20, An Uncluttered Income Tax: The Next Reform Agenda? 3 n.1 (July 1988) (on file with the *Harvard Journal on Legislation*).

[54] *See generally* Ernest S. Christian, Jr., Description of a Prototype Business Tax (Oct. 5, 1993) (explaining the cash flow interaction between the individual and business taxes) (on file with author).

[55] Financial receipts are generated from holding or selling financial assets. Financial receipts include the proceeds from the sale of stocks and bonds and receipts of interest and dividends.

from the business cash-flow tax base,[56] financial receipts such as interest and dividends would be included in gross income under the individual tax. However, if such receipts are saved or reinvested, they would be deductible under the proposal's new net savings deduction.

2. An Unlimited Deduction for Savings and Investment

For individuals the hallmark of the plan would be an unlimited deduction for savings and investment. This is most easily understood as an expanded, unlimited, unrestricted, and simplified IRA. The proceeds could eventually be spent for any or all purposes without incurring the current tax penalty for early withdrawal.

The Nunn-Domenici system would recognize that the act of saving defers personal use of the taxpayer's resources, making it available as investment capital. Because additional investment capital leads to expanded opportunities for economic growth, the nation benefits from this decision to increase savings and investment. Eventually, the Federal government shares in the return on that investment in the form of higher revenues. The proposal compensates individual taxpayers for their act of saving through tax-favored interest and dividends because "it is better to tax on the basis of what we take out of the common pool and not on the basis of what we as citizens put into it."[57]

To put this policy into practice, the Nunn-Domenici proposal allows taxpayers a "net new savings deduction" for net additions to savings accounts, investments in stocks, bonds, mutual funds, life insurance, and other savings assets. Income generated on these investments would not be taxed as earned or received so long as they continued to be reinvested and saved. The same tax treatment would apply to interest, dividends, and capital gains if they were saved or invested.

3. Major Purchases

Advocates of pure tax simplification would not distinguish between big-ticket purchases and any other spending for con-

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[56] For a more complete discussion of the business cash flow tax base, see part III.B.1, *infra* notes 97–98 and accompanying text.

[57] Barry Rogstad, Tax Proposal Outline 1 (Feb. 26, 1994) (on file with the *Harvard Journal on Legislation*).

sumption. These purists would collect the tax in a single, up-front tax payment made in the year of the purchase. They would argue against any special rules for automobiles or any other major purchase, regardless of its business or pleasure purpose or whether it is essential to the taxpayer's life or business. The rules would be the same for the purchase of a refrigerator, a drive-about lawn mower, deluxe Soloflex exercise equipment, a computer for personal use, or a boat. To avoid endless "what about this or that" discussions, the purist would have no special rules—consumption is consumption. And all income spent on consumption would be taxed in the same manner.

Under a progressive tax rate structure, a big purchase might push an otherwise thrifty taxpayer into a higher tax bracket in the year he or she makes a major purchase.[58] The absence of special rules or averaging could result in taxpayers with identical incomes and savings patterns paying different amounts of taxes over their lifetimes. The pure tax simplifier would be unconcerned, preferring the perfect (but perhaps unattainable) system over the attainable, better system.

On the other hand, some economists would argue for a special consumer durables rule. Their analysis leads them to categorize consumer durables as "consumer capital" and conclude that consumer capital should receive the same tax treatment as durable capital facilities used by businesses. Under this approach, the purchase of such consumer assets would be free of tax. However, each year the taxpayer would calculate the value of the consumption services provided by the asset, and that amount would be taxed. For example, the purchase of a car would not be taxed at the time of the purchase, but each year the consumed value of the car (perhaps as measured by the decrease in its resale value) would be taxed. This is probably the most theoretically correct approach, but it poses several complicated questions of administration:[59] Which purchases would qualify for the special

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[58] Consider two taxpayers, Mr. A and Ms. B. Mr. A makes his major purchases during periodic shopping sprees resulting in clustered spending patterns. Ms. B makes her purchases in a more steady and predictable manner. If Mr. A buys a car and a pleasure boat in the same tax year, his aggregate consumption might put him into a higher tax bracket for that tax year and a lower tax bracket in subsequent years. If, in contrast, Ms. B purchases her car in one year and a boat the next year, her consumption in any one tax year may never reach the level at which a higher marginal tax rate applies. Thus, although by the end of the second tax year both Mr. A and Ms. B have consumed the same amount, Mr. A has paid a higher marginal tax rate than has Ms. B on a portion of that consumption.

[59] For a good discussion of possible ways to treat consumer durables, see MICHAEL

rules? How would the value of the consumption services provided be calculated?

Alternatively, a more administrable "rough justice" system could be developed to "average," or spread, the tax on the purchase of major consumer goods over several years. Because some taxpayers might prefer simplicity and a slightly larger tax bill to the recordkeeping requirements of major purchase averaging, averaging could be optional. The basic requirement for major purchase averaging would be that a taxpayer's qualified expenditures for the current year exceed a fixed percentage (120–140%) of his or her average expenditures for the preceding three years by more than a certain dollar figure ($3,000 to $5,000). In effect, major purchase averaging would spread one major purchase or a cluster of expenditures over the current year and several future tax years. Generally, averaging would keep the taxpayer in the same tax bracket he or she would have been in "but for" the major purchase. It also spreads tax liability over several years in much the same way an installment plan would make it easier to purchase the asset in the first place. Prior to 1986, the Internal Revenue Code included a mechanism for income averaging for individuals whose income varied significantly from one year to the next. A similar mechanism could be developed for taxpayers whose annual consumption varies significantly.

Our current solution to the major purchases problem is to propose refining the major purchase averaging approach. This would allow consumers to plan their consumption without fear of inadvertently raising their top marginal tax rate and would avoid the administrative and valuation difficulties inherent in the "purer" approaches. Regardless of the approach we choose, our paramount consideration will be to ensure that a major consumer purchase made with saved income is treated the same as or more favorably than a purchase made with borrowed funds.

4. Home Ownership

Home ownership is the investment of choice for one out of every three dollars of net private investment.[60] This leads many

A. SCHUYLER, INSTITUTE FOR RESEARCH ON THE ECONOMICS OF TAXATION, CONSUMPTION TAXES: PROMISES AND PROBLEMS 69 (1984).

[60] CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVE-

tax policy experts to conclude that America is overinvesting in housing and that the federal income tax preferences for owner-occupied housing are larger than necessary to maintain a high rate of home ownership. For example, the Canadian government grants a capital gains preference for home sales but does not allow deductions for mortgage interest, yet Canada and the United States have achieved comparable home ownership statistics.[61]

The United States's high level of home ownership has not come cheaply. The home mortgage deduction is the third-largest tax expenditure in the federal individual income tax code and subsidized home owners in 1993 with $45.1 billion in the form of lower taxes.[62] The current tax code treats homes more favorably than other investments. A taxpayer may deduct interest paid on a mortgage of up to $1 million used to acquire and improve first and second homes, and interest paid on a home equity loan of up to $100,000.[63] The proceeds can be used for any purpose.

Along with other tax expenditures that infest the federal income tax code, the home ownership deduction is often diagnosed by economists as inefficient, inequitable, and overly generous.[64] Economists have criticized the structure of the mortgage deduction both because the amount of the deduction rises with income and because it gives renters no direct benefits.[65] The value of the deduction varies with a person's tax bracket and can be as low as 15% of qualifying expenditures. The maximum subsidy, 39.6% of qualifying mortgage interest payments, is available only to single persons with incomes of more than $115,000 and to jointly filing families of four with taxable incomes of more than $140,000. For example, a married couple in the top marginal bracket filing jointly and paying 7% interest on a $1 million mortgage could save over $22,000 per year, while lower income families who rent their homes would not have their tax bill reduced at all.[66] Studies show that more than half of the

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NUE OPTIONS: A REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE BUDGET 290 (1994).

[61] *Id.*

[62] U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993 334 (113th ed. 1993).

[63] I.R.C. § 163 (1993).

[64] *See, e.g.*, HENRY J. AARON & HARVEY GALPER, ASSESSING TAX REFORM 18 (1985).

[65] *Id.*

[66] Under the limitations on itemized deductions, an individual with an adjusted gross income above $108,450 is allowed to deduct no more than 80% of otherwise allowable deductions. *See* I.R.C. § 68 (1993). Therefore, a married couple filing jointly could deduct 80% of the interest payments on a house worth up to $1,000,000. At a 7%

subsidies under this deduction accrue to households with incomes of $50,000 per year or more and virtually none to households with incomes of $10,000 per year or less.[67]

Despite these perceived flaws, the home mortgage interest deduction is generally supported by the American people and has a powerful grip on members of Congress. A family residence is both the largest consumer purchase and the main investment for most American taxpayers. While formulating the Nunn-Domenici proposal, we listened carefully to both critics and proponents of the home mortgage deduction. We concluded that home ownership would be considered an investment and a separate deduction would be allowed for principal and interest repayment.[68] While we have not yet made a final decision, we probably will propose capping the mortgage deduction at an amount somewhat lower than the current $1 million.[69] However, no deduction would be allowed for home equity loans and property taxes paid on the home.[70] Our proposal recognizes that home ownership has a significant investment component. However, it does not recognize the consumption element under an economic "imputed rent" calculation. In this case, we decided to sacrifice purity in the name of simplicity.

To ensure parity of treatment between home owners and renters, David Bradford suggests that a homeowner could be charged an amount equal to the value of the financial alternatives he or she foregoes in choosing to buy a home.[71] For example, the tax schedule could direct taxpayers to include in their tax base an amount equal to the current year's interest cost (or some portion of it) on a twenty- or thirty-year bond. Such an amount would roughly equal the market value of the house and provide a con-

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annual percentage rate, the couple could deduct 80% of $70,000 or $56,000. If taxed at the top marginal tax rate of 39.6%, this equals a savings of $22,176 per year.

[67] *See, e.g.*, AARON & GALPER, *supra* note 64, at 17.

[68] *But cf.* DAVID F. BRADFORD, DEPARTMENT OF TREASURY, BLUEPRINT FOR BASIC TAX REFORM 85–89 (1977). Bradford's analysis includes an excellent discussion of the imputed rent concept, in which taxpayers would not be taxed on their initial purchase of their home but would be taxed on the rental value of the housing services they consume each year by living in their homes. While this is probably the most intellectually honest approach to the treatment of housing, we rejected this approach as unduly complicated from both a compliance and administration standpoint.

[69] For possible ways to cap the mortgage deduction, see CONGRESSIONAL BUDGET OFFICE, *supra* note 60, at 290–94.

[70] Bradford agrees that no deduction for property taxes should be allowed as long as imputed rent from the primary residence is excluded from taxable income. *See* BRADFORD, *supra* note 68, at 93.

[71] *Id.* at 85–86.

servative estimate of the annual rental cost and consumption component on the family home. This proposal's simplicity and fairness commends its further consideration.

Senator Nunn and I recognize that our tax treatment, without Bradford's proposed calculation, perpetuates the current tax code's discrimination against renters. However, under the Nunn-Domenici proposal, renters would find it easier to purchase homes since families would receive a deduction for saving. That deduction would help them overcome the primary hurdle to home ownership—amassing a down payment.

5. Family Living Allowance

One objective of the Nunn-Domenici proposal is to retain the current distribution of the tax burden among income quintiles. To meet this goal, the proposal includes the family living allowance, an expanded earned income tax credit (EITC), and a credit for payroll taxes.

The family living allowance recognizes that every family's budget includes necessities and that the federal government should not tax the first dollars earned and spent to maintain a minimal standard of living. The proposal provides a tax-free threshold level of consumption upon which families would not be taxed. The family living allowance would vary to accommodate family size and would include personal exemptions and components similar to the familiar standard deduction. It would also include an amount sufficient to cover average expenditures for essentials.[72] In developing the family living allowance, we have taken special care to ensure equitable treatment of larger families, who typically spend more and save less than smaller families with the same incomes. We estimate a family living allowance of $25,160 for a family of four.[73] This allowance would rise each year with the cost of living.

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[72] This amount is calculated based on the poverty guidelines established by the Department of Health and Human Services. For an explanation of how these guidelines developed, see Gordon Fisher, *The Development and History of the Poverty Thresholds*, 55 SOCIAL SECURITY BULLETIN 3–4 (Winter 1992).

[73] The family living allowance is calculated at 170% of the federal poverty guideline for a family of a given size. Other examples of family living allowances for families of varying sizes include: single individual, $12,512; family of two, $16,728; family of five, $29,376; family of eight, $42,024. Each individual family member after eight would result in an increase of $4,216 in the family living allowance. Although federal poverty guidelines are not codified, they may be found at 59 Fed. Reg. 6277 (1994).

Converting the current personal exemption and standard deduction into our family living allowance is necessary to reflect the shift in the tax base from income to consumption. It should not be interpreted as a commentary or policy judgment on what families should spend or save but rather as one of several mechanisms in the proposal designed to retain the progressivity of the current tax code.

6. A Tax Credit for Employee Payroll Taxes Paid

The payroll tax on employment finances the Social Security and Medicare programs.[74] For the great majority of workers, the combined employee and employer payroll tax exceeds their liability for federal income taxes.[75] Because of its flat rate structure, the payroll tax is often criticized for its regressivity.

Under the Nunn-Domenici proposal, every employee-taxpayer would be given a credit on his or her individual tax bill for some of the payroll taxes he or she pays. Under our current system, no deduction is allowed. The credit would be refunded to any taxpayer whose payroll tax exceeds his or her income tax liability. The payroll tax credit would be gradually reduced as taxable income exceeds the family living allowance: it would start to phase out dollar-for-dollar at $25,001 of income and phase out completely at $50,001.

This credit furthers our guiding principle that income should be taxed only once. In addition, it facilitates our goal of retaining the progressivity of the current income tax and helps neutralize the regressive nature of the current payroll tax while maintaining the financial integrity of the Social Security trust fund.

7. Continuing the Earned Income Tax Credit

The Nunn-Domenici tax proposal currently envisions a tax provision that would accomplish the same objectives as the current EITC.[76] While every family would receive a family living allowance, the families at the lowest end of the income distribution would also be eligible to claim the EITC. To retain the

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[74] I.R.C. § 3102 (West Supp. 1994).

[75] Almost 73% of families who pay some taxes pay larger social security taxes (employer and employee share) than income taxes. *See* COMMITTEE ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: 1993 GREEN BOOK 1544.

[76] I.R.C. § 32 (West Supp. 1994).

progressivity of the current tax code, the Nunn-Domenici plan would increase the EITC by approximately 30%.[77]

8. Pruning Some Itemized Deductions—Reforming Others

Our proposal may retain some itemized deductions from the current law. Those that are not expressly retained would be incorporated in the family living allowance. Generally, retaining itemized deductions leaves us facing a form of Hobson's choice: the more itemized deductions we keep, the higher rates must be to accommodate a smaller tax base and still meet a revenue goal. The tax rates in our proposal assume the continuation of certain itemized preferences.[78] For illustrative purposes, the Congressional Budget Office (CBO) assumed when calculating the tax brackets of the Nunn-Domenici proposal that the deductions for state and local income taxes, charitable contributions, and medical expenses above the 7.5% floor would be retained and that the EITC would be expanded. CBO included this illustrative "basket" of deductions with a total revenue loss of $50 billion per year because we have not reached final decisions on deductions.[79] The basket sets aside a revenue-loss budget to include some worthwhile deductions in our proposal. These deductions could include those assumed in the CBO prototype or others that could be modified, reformed, targeted better, or transformed from deductions into credits.

As a matter of tax equity, itemized deductions are unfair. They provide the greatest tax relief to taxpayers in the highest tax brackets and negligible relief to people who claim the standard deduction. The higher a person's tax bracket, the bigger his or her tax savings from claiming deductions. To achieve greater fairness to all taxpayers, most current deductions that are retained in the Nunn-Domenici proposal could be transformed into tax credits. For example, the current deduction for charitable

[77] Congressional Budget Office Memorandum, Estimates for a Prototype Savings Exempt Income Tax, 23 (Mar. 1994) [hereinafter CBO Estimates] (on file with the *Harvard Journal on Legislation*).

[78] For a further discussion of the tax rates imposed under the Nunn-Domenici proposal, see part III.A.11, *infra* notes 89–93 and accompanying text.

[79] The basket's size corresponds roughly to the sum of the projected revenue losses attributable to the itemized deductions for non-business state and local taxes other than on owner-occupied homes ($25.6 billion), charitable contributions ($19.3 billion), and medical expenses ($3.6 billion). BUDGET OF THE UNITED STATES: ANALYTICAL PERSPECTIVES 77 (1994) (table entitled, "Major Tax Expenditures in the Income Tax, Ranked by Total 1995 Revenue Loss").

giving could be transformed into a credit based on the maximum marginal tax rate. Some argue that it is inequitable for the federal income tax system to provide greater encouragement for charitable giving to higher bracket taxpayers than it provides to low-bracket taxpayers.[80] A credit would provide all taxpayers with the same tax benefit.

Some of the current tax preferences the Nunn-Domenici plan could retain but convert into tax credits include:

a. *Charitable giving.* Charitable giving is income for which the taxpayer has permanently renounced ownership. It represents savings on behalf of society and, thus, would be tax-favored under the Nunn-Domenici proposal.

b. *Pension and profit-sharing plans.* These would continue to be excluded from the individuals' consumed-income tax at the time the employer makes its contributions toward benefits. There would be no taxable event until the benefits are paid out to the retiree taxpayer. Once pension benefits are received by the taxpayer, they would be included in his or her tax base. This income, like any other income, would be partially offset by the tax-free family living allowance. Also, the taxpayer could save or invest the paid-out benefits and avoid tax until those benefits are consumed.

c. *Tax-exempt bonds.* We believe that a tax-favored treatment of municipal and state bonds has become intrinsic to federalism and states' rights. Bonds issued by state and local governments would continue to receive favored treatment. Since all types of bonds, when purchased, would enjoy a deduction as part of the net new savings deduction, our new system would allow the interest earned from tax-exempt bonds to be spent without being taxed.

d. *College tuition.* The cost of higher education is an investment because the greater future earnings generated by attending college eventually would be taxed. Income spent on education also can be characterized as an investment in human capital. If expenditures on post-secondary education are characterized as investments, they should

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[80] AARON & GALPER, *supra* note 64, at 71 (generally supporting conversion of any retained itemized deductions into credits, giving special mention to charitable giving and home ownership), 18 (criticizing these deductions as often being poorly designed, and resulting in inefficient, inequitable, and even bizarre patterns of assistance).

be deductible.[81] Under this approach, loans to finance higher education would be taxable receipts and repayments of principal and interest would be deductible.

Our current plan is to design a special deduction for tuition, books, and fees, capped at a reasonable amount, perhaps $7,500 per year with a lifetime ceiling of $25,000 per student.[82] It is also important to consider that under the new system, the savings would be deducted as part of the net savings deduction and the accumulation of interest and other gains would not be taxed until the funds are spent. Because of this tax deferral, a person who wished to save for a child's college education eighteen years in the future and who could invest at ten percent, would have to earn and set aside considerably less under the Nunn-Domenici proposal than under the current income tax code.

9. Treatment of Previously Acquired Financial Assets

Americans own almost $5.6 trillion in financial assets, including $260 billion in savings accounts, $580 billion in money market accounts, $1.9 trillion in stocks and bonds, $1.2 trillion in retirement accounts, $600 billion in CD's, and $900 billion in other financial assets. Additionally, Americans own $2.4 trillion in net investment real estate.[83] A portion of these assets represents the accumulation of past after-tax savings. Also, any dividends, interest, or rents generated by these investments have already been taxed. These taxpayers have foregone the instant gratification of spending their income as it was earned in order to acquire investment assets that provide security and income in the future, especially during retirement.

If Congress were to change the tax base from income to consumption tomorrow, individuals would be subject to multiple taxation for the $5.6 trillion they had saved under the rules of an income tax system but consumed after implementation of the

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[81] Aaron and Galper provide an interesting commentary concluding that it is impractical to permit parents a deduction for income they spend to support the schooling of their children, "because most of the cost of such education is borne by others." *Id.* at 93 n.25.

[82] In 1993, the national annual average tuition, books and board was estimated at $4,209 per year for four-year public institutions of higher education and $12,756 for private universities. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, DIGEST OF EDUCATION STATISTICS 308–09 (1993).

[83] Figures are for 1989 and are based on FEDERAL RESERVE, FEDERAL RESERVE BULLETIN: CHANGES IN FAMILY FINANCES FROM 1983 TO 1989 5–15 (Jan. 1992).

Nunn-Domenici proposal. Any new tax system has to recognize that taxpayers' current savings and the earnings on that savings have already been subject to the income tax. It would be unfair if the new system simply triggered tax liability all over again when investment proceeds are used to buy consumption goods.

Our proposal will strive for equitable treatment of those investments acquired with after-tax dollar assets, or "old savings," to make sure that people who saved under the current tax code with after-tax dollars are not taxed a second time when they spend their old savings. This problem is particularly important for people who have been saving for their retirement and would start to consume that retirement nest egg sometime after the enactment of the Nunn-Domenici tax system.

There are four possible approaches to the problem of retaxing old savings. First, a "hardline" approach would tax individuals on any withdrawal for expenditure, including any savings account withdrawal or the proceeds from the sale of any asset acquired before the enactment of Nunn-Domenici, and provide no deduction since the proceeds were used for consumption. Under this approach, it is irrelevant whether the saving was done before the enactment of our proposal or whether the consumption was financed with previously taxed savings—consumption is consumption and consumption is taxed. While revenue raisers might like this approach, it would be both unfair and inconsistent with the overall policy objectives of the new tax system. Because this approach would penalize people who saved and invested, behavior the new system is designed to encourage, I categorically reject this approach.

Second, at the other extreme, a blanket grandfather rule would exempt previous net savings from the consumption tax. Although potentially desirable as part of the policy of encouraging savings and investment, this approach could cause a massive revenue hemorrhage, particularly if the new tax system were to allow these old savings to be rolled over completely tax-free through the purchase of new tax-deductible assets.

Basis adjustment, a third approach, would require the taxpayer to determine the basis (usually the acquisition cost) of each previously acquired asset as of the day the consumption-based income tax was enacted. This "date-of-enactment basis" would become the starting point under the new tax system for each previously acquired asset. There would be no tax consequences until a previously acquired asset is sold. When the asset is sold

to pay for consumption, the Nunn-Domenici proposal would then allow individuals to exclude from gross income the gain equal to their existing date-of-enactment basis. Only the gain realized above the date-of-enactment basis would be included in gross income when an asset is sold and its proceeds used for consumption. Additionally, any sale or withdrawal of this tax basis in old savings assets used for consumption would be offset against the purchase of any new savings assets in determining an individual's net savings deduction. This procedure would provide consistent tax treatment between investments made under the current tax code and acquisitions made after enactment of our proposal, since only previously untaxed gains or appreciation would be included in the new tax base. It would also recognize that investments made before the enactment of the new tax system were made with income that has already been taxed.

The main problem with the basis adjustment approach is recordkeeping. Proponents of this approach argue that this burden is no greater than the burden under current provisions that require individuals to keep track of their tax basis. However, the basis adjustment approach would require separating assets into those acquired prior to the new system's effective date and those acquired afterward. It would require keeping track of those assets until they are sold, thereby prolonging the transition period indefinitely. For this reason, we did not incorporate this approach into the Nunn-Domenici proposal.

Finally, a transition adjustment approach blends elements of several of these approaches. By adding two percentage points to marginal rates, the proposal would raise revenue to engineer an equitable treatment of previously acquired financial assets. Under this approach, on the date of enactment all taxpayers would determine their total financial assets or old savings acquired before Nunn-Domenici. This one-time calculation would be administratively simpler than the basis adjustment approach and result in a relatively short and fixed transition period. The new system would allow each taxpayer an additional deduction—called a "previously acquired financial asset adjustment deduction"—for each of several years following the enactment of the new system. For example, the taxpayer could be entitled to a deduction equal to twenty percent of his or her total previously acquired financial assets for each of the five years following date of enactment. This would provide full accommodation of old

savings. However, revenue constraints may not allow Congress to go that far. Alternatively, the system could allow a deduction of ten percent for each of the three years following date of enactment to achieve a partial adjustment. This approach could be designed to favor the less affluent and the elderly if necessary to maintain current code progressivity.[84] The exact percentage of the deduction and its duration would be determined to fit its costs within the revenue raised by the two percentage point "add on" to marginal rates. The rate add-on would be temporary, and tax rates would fall at the end of the transition period.

Since equity and revenue considerations have to be balanced, we support the transition adjustment approach, recognizing that this adjustment is very important in order to insure that today's elderly, whose consumption during retirement relies heavily on already-taxed savings, shoulder only their share of the tax burden.

10. Inheritance

Estate taxes would remain unchanged under the Nunn-Domenici proposal. While some have advocated major changes in the estate and gift tax in conjunction with a shift to a consumption-based income tax, we do not believe that an overhaul of the estate and gift tax is necessary. The proposal treats inheritance as income to the recipient and taxes it to the extent that it is consumed rather than saved. If the entire inheritance is saved, inheritance is not a taxable event for either the donor or the beneficiary because the inheritance neither increases the aggregate amount of net taxable income nor diminishes the nation's saving pool.

In order to conform treatment of inheritance to the principles of the Nunn-Domenici plan, we had to resolve one fundamental issue: Is making a bequest rightly considered consumption? For reasons of both fairness and efficiency, we conclude that it is not. A bequest is not consumption because it is not an exchange for goods or services. In fact, it is almost the opposite of consumption. Inheritance is merely a change of ownership and not a taxable event; the consumption comes when that inheritance is spent by the heir for goods and services. Further, if we were to

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[84] Rudolph G. Penner, *Outline of Discussion of Individual SEIT*, BACKGROUND MATERIALS, A NEW PARADIGM FOR TAX REFORM: THE SAVING EXEMPT INCOME TAX: A SYMPOSIUM ON THE NUNN/DOMENICI PROPOSAL 5 (Oct. 1993) (on file with the *Harvard Journal on Legislation*).

maintain that leaving an inheritance is consumption, subject to our current inheritance tax, a consumption tax, or any other tax that takes effect merely because of death, then our income tax would not really be savings exempt at all—it would merely be a lifetime income tax.[85]

Working from the conclusion that leaving an inheritance is not consumption, the proposal would treat inheritance like any other income. Treating the event of inheritance as consumption by the donor would provide a disincentive to the rational use of capital. If inheritance were taxed to the donor as consumption, then, in order to tax the assets only once, it would have to be received with taxes prepaid for the donee, making immediate consumption of the inheritance and saving it equally attractive to the donee.[86] If the donee were to save the inheritance, the returns would have to be earmarked so that he or she would not be taxed upon consuming the savings, in order to avoid double taxation. This seems unnecessarily complicated. Moreover, if donors must pay taxes on the amount they bequeath, as if it were consumption, they would have an incentive to spread the bequest out over a number of years in order to minimize the rate of taxation.[87] This would distort economic decisions unnecessarily.

Instead, by treating inheritance as regular income to the recipient not consumed by the donor, the Nunn-Domenici plan maintains all its incentives for saving. Donors do not pay taxes on money they never spend. Thus, they will have no additional incentive to consume their savings before they die and, there-

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[85] AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ALTERNATIVES TO THE PRESENT TAX SYSTEM FOR INCREASING SAVING AND INVESTMENT 22 (1985) [hereinafter AICPA STUDY].

[86] Even if a bequest is not treated as consumption, a double taxation problem arises with any transferred assets that were not qualified as savings when owned by the donor because these assets were taxed once as consumption but were not fully consumed. If not treated as tax pre-paid for the recipient, these funds themselves are subject to double taxation when spent by the recipient. The three alternatives in dealing with these assets are to (1) segregate these funds so that the recipient is not taxed for consuming them or for consuming the returns on them if they are invested; (2) provide a refund to the donor of taxes paid, *see* AICPA STUDY, *supra* note 85, at 22; and (3) allow this degree of double taxation as a replacement for the onerous estate tax. The first option is the most administratively burdensome. The third is the most random and unfair and may also be the least progressive to the extent lower income individuals would die with a smaller percentage of their assets in non-qualified accounts. It also violates the principle of single taxation. The second option seems the least burdensome and allocates the costs of consumption to the entire estate, rather than concentrating them on particular assets.

[87] MICHAEL A. SCHUYLER, CONSUMPTION TAXES: PROMISES AND PROBLEMS 59–60 (1984).

fore, will be more likely to make capital available to others. Recipients are treated similarly; they face the standard decision of either consuming and paying tax or saving and avoiding tax. This treatment of inheritance ensures that assets are taxed only once and maintains the incentives to save and invest.

However, this treatment for estates and gifts raises the possibility of "consumption splitting," analogous to attempts at income splitting, which are disfavored by the current code.[88] In order to avoid changing the incentives for taxpayers to make inter vivos gifts and to eliminate the opportunity for high bracket taxpayers to reduce their taxable consumption by making gifts to lower bracket family members, an inter vivos gift could be taxed as consumption to the donor regardless of whether the beneficiary spent or saved the gift. While this tax treatment would close the consumption-splitting loophole, it is not a totally satisfactory answer because it would result in differing treatment of testamentary requests and inter vivos gifts. However, consistency would leave us with a significant loophole. The problem needs to be addressed, but at this time we have not developed a solution or a series of options.

11. Graduated Rates

One prominent feature of the Nunn-Domenici tax system, and of consumed-income tax proposals generally, is its distributive quality. "A consumed income tax permits the sort of flexibility to specify the vertical discrimination among taxpayers that we associate with a graduated income tax."[89] The proposed Nunn-Domenici individual tax includes a graduated rate structure designed to retain the progressivity of the current federal income tax within quintiles. The proposal will include three or four consumed-income brackets.

In setting the tax rates, it is critical to estimate the amount that families save, since all saving would be deductible. In work

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[88] *See, e.g.*, Lucas v. Earl, 281 U.S. 111, 114–15 (1930) (holding that a husband cannot reduce his liability for income tax by entering into an arrangement assigning part of his income to his wife); I.R.C. § 1(g) (West Supp. 1994) (taxing unearned income of children at their parents' marginal rate to avoid income shifting to lower bracket taxpayers).

[89] DAVID F. BRADFORD, UNCLUTTERED INCOME TAX: THE NEXT AGENDA? 4 (1988) (on file with the *Harvard Journal on Legislation*).

done at my request, CBO found that existing data yield inconsistent estimates of the amount saved by families with the same incomes.[90] When modeling the tax rate structure of the Nunn-Domenici proposal, CBO used two different definitions of saving and found that inconsistencies in the data led to different rate structures under the two definitions, even though the those definitions are equivalent. Both structures meet the objectives of revenue neutrality and maintaining current code progressivity.

If saving is measured using a residual approach, which defines annual saving as the difference between a family's income and expenditures during the year, CBO's preliminary estimates suggest that rates could be 16%, 38%, and 49%.[91]

If saving is measured using a net worth approach, which defines annual saving as the change in a family's net worth during the year, CBO's preliminary estimates suggest that rates could be 14%, 28%, and 36%.[92]

Under the net worth methodology the tax rates might look like this for single taxpayers:

Income	Current Income Tax	Nunn-Domenici Plan
up to $22,750	15	14
$22,751–$55,100	28	28
$55,101–$115,000	31	36
$115,001–$250–000	36	36
above $250,000	39.6	36

The rates can be based on income, consumption, or an income tax equivalent.[93]

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[90] CBO Estimates, *supra* note 77, at 18.

[91] *Id.* at 3, 23.

[92] *Id.* For this example, CBO assumed that the burden of the existing corporate tax falls equally on capital and labor.

[93] An empirical analysis performed by Rudolph G. Penner, former Director of the Congressional Budget Office, now at KPMG Peat Marwick, suggests that the rates could be in the 16%, 35%, and 46% range if taxpayers are categorized by income. For individuals with taxable incomes between 0 and $5,000, the tax rate would be 0%; $5,000 to $45,000, the tax rate would be 16%; $45,000 to $85,000, the tax rate would be 35%; more than $85,000, the tax rate would be 46%.

The following tax rates would apply to married couples filing jointly: Taxable incomes between $0 and $8,400, 0%; $8,400 to $75,600, 16%; $75,600 to $142,800, 35%; more than $142,800, 46%. These calculations were done prior to the enactment of the 1993 tax act. *See* Penner, *supra* note 84, at 6.

12. The Bottom Line for Individuals—Everyone Is a Winner, but Some People Will Pay More

An individual taxpayer calculating his or her annual tax bill first would add together all types of annual income. Then, he or she would deduct the family living allowance, all "net new savings" and investment made during the taxable year. The tax rate on income that is saved and reinvested income generated by those savings and investments is zero. Next, the taxpayer will calculate taxes on his or her net consumed income at progressive rates. Finally, the taxpayer can take a number of tax credits that roughly correspond to the most defensible of the current tax deductions.

With a larger savings pool encouraged by the tax-exempt status of savings and investment, every American would be a winner. By stimulating saving, the new tax system will reduce the cost of capital investment, leading to increased capital stock and growth in output. The Nunn-Domenici proposal aims to restore an American entrepreneurial spirit to our tax system while maintaining the distributional equities of the current tax code. To achieve that end, the new tax system has been modeled to retain current code progressivity. Taxpayers in each income quintile would continue to shoulder, as a group, the same proportion of the tax burden as they do under the current tax code. However, those who save more than the average within that quintile would pay less in taxes than they do under the current system, and those who save less would probably pay more in the short run.

B. *The Nunn-Domenici Business Tax*

The corporate income tax was first enacted in 1909 as an excise tax on the privilege of doing business in the corporate form.[94] Despite its continuing presence in our income tax code, considerable controversy surrounds the role of the corporate income tax. Most economists contend that corporations do not pay taxes; only people pay taxes.[95] Furthermore, economists suggest

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[94] TREASURY INTEGRATION STUDY, *supra* note 38, at 153.

[95] In some circumstances, corporations can "forward shift" the incidence of corporate taxes by increasing the prices they charge consumers. In other cases, corporations can "backward shift" the incidence of corporate taxes by reducing the wages they pay to laborers. Even if the corporation cannot shift the tax, some people bear its effects; because the corporation is an artificial entity composed of shareholders, taxes "borne

that the corporate income tax system distorts three fundamental economic and financial decisions: business organizational form, financial structure, and dividend policy.[96]

While many theorists would argue for elimination of the corporate tax and total integration, Senator Nunn and I believe that practically all of the economic distortions can be eliminated and the economic benefits retained without eliminating the corporate tax. Moreover, retaining the corporate tax in modified form would protect against the danger that if the corporate income tax were eliminated, owners of corporations would be able to use their businesses to avoid personal consumption taxes by having their corporations buy goods and services for them such as automobiles, life insurance, health care, or legal services.

A common criticism of the current corporate tax system centers on the double taxation of corporate revenues, which typically are taxed once at the corporate level and again when distributed to shareholders. In other circumstances corporate income is taxed only once and, occasionally, not taxed at all. One goal of the Nunn-Domenici proposal is to tax corporate income once, and only once, under all circumstances, even though the tax may be "collected" at more than one point in the flow of income from the corporations that earn the income to the people that ultimately receive it.

To attain this goal of taxing all income once, the Nunn-Domenici plan taxes corporations, partnerships, and proprietorships identically. A partnership interest is treated exactly like a shareholder's ownership in corporate stock. Both assets are financial assets. Our proposal also eliminates the current bias against equity financing.

1. The Business Tax Base: Eliminating Double Taxation

Under current law, the corporate income tax base is net income or profits. Under the Nunn-Domenici proposal, the corporate tax base would be net cash flow. A business cash-flow tax base is equal to the value of goods and services the business produces during the year. The objective of the business cash-flow tax is to tax the total output of the private sector economy

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by the corporation" actually are borne by individual shareholders in the form of reduced dividend payments or dampened capital gains. *See generally* JOSEPH A. PECHMAN, FEDERAL TAX POLICY 141–48 (5th ed. 1987).

[96] TREASURY INTEGRATION STUDY, *supra* note 38, at 3.

as measured by the receipts from goods and services moving through the economy. In maintaining a two-tier system of individual and business taxes, the Nunn-Domenici proposal treats every business as merely the alter ego of its equity holders, bondholders, and employees, who ultimately receive the net cash flow in the form of dividends, interest and compensation.[97]

From this vantage point, a business cash-flow tax levied on any particular factor of the country's tax base could be collected from the individual who ultimately earns it instead of the business that generates the profits to pay the employee or shareholder. This holds true whether the returns represent compensation, returns to human capital in the form of training and education, returns to risk taking and entrepreneurship, or returns to capital flows in the form of interest, dividends or capital sales.[98] However, under our proposal, we have split the tax collection point for these types of income. The new tax system would collect part of the tax both at the individual and business levels but would collect most of the tax from individuals.

2. Simplified Cost Recovery and Reporting

For all businesses the centerpiece of the Nunn-Domenici proposal would be virtually unlimited expensing—a current year deduction for the amount of all new capital investment. Expensing would replace depreciation, depletion, uniform capitalization rules, and other similarly complicated adjustments for cost recovery. Inventory costs also would be expensed. In addition, the corporate AMT would be repealed. Because our business cash-flow tax would apply only to U.S. source income, the proposal would eliminate the most complicated foreign source tax rules in the current tax code and thereby eliminate the discrimination against U.S. companies as they compete with foreign multinationals.[99] Finally, as a general rule, cash accounting would be used.

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[97] *See* Ernest S. Christian, Jr., The Center for Strategic Tax Reform, The Cashflow Tax Approach 5 (Oct. 16, 1992) (on file with the *Harvard Journal on Legislation*).

[98] *Id.*

[99] The foreign tax aspects of the Nunn-Domenici proposal are discussed in more detail part III.B.10–11, *infra* notes 124–27 and accompanying text.

3. Expensing for Intangible Assets

Few concepts in the federal income tax have caused more litigation than the "amortization of intangibles."[100] Taxpayers and the IRS litigate over whether a certain expenditure can be expensed or must be amortized, and often a second round of litigation determines the appropriate amortization period. The Nunn-Domenici proposal would eliminate this unnecessary complication and confusion. Income generated by a business selling or licensing patents, trademarks, trade names, mailing lists, etc., would be included in the business's tax base. Amounts paid for intangible assets would be treated as necessary and ordinary business expenses and fully deducted in the year the expenditure is made.[101]

4. Lower Business Tax Rates and a Broader Base

The business tax would be a flat rate in the ten percent range. In work done at my request, CBO estimated that a business tax rate of 7.1% would raise the same amount of revenue as the current federal corporate income tax and the employer share of the payroll tax.[102] Though this rate would not lessen the aggregate tax burden for businesses, a rate reduction from current levels is possible because the tax base would be significantly broader after elimination of many current business deductions. For example, interest paid on borrowing would not be deductible, nor would tax payments, salaries, or wages. However, a credit would be allowed for most current payroll taxes paid by businesses.[103]

5. Treatment of Dividends and Interest Paid by Corporations

Under current law, most corporate income is taxed to the corporation at a marginal rate of 35%.[104] When corporations use

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[100] For the most recent attempt to solve this problem, see I.R.C. § 197 (West Supp. 1994) (creating a common 15-year amortization period for a wide variety of intangibles).

[101] For a discussion of this proposed method of taxing intangibles, see Ernest S. Christian, Jr., Memorandum to Barry Rogstad, Rudolph Penner, and Lin Smith 2 (May 12, 1993) (on file with the *Harvard Journal on Legislation*).

[102] CBO Estimates, *supra* note 77, at 20.

[103] For a more complete discussion of the payroll tax credit, see part III.B.9, *infra* notes 115–23 and accompanying text.

[104] I.R.C. § 11(b) (West Supp. 1994). For a general discussion of the double taxation

some of that income to pay dividends to shareholders, the dividend income is usually taxed again to the shareholders at their individual marginal tax rates.[105] If the corporation retains earnings, the company's stock price might increase to reflect those retained earnings. When shareholders sell their stock, gains from the sale also are taxed, usually at capital gains rates.[106] The greater the stock price increase, the larger the capital gains tax bill. In short, both income distributed as dividends and retained corporate income often are taxed to both corporations and shareholders.[107]

Unlike dividends, interest generally is deductible by corporations.[108] This dichotomy of treatment distorts financial markets and interferes with the efficient allocation of resources.[109] "Interest income received by domestic lenders is generally taxed at their marginal tax rates,"[110] but interest income received by foreign lenders from U.S. corporations is seldom subject to U.S. tax.[111]

Pension funds and educational, religious, and other not-for-profit organizations supply a sizeable amount of corporate capital to the U. S. economy. While they are not taxed on interest, dividends or ,capital gains, the corporate level income tax does apply to corporate income attributable to the equity capital they supply. Moreover, "tax-exempt entities may be subject to the unrelated business income tax (UBIT) on earnings from equity investments in partnerships."[112]

Under the Nunn-Domenici proposal, two simple rules replace the myriad current rules governing interest and dividends. First,

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phenomenon and proposals to integrate the individual and corporate tax, *see generally* TREASURY INTEGRATION STUDY, *supra* note 38.

[105] I.R.C. § 61(a)(7) (West Supp. 1994) (dividends are income). This general rule has two major exceptions. First, corporate taxpayers can take a "dividends received" deduction, which varies with the level of control of the shareholding corporation over the dividend-paying corporation. I.R.C. § 343 (West Supp. 1994). Second, foreign shareholders' capital gains are exempt from U.S. federal income tax. I.R.C. § 871–79 (individual); 881–85 (corporate) (West Supp. 1994).

[106] *See* I.R.C. §§ 1(h), 1001, 1221, 1222 (West Supp. 1994).

[107] TREASURY INTEGRATION STUDY, *supra* note 38, at 2.

[108] I.R.C. § 163 (West Supp. 1994).

[109] TREASURY INTEGRATION REPORT, *supra* note 38, at 1.

[110] *Id.* at 2. *See also* I.R.C. § 61(a)(4) (West Supp. 1994) (interest is income).

[111] *Id. See also* I.R.C. § 871(f) (individual exemption for annuities); 871(h) (excluding portfolio debt interest); 871(i) (excluding interest and dividends received by individuals); 881(c) (corporate exemption for portfolio debt interest); 881(d) (exclusion for interest and dividends received by corporations) (West Supp. 1994).

[112] *Id. See also* I.R.C. § 501(b) (West Supp. 1994) (codifying the unrelated business income doctrine).

a business's "financial income," such as interest received by the business, would not be included in gross income. Second, a business's interest payments would not be deducted from gross income. Similarly, dividends received from other businesses would not be included as part of gross income, and dividends paid would not be deducted. Since financial income is excluded from the tax base at the business level, it becomes part of an individual's gross income under the individual income tax.[113]

These proposed rules eliminate a host of complicated rules from current tax law and address two of the fundamental flaws in the current code by neutralizing the tax implications of the business's choice of organizational form and eliminating the double taxation of dividends and interest. Under the proposed business cash-flow tax, it is irrelevant for tax purposes whether a business decides to retain earnings or pay shareholders dividends. Thus, the current tax incentive to finance expansion or other capital improvements with debt instead of equity would be eliminated.

Non-profit organizations would not pay the business cash-flow tax unless they were actively engaged in unrelated business activities. If they are engaged in business activities unrelated to their tax exempt status, they would either pay the Nunn-Domenici business cash-flow tax or continue to pay the UBIT.

Although the Nunn-Domenici proposal keeps in place a two-tier system with an individual and business tax, the result is a single tax that is the same whether income is created and received by a corporation or an unincorporated business entity. Dividends and interest received are taxed only once.

6. Taxation of Partnerships

Under current law the choice of business form can have substantial tax consequences because a partnership's earnings are taxed directly to the partners at their personal tax rates and not taxed to the business, even if all of these earnings are invested in the business; corporate income, on the other hand, is double taxed because it is subject to the corporate income tax and the individual tax when shareholders receive dividends.[114]

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[113] *See supra* part III.A.1, notes 54–56 and accompanying text.

[114] *Compare* I.R.C. §§ 701–761 (West Supp. 1994) (taxation of partnerships) *with*

The Nunn-Domenici proposal postpones taxation of a partnership's earnings until the money is withdrawn from the partnership for the partners' personal use, typically in the form of salaries, dividends, and bonuses. This is consistent with the treatment of net savings at the individual level. The proposal treats undistributed income as if it were saved, or reinvested, by the business on behalf of its owners. The cash-flow accounting treatment of retained earnings accomplishes this.

Finally, in this discussion of smaller businesses, one should note that the Nunn-Domenici business cash-flow tax will probably contain an exemption from tax for certain small businesses.

7. Tax Treatment of Employer-Provided Fringe Benefits

If Congress were not engaged in a major health care reform debate, some tax experts would consider treating employer-paid medical insurance, life insurance, and other fringe benefits as nondeductible compensation. However, there are good reasons to retain some tax-favored status for health care fringe benefits, and those reasons will be evaluated in the health care reform debate. Since Congress is in the process of developing health care legislation, we have postponed decisions regarding the appropriate tax treatment awaiting the outcome of this debate.

8. Casualty Insurance

Any premiums paid by the business on business assets for property and casualty insurance are ordinary and necessary business expenses and would retain current tax deductible status.

9. A New Credit for Payroll Taxes Paid

Payroll taxes are the taxes Americans love to hate. They are both expensive and regressive, yet they fund, among other programs, Social Security and Medicare. Moreover, payroll taxes cause several other unintended harms to our economy. GATT discriminates against both our Federal income tax system and our payroll tax system, while providing favorable cross-border

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I.R.C. §§ 61(a)(7) (dividends are income); 161–195 (West Supp. 1994) (enumerating deductions for certain "business expenses" but not enumerating one for dividends paid).

treatment to the value-added taxes (VATs) relied upon by most of our international competitors.

While Senator Nunn and I do not favor a VAT, we believe that the United States should strive toward a tax that receives favorable GATT treatment, while maintaining the integrity of the Social Security trust fund and minimizing the burden payroll taxes place on employers and employees. To accomplish this goal, we would replace the current deduction for wages and salaries with a tax credit that would offset part of the existing Social Security or FICA employer payroll tax.

a. *Mechanics of the credit.* Under current law the payroll tax applies only to direct wages and not to indirect compensation such as fringe benefits.[115] In addition, the payroll tax is higher on the first $60,601 of wages paid to each employee. In the case of employees earning less than $60,601, the Nunn-Domenici payroll tax credit for employers would be substantially equivalent to allowing the business to deduct 75% of these wages paid against a 10% business cash-flow tax rate. Currently, employers can deduct between 75% and 100% of the costs of wages from corporate taxes.[116] The Nunn-Domenici plan replaces this income deduction for wages with a tax credit for payroll taxes paid.

Currently, the payroll tax is 7.65% on all wages up to $60,601 and 1.45% on any excess. For example, if an employer paid an employee a wage of $50,000 and were allowed to deduct $50,000 against a 10% business cash-flow tax rate, the tax saving to the employer would be $5,000. Not deducting the $50,000 wage payment but being allowed a payroll tax credit for 7.65% of the $50,000 wage results in a tax saving of $3,825. In comparing the proposal to the current tax code, it is important to remember that no payroll tax credit is available and that businesses are not always allowed to deduct the entire amount of wages in the year paid; often they must defer the deduction until associated items of capital or inventory can be deducted.[117]

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[115] *See* I.R.C. §§ 132 (fringe benefits generally); 104(a)(3) (health insurance benefits); 3101 (imposing FICA) (West Supp. 1994).

[116] In many instances, corporations must defer deductions for the cost of wages paid until associated items of capital or inventory can be deducted. This deferral can be virtually indefinite, resulting in an effective deduction for wages paid of perhaps as little as 75% of total wages paid. *See* Memorandum from Ernest S. Christian, Jr., Center for Tax Reform 2 (Nov. 16, 1993) (on file with the *Harvard Journal on Legislation*).

[117] Currently, wages are up to 100% deductible. The proposed business cash-flow tax

b. *Rationale behind the credit.* Our current federal income tax system, our current payroll tax mechanism, and the differential treatment under GATT of direct and indirect taxes all put U.S. exporters at a competitive disadvantage.[118] Under current law, U.S. exports to Europe bear the burden of both U.S. direct taxes (income taxes) and European indirect taxes (their VAT); while European exports to the United States bear the burden of neither European indirect taxes (the VAT provides a rebate for exports, making it "border-adjustable") nor U.S. direct federal income taxes.

The GATT allows other countries' VAT systems to be border-adjusted for exports and imports but does not allow either our current corporate income tax or our FICA payroll tax to be border-adjusted for exports and imports. That unfavorable result under GATT arises for several reasons, of which the most important is that our present corporate income tax does not include wages paid, as such, in the corporate income tax base even though our separate employer-paid payroll tax has much the same effect as a corporate tax on wages paid (albeit at a rate of 7.65% rather than at the current corporate income tax rate of 35%).

Because GATT prohibits border adjustments, or rebates, for direct taxes like the payroll tax,[119] when a U.S. company exports its U.S.-made products for sale abroad, neither the company nor the purchaser may be given a refund of the payroll taxes associated with those products. However, under GATT it is legal to rebate indirect taxes to exporters and to levy such indirect taxes on importers of like products as a border tax adjustment.[120] Border tax adjustments consist of waiving or rebating consumption taxes on exports while applying those taxes to imports. This procedure allows the country in which consumption occurs to be the one that taxes that consumption.[121]

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rate is 10%. Thus, a full deduction at a tax rate of 10% is equivalent to a 10% credit. *See generally id.*

[118] Direct taxes are "taxes on wages, profits, interest, rents, royalties and all other forms of income and taxes on the ownership of real property." Indirect taxes are "sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges." General Agreement on Tariffs and Trade, Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, 31 U.S.T. 513, T.I.A.S. No. 9619, Illustrative List of Export Subsidies (1979).

[119] *Id.* at Art. III:2.

[120] *Id.*

[121] *See 1991 Competitiveness Hearings*, *supra* note 25, at 596 (statement of Judith H. Bello, former General Counsel to the U.S. Trade Representative).

Because the Nunn-Domenici business cash-flow tax allows no deduction for interest paid and because it allows no direct deduction for wages paid, although a payroll tax credit is allowed, some experts predict that the proposal would qualify for export and import border tax adjustments.

The business payroll tax credit is one of the more innovative features of the new tax system.[122] It resolves the current inequality of treatment the United States suffers, relative to its trading partners under GATT, while protecting the financial integrity of the Social Security trust fund. Payroll taxes will continue to be paid into the Social Security trust fund. However, because the payroll tax credit, unlike the current deduction, is designed to be a border-adjustable tax, it would help make our exports more competitive.[123]

10. Treatment of Exports and Imports

Under the Nunn-Domenici proposal, income from export sales would be excluded from the business cash-flow tax base. The foreign operations of U.S. companies would not be taxed. This should move the United States toward a more globally competitive tax system. Amounts received from export sales that are distributed to shareholders in the form of dividends or used to pay employees would, however, be included as income for individual tax purposes.

An import tax equal to the business cash-flow tax would be imposed on imports sold in the United States. Under this import tax, any company, regardless of its location, that manufactures goods or provides services to be sold in the U.S. market would be taxed essentially at the same rate as if the factory or service were located in the United States.

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[122] Credit for the ingenuity behind this mechanism belongs to Ernest S. Christian, Senior Tax Partner, Patton, Boggs & Blow, who developed the border-adjustable payroll tax credit. *See* Ernest S. Christian, Jr., Description of Prototype Business Tax 5 (Oct. 5, 1993) (on file with the *Harvard Journal on Legislation*).

[123] Several sectors of the economy, including the retail and service sectors, may be concerned about the tax treatment of wages and salaries under the Nunn-Domenici proposal. Our objectives are to be fair and to encourage U.S. businesses to be competitive internationally. Therefore, the staff of the Senate Budget Committee has been instructed to explore the process for changing the GATT rules to allow a GATT-legal border adjustment for a tax system similar to the Nunn-Domenici proposal but with a modification to allow a deduction for wages. If the GATT rules could be changed, I would prefer to allow a deduction for wages paid and increase the business tax rate to maintain the same aggregate level of receipts from the tax.

11. Territorial Tax System

Most of our competitors have already moved substantially toward a "territorial tax system" that exempts the foreign operations of their multinational corporations from home-country tax.[124] In light of this development, our current tax on the foreign operations of U.S.-based multinationals creates another competitive disadvantage for U.S. companies.[125] Moreover, foreign-headquartered multinationals that compete head-to-head with U.S multinationals are permitted full deductions by their home countries for their interest, research expenses, and other costs, while U.S. expense allocation rules prevent the benefit of a full deduction for many U.S. federal income tax paying companies.[126]

The Nunn-Domenici proposal eliminates a great deal of complexity in this area as well as many anti-competitive consequences by taxing only U.S. activities.[127]

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[124] *See* TREASURY INTEGRATION STUDY, *supra* note 38, at 216 n.1.

[125] *See generally Factors Affecting the International Competitiveness of the United States, Schedule for Hearings Before the Committee on Ways and Means* 89 (1993) (comparing U.S. taxes on domestic operations of foreign corporations with foreign operations of domestic corporations).

[126] *See* U.S. INTERNATIONAL TAX POLICY FOR A GLOBAL ECONOMY E-5 (Robert A. Ragland ed., 1991).

[127] As a testament to the complexity of current law in this area, consider that the comprehensive Joint Committee on Taxation pamphlet issued in conjunction with the 1991 Ways and Means hearings on international competitiveness needed 150 pages just to explain pertinent rules. *See* STAFF OF THE JOINT COMM. ON TAXATION, 102D CONG., 1ST SESS., FACTORS AFFECTING THE INTERNATIONAL COMPETITIVENESS OF THE UNITED STATES 88–231 (Comm. Print 1991).

For a concise critique of the foreign tax provisions of the current federal income tax code, see *Comparative Tax Systems: Hearings Before the Senate Committee on Finance*, 102d Cong., 2d Sess. 149–62 (1992) (statement of Anthony Saggese, general tax attorney, Texaco).

Under the Nunn-Domenici proposal, the United States would eliminate the following features of the current code: (1) an immediate tax on foreign affiliates of U.S. companies involved in cross-border sales and service activities; (2) a minimum tax on foreign income when foreign income is a high percentage of total income, which often has resulted in double taxation; (3) the foreign tax credit; (4) the U.S. rules for interest and other expense allocations; (5) the deemed paid foreign tax credit rules; and (6) the separate foreign tax credit limitation for dividends for non-controlled foreign corporations.

The current foreign tax credit places U.S. businesses at a competitive disadvantage because the U.S. credit is not as generous as other countries' foreign tax credits. The current U.S. foreign tax credit fragments into different lines of business income, keeping U.S. companies from applying unused tax credits on one line of business to other areas. In contrast, other countries either exempt broad categories of foreign business income or permit a simpler foreign tax credit allocation.

We plan to add additional details on the foreign tax aspects of the Nunn-Domenici proposal following Congressional hearings on the subject.

12. Transition Rule for Unrecovered Cost Basis of Depreciable and Depletable Assets

The recordkeeping required to calculate depreciation under the current tax code, examined by itself, is complicated enough to make a case for reform. Many companies are in the unenviable position of maintaining three different depreciation schedules—one for pre-1980 assets, one for assets acquired between 1980 and 1986, and one for assets acquired after the company became an AMT taxpayer, if it has become one.[128]

If Congress were to enact the Nunn-Domenici proposal, businesses would have a large amount of unrecovered cost basis in assets that were acquired before enactment and only partially depreciated or depleted. There are several methods available to facilitate the transition from the current corporate income tax to a business cash-flow tax. One approach would allow the companies to deduct the remainder of their depreciation in the first year of the new tax. Rates could be adjusted upwards for that first year to accommodate this transition while maintaining a sufficient revenue stream. Some would argue that this would needlessly reward taxpayers for investments that they already made with full knowledge that they would be required to take a depreciation allowance over many years. An alternative approach would require the taxpayer to continue along whatever depreciation path his existing assets take him. While this is fair, it would continue the complexity of current law and would add post-Nunn-Domenici property as an additional category in calculating depreciation and expenses.

Regardless of the transition rule chosen, to provide symmetry between the business tax and the individual tax, the Nunn-Domenici proposal would allow these partially depreciated assets to be amortized over the same period that individuals are given for previously acquired assets.[129]

13. The Bottom Line for Businesses

Under the Nunn-Domenici proposal, paying business taxes would be simpler than under current law. A business would add

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[128] I.R.C. § 56 (West Supp. 1994).

[129] For other approaches to this problem of unrecovered cost basis see Ernest S. Christian, Jr., *supra* note 101, at 14.

up its total receipts from U.S. sales of goods and services made during the year, excluding export sales of U.S.-made products sold to foreign markets. Next, the business would deduct the costs of purchases from other businesses, including the cost of plant and equipment (equivalent to expensing), parts, components, inventory, and outside services such as accounting, engineering, legal, and transportation services. After deducting purchases attributable to U.S. sales, the business's remainder is "gross profit," or the tax base to which the business tax rate would be applied. Finally, the business would take allowable credits such as the payroll tax credit.

IV. CONCLUSION: THE PERFECT TAX BASE AS HOLY GRAIL

When Senator Nunn and I began our search for a fundamentally more efficient tax system, we knew we did not have all the answers. Our proposal is a work in progress, embodying over 400 years of economic and political thought. The idea of taxing consumption dates back to the 1600s and has been advocated by scholars ever since, seemingly regaining visibility about once every twenty years.

In 1651, Thomas Hobbes asked:

> For what reason is there, that he which laboureth much, and sparing the fruits of his labour, consumeth little, should be more charged, than he that living idly, getteth little, and spendeth all he gets; seeing the one hath no more protection from the Commonwealth, than the other?[130]

Those who agreed with Hobbes argued that a person should be taxed on what he or she uses and not on the fruits of labor which are saved and thereby made available for use by others. In the 1800s, John Stuart Mill accused the income tax of being unfair to savers, asserting that "[n]o income tax is really just from which savings are not exempted . . . ."[131]

Alfred Marshall, a giant in the world of economics in this century, also believed that, despite its practical problems, a tax on consumer expenditures would be superior to a tax on incomes.[132]

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[130] HOBBES, *supra* note 50, at 226.

[131] JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 814 (William J. Ashley ed., 1929).

[132] *See* Alfred Marshall, *The Equitable Distribution of Taxation* (1917), *reprinted in* MEMORIALS OF ALFRED MARSHALL 347, 350–52 (A.C. Pigou ed., 1925).

The prominent American economist Irving Fisher sought to establish that a consumption tax is not only superior to an income tax but also feasible. He used accounting principles to illustrate how a consumed-income tax could be put into operation, proving that such a tax was not merely a theoretical curiosity.[133]

In Great Britain after the mid-1950s, interest in this type of consumption tax increased substantially. Nicholas Kaldor advocated replacing the British income tax with an expenditure tax.[134] In 1978, the Meade Commission issued a report confirming the feasibility of a consumed income tax system.[135]

In 1977, the U.S. Treasury conducted a study entitled *Blue Prints for Basic Tax Reform* and specified in great detail how a comprehensive consumption tax would work. One of the chief architects of the study believed that a consumption tax would reduce our reliance on the existing unsatisfactory system and that "if consistently implemented, should provide major advantages in fairness, simplicity, and economic efficiency."[136]

Senator Nunn and I will introduce legislation calling for a comprehensive examination of a consumed-income tax. We need hearings to evaluate the proposal and determine how the system should be structured. We have three sets of goals for the hearings. First, we will call upon Congress to evaluate the macroeconomic effects of a consumed-income tax, or savings-exempt income tax. These effects include potential changes in the growth rate of the Gross Domestic Product, the costs of capital and labor, productivity, and the national savings rate. Second, the hearings should evaluate the proposal's effects on generating revenues, increasing fairness, and simplifying the tax system. Finally, we hope that the hearings will refine or suggest solutions for several key elements of the proposal, including the following: (a) the family living allowance, (b) the treatment of tax expenditures to reflect the investment and consumption components of such subsidies, (c) an appropriate treatment of gifts

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[133] *See* IRVING FISHER & HERBERT W. FISHER, CONSTRUCTIVE INCOME TAXATION: A PROPOSAL FOR REFORM (1942).

[134] NICHOLAS KALDOR, AN EXPENDITURE TAX 15 (1955). *See generally id.* at 11–17 (summary of earlier statements in support of expenditure taxation).

[135] THE INSTITUTE FOR FISCAL STUDIES, THE STRUCTURE & REFORM OF DIRECT TAXATION 150–215 (1978) (The Meade Report). Although its general conclusions indicate that a consumed-income tax is feasible, the Meade Commission's report recognizes some troubling transition issues and leaves a large number of questions about converting to a consumed-income tax unaddressed.

[136] DAVID F. BRADFORD & U.S. TREASURY TAX POLICY STAFF, BLUEPRINT FOR BASIC TAX REFORM 3 (2d ed. 1984).

and estates to achieve generational equity, and (d) unresolved transitional issues.

There are many issues to be resolved, but we need to start on the path toward a savings-exempt income tax now. Income taxes are distorting our economic decisions by favoring consumption and penalizing savings. Greater reliance on consumption taxes rather than income taxes will enhance the nation's competitive position; people will save more, financing investment for future growth.

At one time, most tax policy experts preferred income taxes to consumption taxes and the highly regressive, stifling tariffs that income taxes replaced. But there is a better way. Today we have the opportunity to replace our current tax system, flawed at its inception and made worse with each passing year, with a tax system that encourages investment. It is a progressive tax system that distinguishes between those who spend and those who save, making capital available to build our future. The savings-exempt income tax will simplify and eliminate many of the economic distortions inherent in the current code. It will unshackle our productive power, encouraging international trade and economic growth that will benefit all Americans.

ARTICLE

THE DECLINE OF DELIBERATIVE DEMOCRACY IN THE HOUSE AND PROPOSALS FOR REFORM

CONGRESSMAN GERALD B.H. SOLOMON*
DONALD R. WOLFENSBERGER**

The ideal of congressional process is that the two houses should serve as forums for the free exchange of ideas and proposals, producing legislation that reflects the will of the people and accomplishes important goals. In the House of Representatives, this ideal is impeded by committee structure, the powers of committee chairmen and party caucuses, and by restrictive rules that govern floor debate. The result has been the exclusion of the minority party from meaningful participation in congressional process and, consequently, the reduction of substantive debate on critical issues.

In this Article, the authors trace early attempts to reform House process to enhance its deliberative and democratic qualities. The Article analyzes the most recent reform efforts begun by the Joint Committee on the Organization of Congress of the 103d Congress. The authors argue that the Joint Committee's recommendations fall short of the goals of revising House committee structure, curbing the powers of the majority leadership and the House Rules Committee, and returning House process to the ideal of deliberative democracy.

A major breakdown in the congressional policy-making process threatens the deliberative democracy upon which our form of government depends. As Congress has grown in membership, and as the issues faced by members of Congress have become more complex, the ideal of deliberative democracy has become more elusive just when it most needs to be realized. The American people lack faith in current congressional legislative process because trillion dollar budgets, the overhaul of the nation's health care system, and reform of campaign finance rules, for example, are addressed via a committee process known more for posturing than for substantive work on proposed legislation and a process of floor debate that represents the enactment of prearranged deals on critical issues. Rather than providing for the free exchange of conflicting opinions, resulting in an improved legislative product, the processes of Congress—floor deliberation, commit-

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tee and subcommittee consideration, policy direction by parties and caucuses—now serve to restrict debate rather than enhance it. The public suffers from a lack of information about how their elected representatives are fulfilling their mandate to serve the people. Members of the majority party are excluded by the technical and restrictive procedural rules imposed by majority leadership. Members of the minority party find it difficult to participate in the legislative process in any meaningful way.

In 1992, Congress appointed a bipartisan, bicameral Joint Committee on the Organization of Congress to "study . . . the organization and operation of the Congress."[1] Congress directed the Committee to recommend improvements in organization and operation that would strengthen the effectiveness of Congress, simplify its operations, improve its relationship with and oversight of other branches of the government, and improve the orderly consideration of legislation.[2]

In December 1993, following six months of hearings lasting 114 hours and the testimony of 243 witnesses, the House and Senate subcommittees of the Joint Committee filed separate reports of their findings and recommendations. A recurrent theme emerged from the proceedings of the Joint Committee: Congress lacks the organization and equipment to solve America's problems rationally, coherently, and effectively.

This Article argues that while the Joint Committee's report identifies the barriers to deliberative democracy in current congressional practices, the Committee failed to go far enough in its recommendations for reform. Part I of the Article defines deliberative democracy from the perspectives of leaders of the House of Representatives, congressional commentators, and political scientists, and traces the history and decline of deliberative democracy in the House. In Part II, the Article reviews Congress's early attempts at reform of its legislative processes and the reactions produced by those reforms. Part III analyzes the modern reforms, particularly the rise of the powerful majority party caucus, whose results continue to shape current congressional deliberations. Part IV examines the modern uses of two early reforms: majority party leadership, and restrictive rules of debate promulgated by the Rules Committee. Part V describes the work and report of the recent Joint Committee on the Or-

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[1] H.R. Con. Res. 192, 102d Cong., 2d Sess. (1992).
[2] *Id.*

ganization of Congress. The Article concludes with an exposition of reforms rejected by the Joint Committee, reforms supported by the House Republican Conference, that would contribute to openness and enhanced deliberation if enacted.

I. DELIBERATIVE DEMOCRACY DEFINED

"Deliberate" comes from the Latin word *deliberare*, "to weigh in mind," and is defined as, "to think about or discuss issues and decisions carefully, . . . to think about deliberately and often with formal discussion before reaching a decision."[3] "Deliberation" is defined as "a discussion and consideration by a group of persons of the reasons for and against a measure."[4]

A. *The Democratic Process*

This Article uses the term "deliberative democracy" to describe an ideal representative, or republican, form of government. True deliberative democracy allows the full and free airing of conflicting opinions and ideas on legislative policies through hearings, debates, and amendments. In a 1942 radio address, former House Speaker Sam Rayburn described the concept of deliberative democracy:

> It is in the Congress that the varied needs and interests of the people find expression. It is in the Congress that out of the clash of contending opinions is forged the democratic unity of a democratic people.
>
> Too many people mistake the deliberations of Congress for its decisions . . .
>
> Common consent in democratic government springs from common understanding. It is out of the airing of conflicting opinions in hearings, debates, and conferences that a people's Congress comes to decisions that command the respect of a free and democratic people. Not all the measures which emerge from the Congress are perfect, not by any means, but there are very few which are not improved as a result of discussion, debate, and amendment. There are very few that

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[3] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 336 (9th ed. 1983).
[4] *Id.*

> do not gain widespread support as a result of being subject to the scrutiny of the democratic process.[5]

Rayburn appropriately defined deliberation as the "scrutiny of the democratic process."[6] Without it, the process would be blind, uninformed, and driven by popular passion or political imperatives rather than informed debate and analysis. Accordingly, the diminution of this scrutiny has contributed to the erosion of public confidence in Congress.

Long before Rayburn, James Madison considered deliberation in *The Federalist No. 10.* He wrote that the effect of representative government is "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[7]

In his first annual message to the Congress as President, Thomas Jefferson enunciated the vital role of deliberation in uniting the Congress and the people:

> The prudence and temperance of your discussions will promote, within your own walls, that conciliation which so much befriends rational conclusion; and by its example will encourage among our constituents that progress of opinion which is tending to unite them in object and in will. That all should be satisfied with any one order of things is not to be expected, but I indulge the pleasing persuasion that the great body of our citizens will cordially concur in honest and disinterested efforts . . . .[8]

Thus, prudence and temperance in discussion by Congress, leading to conciliation and rational conclusion, tends to educate the public and unite the nation behind the decisions made. In other words, deliberation legitimizes the democratic decision-making process.

1. The Elements of Deliberative Democracy

Before considering the state of deliberative democracy in the House of Representatives today, it is useful to identify important

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[5] *Texas Forum of the Air,* (radio broadcast, Nov. 1, 1942) *reprinted in* 88 CONG. REC. 3866 (1942) (statement of Rep. Patman).

[6] *Id.*

[7] THE FEDERALIST No. 10 (James Madison).

[8] Thomas Jefferson, First Annual Message (Dec. 8, 1801), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 325, 331–32 (Adrienne Koch & William Peden eds., 1944).

elements of the deliberative process. According to political scientist Joseph M. Bessette, members of a deliberative institution "reason together about the problems facing the community and seek to promote what they judge to be good public policy."[9] Thus, in the Congress, "deliberation is a process of reasoning on the merits of public policy."[10]

Bessette identifies examples of deliberative activities in Congress as the "investigation and identification of social needs, the evaluation of ongoing programs, the formulation of legislative remedies, and the consideration of alternative proposals."[11] He adds that deliberation "requires that legislators make decisions with an openness to the facts, arguments, and proposals brought to their attention and with a general willingness to learn from their colleagues and others."[12]

Bessette also characterizes three elements of deliberation: information, arguments, and persuasion. A deliberative process begins with "serious consideration of pertinent substantive information on policy issues" which argument links to "desirable goals."[13] Information, and arguments linking information to desirable goals, "must have some real persuasive effect," and they "must actually influence the outcome of the decision making process."[14]

2. Minority Rights

Minority rights are also essential in a truly democratic deliberative process. Without offering all members full opportunity to participate and influence the process, representative government fails.[15]

Thomas Jefferson identified the importance of minority rights in his *Manual of Parliamentary Practice*, which he wrote while serving as the Vice President and presiding officer of the Senate. He wrote that only strict adherence to rules of procedure arms

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[9] Joseph M. Bessette, *Is Congress a Deliberative Body?*, *in* THE UNITED STATES CONGRESS: PROCEEDINGS OF THE THOMAS P. O'NEILL, JR., SYMPOSIUM 3, 5 (Dennis Hale ed., 1982).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 5–6.

[15] The term "minority rights" broadly signifies any political minority in reference to a particular issue, not a minority party.

a minority against "those irregularities and abuses which these forms were intended to check, and which the wantonness of power is but too often apt to suggest to large and successful majorities."[16]

B. *House Deliberation in the Early Congresses*

Although deliberation over policy matters certainly takes place in informal settings in Congress and in members' districts, this Article focuses on the role of deliberative democracy in the early history of the House and its subsequent demise as the House grew in size and importance.

The deliberative process in the twentieth century House is a far cry from what it was in Jefferson's day. As America grew, the problems facing it became more complex, and the House's workload increased. The membership and structure of the House were forced to change accordingly. Put simply, the earlier Congresses had the luxury of discussing fewer and less complex issues than those facing Congress in the modern era. Comparing early legislative process to the organization and process of the modern Congress is instructive.

1. The Committees of the Whole

Central to understanding the evolution of the deliberative process is the concept of the House Committee of the Whole, which has always been comprised of the entire membership of the House acting as a committee for various purposes.

In the early Congresses there were two types of committees of the whole: the Committee of the Whole House on the state of the Union, and the Committee of the Whole House. The Committee of the Whole House on the state of the Union was initially used as a forum for consultation and general discussion by members on an issue before it was sent to a select or standing committee to draft legislation.[17] Before the existence of a standing committee system, separate select committees, consisting

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[16] THOMAS JEFFERSON, JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE (1802), *reprinted in* CONSTITUTION JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED THIRD CONGRESS, H.R. DOC. No. 405, 102d Cong., 2d Sess. 117, 120–21 (1993) [hereinafter RULES OF THE HOUSE].

[17] *See* Don Wolfensberger, *Committees of the Whole: Their Evolution and Functions*, 139 CONG. REC. H27 (daily ed. Jan. 5, 1993).

only of a bill's supporters, would be appointed by the House for each piece of legislation, taking their guidance from the discussions in the Committee of the Whole House on the state of the Union. Speeches, messages, and "other matters of great concernment"[18] were initially referred to the Committee of the Whole House on the state of the Union:

> [W]here general principles are digested in the form of resolutions, which are debated and amended till they get into a shape which meets the approbation of a majority. These being reported and confirmed by the House are then referred to one or more select committees, according as the subject divides itself into one or more bills.[19]

In referring to the advantage of this initial consideration by the Committee of the Whole House on the state of the Union, Jefferson concluded, "[t]he sense of the whole is better taken in committee, because in all committees everyone speaks as often as he pleases."[20]

Select committees were dissolved upon reporting a bill back to the House and issuing a committee report. The bill would then be referred to the second type of committee of the whole—the Committee of the Whole House—where it would undergo formal debate and amendment before being reported back to the House for final passage. Debate was unlimited in both types of committees of the whole.[21]

This system of initial consideration in a Committee of the Whole House on the state of the Union, referral to a select committee, and then further consideration in the Committee of the Whole House was in use for roughly the first quarter century of the republic. This system gradually gave way to the establishment of a specialized, standing committee system for the referral of bills of related subject matter. With this development of standing committees in the mid-1800s, the originating function of the Committee of the Whole House on the state of the Union disappeared. Instead, the Committee of the Whole House on the state of the Union became the place for the consideration of public bills reported by standing committees while the Committee of the Whole House became the place to consider private

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[18] JEFFERSON, *supra* note 16, at 149.
[19] *Id.*
[20] *Id.*
[21] *Id.*

bills.[22] These evolutionary developments were codified in the House Rules revision of 1880.[23]

2. The End of Unlimited Debate

The practice of unlimited debate in the House became impractical with the growth in membership. Whereas the House in the First Congress consisted of only 65 members, by the turn of the century the House had 105 members; by 1825, the House had grown to 213 members. According to former House Parliamentarian Asher Hinds, it was not until 1841, when the House consisted of 242 members, that it adopted a temporary rule limiting members to no more than one hour of debate in the House or in the Committee of the Whole on any question.[24] In 1842, this temporary rule became part of the standing rules of the House. As Hinds explained: "[T]he hour rule was not adopted until the practice of unlimited debate had caused the greatest danger to bills in Committee of the Whole. The rule was often attacked, but the necessities of public business always compelled its retention."[25]

In 1841, the Rules Committee also reported and secured adoption of a rule permitting the House to discharge the Committee of the Whole of a bill without further debate on pending amendments or on amendments that might be proposed. This discharge would occur upon a majority vote, rather than by the previously required two-thirds vote for suspending the rules. Consequently, after a vote on pending amendments, a public lands bill that had been under debate in the Committee of the Whole for over two weeks was immediately reported to the House.[26]

The discharge rule of 1841 was "only the beginning of the present system of guiding business in Committee of the Whole," according to Hinds, since "there was found to be great incon-

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[22] 4 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 989 (1907).

[23] Wolfensberger, *supra* note 17, at H29.

[24] 5 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 24 (1907) (footnotes omitted).

[25] *Id.* The possibility of unlimited debate was a powerful tool in the hands of a bill's opponents. Unlimited debate enabled opponents to prevent a bill from being reported from committee back to the House for a final vote. Today, this practice survives only in the Senate; it is popularly known as the filibuster, a term first used in 1853. CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 100 (2d ed., 1976) [hereinafter GUIDE TO CONGRESS].

[26] HINDS, *supra* note 24, at 126.

venience in the requirement that amendments should be voted on without debate after the closing of general debate."[27] Therefore, on December 18, 1847, a rule was adopted "that where debate is closed by order of the House any Member shall be allowed in Committee five minutes to explain any amendment he may offer."[28]

To address the problem of insufficient debate on amendments, the House adopted the so-called "five-minute rule" for debating amendments in the Committee of the Whole. The initial effect of the rule was to allow any member to speak five minutes on any amendment, simply by offering a pro forma, second degree amendment ("I move to strike the last word"). The practice often led to mini-filibusters. To stop this practice, in 1860 the House adopted an amendment to permit the Committee of the Whole to vote to close debate on proposed amendments to a section or paragraph after five minutes of debate had occurred on the pending amendment.[29]

C. *Woodrow Wilson's View*

In his 1885 treatise, *Congressional Government*, then-political scientist Woodrow Wilson wrote: "I know not how better to describe our form of government in a single phrase than by calling it a government by the chairmen of the Standing Committees of Congress."[30] At the time Wilson wrote his thesis in 1883–84, there were forty-seven standing committees in the House. It was this system of autonomous, fragmented "little legislatures," as he called them, that was the subject of Wilson's critique.

1. The Ideal of Openness

In one of his most quoted passages, Wilson contrasted the work of the House with that of its committees:

> The House sits, not for serious discussion, but to sanction the conclusions of its Committees as rapidly as possible. It

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[27] *Id.* at 127.

[28] *Id.* (footnote omitted).

[29] *Id.* at 127–28.

[30] WOODROW WILSON, CONGRESSIONAL GOVERNMENT 82 (Johns Hopkins Paperback Edition 1981) (3d ed. 1885).

> legislates in its committee-rooms; not by the determinations of majorities, but by the resolutions of specially-commissioned minorities; so that it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work.[31]

According to Wilson, this "shift [in] the theatre of debate upon legislation from the floor of Congress to the privacy of committee-rooms" constituted a delegation by the House to its committees of "not only its legislative but also its deliberative functions."[32] Although the deliberation of the Committees permits the input of authoritative sources and adds clarity to reports submitted to the House, Wilson was troubled by the fact that secrecy was the central feature of this procedural shift.[33]

Wilson viewed open deliberation as essential to the democratic system. Because "the proceedings of the Committees are private and their discussion is unpublished,"[34] Wilson saw even the most exhaustive discussion in Committee as not fulfilling the role of debate by Congress in open session. His central point was that "[t]he chief, and unquestionably the most essential, object of all discussion of public business is the enlightenment of public opinion; and of course, since it cannot hear the debates of the Committees, the nation is not apt to be much instructed by them. Only the Committees are enlightened."[35]

Wilson believed that committee hearings that were open to the public were ill-suited to the education the public because they consisted primarily of speeches by special pleaders or advocates for various interests and exhibited "none of the searching, critical, illuminating character of the higher order of parliamentary debate . . . ."[36] Instead:

> There is needed public discussion of a peculiar sort: a discussion by the sovereign legislative body itself, a discussion in which every feature of each mooted point of policy shall be distinctly brought out, and every argument of significance pushed to the farthest point of insistence, by recognized leaders in that body; and, above all, a discussion upon which something—something of interest and importance, some pressing question of administration or of law, the fate of a party or the success of a conspicuous politician—evi-

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[31] *Id.* at 69.
[32] *Id.* at 70–71.
[33] *Id.* at 72.
[34] *Id.* at 71.
[35] *Id.*
[36] *Id.* at 72.

> dently depends. It is only a discussion of this sort that the public will heed; no other sort will impress it.[37]

Wilson, however, did recognize that it would be impractical to return to the days of great statesmen and orators like Calhoun, Randolph, Webster, and Clay who reigned in an era when floor debates actually mattered. The size and workload of the House of the late 1800s militated against the luxury of extended debates on great policy issues.[38]

2. Party Government

Perhaps the chief reason Wilson felt House debates could no longer be instructive to the public was "that there are in Congress no authoritative leaders who are the recognized spokesmen of their parties. Power is nowhere concentrated; it is rather deliberately and of set policy scattered amongst many small chiefs."[39]

Wilson believed strongly that the conduct of government should be based on party organization and that all legislation should demonstrate the action of parties as cohesive organizations. In contrast to Wilson's ideal, legislation approved by a committee merely represents the recommendations of a small contingent of members representing both parties. Therefore, the passage or rejection of a particular measure constitutes neither a party victory nor a party defeat.[40]

Translated to the committee level, Wilson's view would mean that committees should be composed only of majority party members just as, in Jefferson's time, select committees were composed only of those members supporting the bills they were authorized to draft. Wilson felt this would be the best way to establish party accountability and responsibility for legislation.[41] The debate could then be joined on the floor where "there would spring up debate under skillful masters of opposition, who could drill their partisans for effective warfare and give shape and meaning to the purposes of the minority."[42]

Wilson's system would restore some semblance of deliberative democracy to the House. Such change would be contingent,

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[37] *Id.* at 72–73.
[38] *Id.* at 74–75.
[39] *Id.* at 76.
[40] *Id.* at 78–79.
[41] *Id.* at 81.
[42] *Id.*

however, upon the legislative policies developed by the party organization in control of the committees. Absent such exclusive control over committees by the majority party, Wilson saw the majority and minority party caucuses "as an antidote to the Committees . . . designed to supply the cohesive principle which the multiplicity and mutual independence of the Committees so powerfully tend to destroy."[43]

Wilson argued that the parties were wary of deliberative democracy on the floor of the House, because any serious weighing of ideas and alternatives through argument and persuasion leading to a final decision would be a threat to party discipline and would expose to the public the lack of party unanimity:

> Rather than imprudently expose to the world the differences of opinion threatened or developed among its members, each party hastens to remove disrupting debate from the floor of Congress, where the speakers might too hastily commit themselves to insubordination, to quiet conferences behind closed doors, where frightened scruples may be reassured and every disagreement healed with a salve of compromise or subdued with the whip of political expediency.[44]

Instead, Wilson saw the caucuses as the "drilling-ground of the party" where "discipline is renewed and strengthened, its uniformity of step and gesture regained."[45] In other words, floor debates rarely involved a genuine exchange and testing of ideas. Instead, the "voting and speaking in the House are generally merely the movements of a sort of dress parade, for which the exercises of the caucus are designed to prepare . . . . [T]he silvern speech spent in caucus secures the golden silence maintained on the floor of Congress, making each party rich in concord and happy in cooperation."[46]

This view brings us back to Wilson's original criticism of Congress that floor debates are mere exhibitions while the substantive work and deliberation take place behind closed doors. Indeed, Wilson readily acknowledged that the most significant deliberations of the caucuses take place privately and are, therefore, unfettered by public accountability. Caucus deliberations would be enlightening to the public because they are much more

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[43] *Id.* at 211.
[44] *Id.* at 211–12.
[45] *Id.* at 212.
[46] *Id.*

candid than the closely monitored debate in Congress.[47] By virtue of their secret nature, however, caucuses fail one of the central tests of deliberative democracy identified by Wilson: to enlighten the public. Nevertheless, Wilson rationalized the necessity of such secret caucus deliberations as the only means available to offset the "centrifugal forces"[48] and disruptive effects of the committee system by providing "some energetic element of cohesion."[49]

II. Early Attempts at Reform

Within five years after Wilson published *Congressional Government*, the House embarked on a new era of party government, sparked not by Wilson's party, but by the Republicans.

A. *Reed's Rules and the Modern Rules Committee*

Public frustration with Congress was running high in the late 1800s. According to historian George B. Galloway, "the House of Representatives had been reduced to a condition of legislative impotence by abuses of its then existing rules of procedure."[50] Galloway provided these examples of abuses:

> Not only was its legislative output small and insignificant, but the use of dilatory motions combined with the disappearing quorum and a series of filibusters to make the House an object of public ridicule and condemnation.[51]

All this was to change with the ascendancy to the speakership in December 1889, of Republican Thomas Brackett Reed of Maine. Reed believed strongly in the right of the majority to work its will and had little tolerance for minority rights or dilatory tactics. He consequently issued rulings from the Chair to outlaw certain minority obstructionist practices.[52] As chairman

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[47] *Id.* at 213.
[48] *Id.* at 214.
[49] *Id.* at 213.
[50] George B. Galloway, History of the United States House of Representatives 118 (2d ed. 1965).
[51] *Id.*
[52] *Id.* at 120–21. Reed eliminated the so-called "disappearing quorum" whereby members would refuse to respond when their names were called in order to prevent business from proceeding due to the lack of a required quorum. He also refused to recognize members who intended to offer dilatory motions. *Id.*

of the Rules Committee, Reed had the Committee incorporate such rulings into the standing rules of the House. After considerable debate, these "Reed Rules" were adopted by the House on February 14, 1890. "[T]he adoption of the 'Reed Rules' in 1890 finally doomed the dilatory tactics of a minority in the House to defeat."[53]

Although a Rules Committee has existed since the second day of the first Congress, before 1880 it was a select rather than a standing committee, concerned primarily with reporting any revisions in House Rules at the beginning of a session of Congress. It was not until the 1880 House Rules Revision that the Rules Committee was made a permanent, standing committee with the Speaker as its chairman.[54] Reed was the first Speaker to exploit the full potential of the Rules Committee to order the business of the House, not only through changes in the standing rules, but by way of special rules or order of business resolutions which provided for the consideration of particular pieces of legislation.

B. *The Revolt Against Czar Speaker*

The era of strong party government reached its apogee under Republican Speaker Joseph Cannon of Illinois, who served as Speaker from 1903 to 1910. Cannon carefully built on the powers of the Speakership established under Reed—the powers to appoint standing committees and designate their chairmen, and to chair the Rules Committee and thus control the legislative agenda. While Cannon was known fondly as "Uncle Joe" at the outset, by the time of his overthrow in 1910 he was derided as "Czar Cannon."[55]

Although Cannon resisted Wilson's suggestion to appoint only majority members to committees,[56] he did not hesitate to appoint and remove committee members according to their support or opposition for what he saw as the approved party positions. An insurgent group of progressive Republicans, led by George Norris of Nebraska, disapproved of such practices. On March 16,

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[53] *Id.* at 50.

[54] HOUSE COMM. ON RULES, 97TH CONG., 2D SESS., A HISTORY OF THE COMMITTEE ON RULES 51 (Comm. Print 1983) [hereinafter HISTORY OF THE COMMITTEE ON RULES].

[55] GALLOWAY, *supra* note 50, at 51.

[56] *See* WILSON, *supra* note 30, at 81.

1910, these Republicans joined with the minority Democrats to amend the House Rules. They removed the Speaker as chairman and a member of the Rules Committee, expanded committee membership from five to ten members, and replaced the Speaker's power to appoint the committee with election of committee membership by the House.[57]

As historian George Galloway observed, "the revolution of 1910 was not only political in character; it was also social in the sense it reflected an aroused public opinion which felt that legislative power, under 'Czar' Cannon's leadership, had grown so great as to upset the balance of power in the American constitutional system."[58] The 1910 reforms of the Rules Committee rescued the House from a situation which Wilson had described as "a dangerous 'one-man power' and an untoward concentration of functions . . . ."[59]

C. *The Rise of King Caucus*

Another explanation for the rejection of "Czar" Cannon's brand of conservatism was that his views were not compatible with the progressivism of his own party's former President, Theodore Roosevelt, or with the changing political mood and direction of the electorate. This changing mood manifested itself in the 1910 elections: the Democrats regained control of the House in 1911.

The new House Democratic majority immediately adopted a major revision in House rules. The revised rules provided for the election of all committees and their chairmen by the House and retained and strengthened the "Calendar Wednesday" rule permitting committees to call up bills from the Rules Committee and place them on the calendar even though they had not received a special rule for floor consideration by the Rules Committee.[60] The new rules also preserved the unanimous-consent calendar, under which individual members could call up minor bills two days a month.[61]

While these rule revisions reflected a new openness and democratization of the House, the overthrow of Cannon was not

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[57] GALLOWAY, *supra* note 50, at 50–51.
[58] GALLOWAY, *supra* note 50, at 51.
[59] *See* WILSON, *supra* note 30, at 76–77.
[60] GALLOWAY, *supra* note 50, at 52.
[61] *Id.*

the end of party government. The 1910 reforms simply prompted a shift in leadership from the Speaker to the Democratic Caucus[62] and to the new majority leader, Democrat Oscar Underwood of Alabama. Underwood also served as chairman of the Ways and Means Committee. By Caucus rule, the Democratic Caucus assigned to Underwood and to Ways and Means Committee Democrats the responsibility of nominating Democrats to committee assignments.[63]

The Democratic Caucus was involved in more than choosing party leaders and ratifying nominations for committee assignments: "the essence of the new system was direct control of legislative action by the caucus itself," both through caucus rules and binding policy resolutions adopted by two-thirds of the caucus membership.[64] Examples of this control are found in several resolutions offered by Underwood and adopted by the caucus in April of 1911. One of these resolutions directed the Democratic members of various committees not to report any legislation to the House, except with reference to matters specified in the resolution, "unless hereafter directed by this caucus."[65] Another one of these resolutions endorsed certain bills reported by the Ways and Means Committee and instructed Democrats to vote against all amendments to these bills which were not proposed by the Committee.[66]

The caucus system was not without its detractors, however, and like the Cannon speakership, the party caucus came under attack as despotic. Unlike the bi-partisan overthrow of Cannon, criticism of Democratic Caucus practices came primarily from the minority party, which felt increasingly irrelevant to the legislative process. This minority discontent is perhaps best illustrated by the 1913 protest resignation from the Ways and Means Committee of Representative Sydney Anderson (R-Minn.).

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[62] Party caucuses in Congress (called a "conference" by House and Senate Republicans and Senate Democrats) consist of all party members of that house. Caucuses date back to the Jefferson administration and have been used sporadically ever since to adopt party positions. Since Cannon's overthrow, caucuses have also assumed the task of nominating members to committees. GALLOWAY, *supra* note 50, at 123–24.

[63] *Id.* at 124.

[64] *Id.* at 125.

[65] *Id.* at 123.

[66] *Id.* at 125–26. Appropriately enough, party government operating through the majority party caucus was in full control of the House when Woodrow Wilson became President in 1913. Four major pieces of legislation were expedited to enactment under this new system in the 63d Congress (1913–1915): the Underwood Tariff Act, the Federal Reserve Act, the Clayton Antitrust Act, and the Federal Trade Commission Act. *See* HISTORY OF THE COMMITTEE ON RULES, *supra* note 54, at 105.

In a speech on the House floor in 1974, Representative John Anderson (R-Ill.) discussed Sydney Anderson's resignation.[67] Sydney Anderson resigned from the House Ways and Means Committee because the caucus system had deprived him of his ability to fulfill his role as a public servant.[68] Though he had been a member of the House Ways and Means Committee, he had taken no part in drafting the Underwood tariff bill reported by the committee.[69] Instead, the bill was first drafted by the caucus of committee Democrats and then taken to the House Democratic Caucus where it was further amended.[70] When the bill was finally brought before the Ways and Means Committee, it was reported out within thirty minutes with no opportunity for discussion or amendment.[71] When the bill was brought to the House floor, it was debated for 156 hours, but any amendments offered were beaten back on party-line votes since Democrats had been instructed by the Caucus to oppose them.[72]

Sydney Anderson had this criticism of the role of a strong Democratic Caucus: "The caucus not only destroys the representation of the minority but of a minority of the majority, for it binds the votes of both majority and minority of the caucus as a unit in the House against all suggestion, amendment and debate."[73]

In Sydney Anderson's view, rule by caucus destroyed an essential element of good legislation: "that the acts of Representatives should be always open to the scrutiny of the public."[74] In Sydney Anderson's words:

> The caucus is the real legislative body and its proceedings are essentially secret . . . . I frankly hope that what I have said will arouse the whole people to protest, to a determination to assert their effective representation. I believe they can be relied upon to act intelligently when they are well informed, and I shall have mistaken their temper if they do not, in the near future, demand the reconstruction of the system which deprives them of the vital right of a free government.[75]

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[67] 120 CONG. REC. 19,854 (1974).
[68] *Id.* at 19,855.
[69] *Id.*
[70] *Id.* at 19,856.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

In his 1974 speech, John Anderson included House Speaker Champ Clark's (D-Mo.) response to Sydney Anderson's charges of secret process: "All this talk of secrecy is of no avail . . . . The people of the United States want to know what the Congress does. They are much more interested in results than in the methods by which those results are worked out."[76]

Sydney Anderson's thoughts illustrate the ongoing controversy and dialogue over representative government versus party government, and open, deliberative democracy versus closed, party caucus deliberations leading to binding decisions.

III. Modern Reforms

By the onset of the First World War, Democrats were split over Wilson's foreign policies, and the majority caucus fell into disuse as an instrument of legislative policy-making. In its place, the autonomous and fragmented committee system, against which Wilson had argued, was reborn. In fact, the committee system emerged more powerful than it had been before, in part because of the heavy weight the caucuses placed on committee seniority, rather than other important qualifications, in elevating and retaining committee chairmen.[77]

However, the fall of "King Caucus" did not spell an end to all majority party control over the legislative business of the House. The elected majority party leaders continued to work with the Rules Committee in arranging the schedule of the House, and the Rules Committee gained strength during this period.

A. *From the New Deal to the Great Society*

During the early days of the presidency of Franklin D. Roosevelt, the Rules Committee became an effective arm of the President and the majority leadership in guiding the early New Deal legislation through Congress.[78]

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[76] *Id.*

[77] *See* History of the Committee on Rules, *supra* note 54, at 107–08.

[78] History of the Committee on Rules, *supra* note 54, at 124. For example, during the first session of the 73d Congress (1933), a record number of bills were considered by the House under closed rules allowing for no amendments. Galloway claims that ten bills were thus considered, Galloway, *supra* note 50, at 134, while the History of the Rules Committee shows only eight. History of the Committee on Rules, *supra* note 54, at 127.

The role of the Rules Committee changed as the country and Congress became disenchanted with the New Deal in the late 1930s. Beginning in 1937, a coalition of Southern conservative Democrats and Republicans gained control of the Rules Committee by virtue of their seniority and survivability. During this period, "the Rules Committee repeatedly framed rules designed to facilitate its own views of public policy rather than those of the House leadership and the Roosevelt administration by including special provisions in its resolutions granting a 'green light' for bills to the floor of the House."[79] While the Rules Committee failed to act as an instrument of majority party government, "it apparently did faithfully reflect majority sentiment in the House" for much of the period of its control.[80]

The passage of the Legislative Reorganization Act of 1946 also had a considerable impact on House committee deliberations, primarily by reducing from forty-eight to nineteen the number of House standing committees and by consolidating their jurisdictions.[81] In addition, the Act required committees to keep a record of their actions and votes, and gave all House members access to these committee records.[82] House Rules were also amended to require open committee hearings, the attendance of a majority of committee members at meetings where bills would be reported out, and the prompt filing of committee reports with the House by the chairman.[83] The Act provided permanent professional and clerical staff to committees and created a Legislative Reference Service to provide additional staff assistance to members and committees.[84] The Act also clarified the oversight responsibilities of congressional committees.[85]

Despite these reforms, frustration grew both inside and outside the House over actions of the Rules Committee's conservative coalition. When Democrat John F. Kennedy was elected President in 1961, supporters of his progressive New Frontier legislation realized that the conservative Rules Committee would be a major obstacle to the consideration and passage of this legislation. Speaker Sam Rayburn (D-Tex.) led a successful ef-

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[79] GALLOWAY, *supra* note 50, at 135.
[80] *Id.*
[81] *Id.* at 60–61.
[82] *Id.* at 80.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 62–63.

fort to push changes in the Rules Committee through the House.[86] These changes enlarged the committee from twelve to fifteen members, resulting in the addition of two liberal Democrats and one Republican.[87]

However, according to the Rules Committee's own history, these changes "did not resolve the controversy over the relationship between the Rules Committee and the majority party leadership."[88] Rather it was, as one observer put it, "the end of the beginning."[89]

B. *The Reform Decade: 1965–1975*

During Lyndon Johnson's first year as an elected President in 1965, an era of House reform truly took hold. Johnson's election gave the Democrats their largest majority in the House since the 75th Congress (1937–1938) with 295 members or sixty-eight percent of the House membership. As a result of this new, more liberal makeup of the House, Johnson was able to push through a large volume of his Great Society legislation.[90]

1. The Joint Committee on the Organization of Congress: 1965

In 1965 the Rules Committee reported a concurrent resolution creating a Joint Committee on the Organization of Congress to recommend comprehensive changes in the institution. The Joint Committee of 1965 was patterned after a 1945 joint committee that had produced the Legislative Reorganization Act of 1946.[91] The work of the 1965 Joint Committee culminated with the enactment of the Legislative Reorganization Act of 1970. The Act's provisions affected House committee deliberations and House floor deliberations.[92] The Act also challenged the committee sen-

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[86] *Id.* at 134.
[87] *Id.* at 146.
[88] HISTORY OF THE COMMITTEE ON RULES, *supra* note 54, at 189.
[89] *Id.*
[90] *Id.* at 198–99. Some bills were brought to the floor under a new version of the old twenty-one-day rule that allowed committee chairmen to circumvent the Rules Committee if the Committee had not cleared their bills for floor action within three weeks. However, this rule also acted to motivate the Rules Committee to clear up other bills under its own terms. *Id.*
[91] *See supra* note 81 and accompanying text.
[92] *See* GUIDE TO CONGRESS, *supra* note 25, at 60, app. 248-A-51-A. The provisions affecting House committee deliberations required committees to adopt written rules, including a provision for regular meeting days at least once a month; banned general

iority system with provisions referred to as the "committee bill of rights;" these provisions were intended to remedy certain abuses of powers by committee chairmen.[93] These reforms included requiring written committee rules and regular committee meetings and empowering a committee majority to convene a meeting over the chairman's objection.[94]

2. Democratic Caucus Reforms

Following the passage of the Legislative Reorganization Act of 1970, several junior Democrats remained dissatisfied with the power exercised by conservative committee chairmen. These reformers turned to the Democratic Caucus for relief.[95]

In 1973, the Democratic Caucus dealt directly with the committee seniority system by providing in its rules that committee chairmen be elected by a separate, secret ballot vote. That same year, the Caucus adopted a set of rules known as the "subcommittee bill of rights," which required the establishment of Democratic committee caucuses on each committee, the election of subcommittee chairmen and establishment of their jurisdictions by the committee caucuses, the automatic referral of legislation to subcommittees within two weeks unless the full committee voted to retain the measure, and the right of subcommittee chairmen and ranking members to hire one staff person each. By

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proxies while allowing committees to authorize proxies on specific matters by rules; authorized public access to the results of roll-call votes; authorized the filing of views with committee reports within three days of the committee's vote to report; authorized broadcast coverage of committee hearings; authorized additional professional and clerical staff for committees and guaranteed one-third of the staff to the minority as well as one-third of investigative staff funds (though the latter provision was repealed by a Democratic Caucus amendment to House Rules at the beginning of the next Congress); and authorized the minority to call its own witnesses at an additional day of hearings.

The provisions affecting House floor deliberations allowed for recorded votes on amendments in the Committee of the Whole; required the three-day layover of committee reports before floor consideration; allowed for ten minutes of debate on floor amendments printed in the Congressional Record in advance, even if offered after time has run out on a motion to limit debate on amendments; allowed for separate debate and vote on non-germane Senate amendments to House bills; and prohibited consideration of conference reports unless available in writing for at least three days.

[93] *Id.* at 362–63, 368–69.

[94] *Id.*

[95] Representative Richard Bolling (D-Mo.) had called for further reform in two influential books. *See* RICHARD BOLLING, HOUSE OUT OF ORDER (1965); RICHARD BOLLING, POWER IN THE HOUSE: A HISTORY OF THE LEADERSHIP OF THE HOUSE OF REPRESENTATIVES (1968).

1973, the Democratic Caucus had already restricted full committee chairmen to not more than one subcommittee chairmanship.[96]

The 1973 Democratic Caucus forwarded to the House a new rule providing for open committee hearings and open meetings to amend and report legislation unless the committee, by majority vote taken with a majority present, voted to close the hearing or meeting.[97] To deal with the Ways and Means Committee's habit of requesting closed rules on tax matters, the Caucus adopted new rules in 1973.[98] These rules required committee chairmen and the Rules Committee to announce their intention to provide for less than an open amendment process on a bill, and permitted any fifty members of the Caucus to call a special caucus meeting to discuss and vote on whether specific amendments should be allowed on the floor.[99] As part of its 1973 rules, the Caucus established a Steering and Policy Committee, chaired by the Speaker, to assist him in developing party legislative policies and priorities.[100]

In 1974, in anticipation of the House Judiciary Committee's impeachment deliberations, the Democratic Caucus expanded committees' authority to permit broadcast coverage of committee meetings.[101] In 1975, the Democratic Caucus pushed through a change in House rules to require open conference committee meetings unless the House, by roll-call vote, determined that the conference should be closed.[102] In 1975, the Caucus shifted authority to nominate members to committees from the Ways and Means Committee to the Steering and Policy Committee.[103] That same year, the Caucus gave the Speaker the authority to nominate Rules Committee Democratic members for Caucus approval.[104] In 1978, the House authorized the broadcast coverage of its floor proceedings which, after a closed test, was made available to the public in early 1979.[105]

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[96] GUIDE TO CONGRESS, *supra* note 25, at 62.
[97] *Id.* at 61.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 63.
[102] *Id.* at 61.
[103] *Id.* at 62.
[104] *Id.* at 63.
[105] *Id.*

3. Committee Jurisdiction and the Select Committee on Committees

The 1970 Legislative Reorganization Act did not affect House and Senate committee jurisdictions. To address the growing problem of jurisdictional overlap among committees and related problems with committee operations, the House established a bipartisan Select Committee on Committees in 1973, chaired by Representative Richard Bolling (D-Mo.).[106] In 1974, the Select Committee on Committees reported to the House a comprehensive overhaul of the House committee system.[107] This proposed overhaul would have left the number of committees constant at twenty-two but would have substantially realigned committee jurisdictions along more functional and rational lines.[108]

The Democratic Caucus substantially rewrote the Bolling plan, however, leaving committee jurisdictions virtually intact; the rewrite preserved the Bolling proposal to allow bills to be referred to more than one committee for the first time.[109] The substitute amendment ultimately adopted by the House also would have abolished proxy voting and granted one-third of committee investigative funds to the minority.[110] Both of these provisions were repealed at the beginning of the next Congress in the Democratic Caucus amendments to House rules.[111] The resolution as finally passed also increased committee professional and clerical staff, required committees of over fifteen members to have at least four subcommittees, and required committees to file oversight plans with the Government Operations Committee at the beginning of each Congress.[112]

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[106] *Id.* at 64.

[107] *Id.* at 64–65.

[108] SELECT COMM. ON COMMITTEES, COMMITTEE REFORM AMENDMENTS OF 1974, 2 H.R. Doc. No. 916, 93d Cong., 2d Sess. 26–27 (1974). Two committees, the Committee on Post Office and Civil Service, and the Committee on House Internal Security, would have been abolished. The Committee on Education and Labor would have been split into two committees. The Committees on Energy and Environment would have been combined into a single committee, and the Interstate and Foreign Commerce Committees would have become the Committee on Commerce and Health. *Id.* at 26–27. According to the Committee, these changes would have enabled members "to give coherent consideration to a number of pressing policy problems whose handling has been fragmented . . . ." *Id.* at 26.

[109] GUIDE TO CONGRESS, *supra* note 25, at 372.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 64–65, app. 251-A. *See also* ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AGAINST ITSELF (1977) (providing a detailed history of the Bolling select committee).

4. The Congressional Budget and Impoundment Control Act

In 1974 the Congress enacted the Congressional Budget and Impoundment Control Act, which had a significant impact on House committee and floor proceedings.[113] The Act established House and Senate Budget Committees, a shared Congressional Budget Office, and a new budget process. The new budget process consisted of congressional adoption of an annual budget resolution, special points of order, and a new reconciliation process for its enforcement.[114] Additionally, the Act curtailed the President's impoundment authority by subjecting any termination of spending authority to approval by Congress.[115]

C. *Reform Breeds New Problems*

There have been numerous analyses of the impact the reform decade has had on the House, particularly on its policy development process. While the reforms discussed in Part B were designed to make the House more open, responsive, accountable, and democratic, the replacement of committee government with subcommittee government has had unintended consequences.

1. The Proliferation of Subcommittees and the Fragmentation of Policy-Making

Since the reform decade, the policy process has become even more fragmented than under the old committee system. For example, the 1974 innovation of referring one bill to multiple committees, without prior realignment of committee jurisdictions along more rational and functional lines, has further compounded the problems of policy coordination and accountability in the House.[116] In addition, the 1974 Budget Act process has been imposed on top of the existing authorization and appropriations processes.[117] While the new budget process achieves some overall fiscal policy coordination, it has further complicated the ability of authorizing committees to report even routine authori-

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[113] GUIDE TO CONGRESS, *supra* note 25, at 129.
[114] *Id.* at 130–34.
[115] *Id.* at 133–34.
[116] *See supra* note 109 and accompanying text.
[117] CONGRESSIONAL BUDGET OFFICE, UNAUTHORIZED APPROPRIATIONS AND EXPIRING AUTHORIZATIONS 2–3 (Jan. 15, 1994).

zations in a timely manner or secure adequate floor time for their consideration.[118] One consequence of the committees' inability to report authorizations in a timely manner has been that billions of dollars of discretionary appropriations have remained unauthorized. According to the Congressional Budget Office ("CBO"), of the $501 billion in discretionary appropriations in fiscal year 1994, approximately $57.8 billion (11.5%) was categorized as unauthorized in the House. This unauthorized funding was caused by the expiration of 103 authorization laws under the jurisdictions of sixteen House committees. Some $27.2 billion of that amount involved authorizations which had expired at the end of fiscal 1993, and the remaining $30.6 billion expired at the beginning of the 103d Congress.[119]

The goal of the House reform revolution of the seventies was a more open and participatory policy process that would allow more members to play leadership roles in developing national policies through the newly semi-autonomous subcommittees. The theory was that a larger number of policy entrepreneurs would lead to greater fermentation and competition of ideas and options, as well as broader representation of diverse interests. All this in turn would come together to produce more broadly based national solutions to national problems, widely acceptable to the American people. In short, the delegation of policy-making to the subcommittees was a sincere attempt to develop a new model of deliberative democracy at the national legislative level. This model broke down due to the unrepresentative nature of subcommittees and their inability to make decisions and forge policy solutions that are acceptable and binding on the larger representative institution.[120] The reason for failure is a matter of simple mathematics. Subcommittees are small; by definition, only a tiny fraction of House membership can be represented in any subcommittee. In addition, members are burdened with many committee and subcommittee assignments; members' attendance at committee and subcommittee meetings has suffered as a result. During each of the three Congresses in which Joint Com-

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[118] *Id.* The Budget Act of 1974 and its successor amendments (the Gramm-Rudman-Hollings Acts of 1985, 1987, and the 1990 Budget Enforcement Act) have also focused inordinate attention on the fiscal impact of proposed policies, often at the expense of deliberations over the wisdom, necessity, or likelihood of success of new policies, or the need to weed out ineffective existing programs through more systematic oversight.

[119] *Id.*

[120] *See, e.g.*, HISTORY OF THE COMMITTEE ON RULES, *supra* note 54, at 221; GUIDE TO CONGRESS, *supra* note 25, at 382–83.

mittees on the Organization of Congress have been formed—the 79th (1945–46), the 89th (1965–66), and the 102d (1991–92)—both the size of committees and subcommittees and the number of member assignments have increased, even though the number of House members has remained constant throughout. In the 79th Congress there was a total of 166 standing, select, and joint committees and their subcommittees and a total of 1806 member assignments; the mean number of assignments per member was 4.15.[121] By 1965, the total number of committees had increased to 176, total assignments to 2047, and the mean number of assignments to 4.71.[122] By 1991, the total number of committees had increased to 185, assignments to 3097, and the mean assignments to 7.04.[123]

Testimony given by members of the 103d Congress before the Joint Committee on the Organization of Congress bolstered the conclusion that members of Congress do not have adequate time to devote to all their committee and subcommittee responsibilities. In turn, this time pressure has resulted in poor attendance, especially at the subcommittee level.[124]

A survey of House and Senate Members by the Joint Committee on the Organization of Congress of the 103d Congress revealed that 87.1% of the House respondents agreed that the number of subcommittees should be further reduced, and 85.1% favored limiting the number of member assignments to two full committees and four subcommittees.[125] While 48.1% of the House respondents said they spent a great deal of time in committee hearings, meetings, and markups, only 16.5% ranked committee attendance first as the activity they would most like to spend more time on when given a choice of twelve different activi-

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[121] JOINT COMM. ON THE ORGANIZATION OF CONGRESS, S. DOC. NO. 55, 103d Cong., 1st Sess. 474, 480 (1993).

[122] *Id.*

[123] *Id.* While the mean number of assignments per member has improved somewhat in the 103d Congress due to the elimination of four select committees and a new limit, established by Democratic Caucus rules, on the number of subcommittees standing committees may have, members are still clearly overburdened by assignments; their attendance at committee meetings and ability to keep up with the work of the committees suffer accordingly.

[124] *Id.* at 365–462.

[125] JOINT COMM. ON THE ORGANIZATION OF CONGRESS, FINAL REPORT OF THE JOINT COMMITTEE ON THE ORGANIZATION OF THE CONGRESS, 2 S. REP. NO. 215, 103d Cong., 1st Sess. 262–63 (1993) [hereinafter FINAL REPORT OF THE JOINT COMMITTEE]. The report was prepared for the Joint Committee on the Organization of Congress by the Government Division of the Congressional Research Service. A little over 30% of all House members (136) responded, roughly reflecting the party composition and tenure of House membership.

ties.[126] Studying or reading about legislation or future issues was ranked first by 28.9% of respondents; returning home to meet with state and district residents was ranked first by 17.4%; and attending floor debates or following debates on television was ranked first by 14%.[127]

2. Undemocratic Adaptations

In the 1970s, in an attempt to deal with the growing problem of committee and subcommittee attendance, the House adopted several rules to make it easier for committees to operate without the majority quorum that Thomas Jefferson felt was essential for committee action.[128] In 1977 the House adopted a rule permitting committees to fix the quorum requirement "for taking any action other than the reporting of a measure or recommendation . . . [at] not less than one-third of the members."[129]

Since the rules of a committee are also the rules of its subcommittees, the average House subcommittee of the 102d Congress, with 13.5 members, can conduct business if as few as five members are present; consequently, as few as three would constitute a majority to carry a vote. This is true even when the committee or subcommittee exercises one of its most important functions: the markup, or amendment, of a bill in committee. A mere one-third of committee membership may approve or reject critical alternatives to the original bill being considered.

Subcommittee chairmen usually come to a markup session armed with proxy votes in support of their position; as a result, even if the chairman is the only majority member present and all six minority members are present (rounding to a fourteen-member subcommittee), the chairman's position will still prevail on an 8–6 vote. While the House rule on proxy votes requires that the proxies be in writing, assigned to a specific member, and "limited to a specific measure or matter and any amend-

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[126] *Id.* at 275, 281.

[127] *Id.* at 282, 284, 287.

[128] Jefferson believed true deliberative democracy required that a committee majority be assembled before a committee could conduct business:

> A committee [may] meet when and where they please, if the House has not ordered time and place for them, and not by separate consultation and consent—nothing being the report of the committee but what has been agreed to in committee actually assembled . . . . A majority of the committee constitutes a quorum for business.

JEFFERSON, *supra* note 16, at 195, 197.

[129] H.R. Res. 5, 95th Cong., 1st Sess. (1977) (adopted).

ments or motions pertaining thereto,"[130] this does not mean the proxy must specify the substance of an amendment. The member may assign his or her voting responsibilities to another member for any amendment that might be offered during the markup of a specified bill. The House attempted to abolish proxy voting in 1974; the practice was restored three months later by the Democratic Caucus.[131]

The House Rules of the 103d Congress provide for a so-called "rolling quorum" for reporting legislation to the House by full committees. House Rule XI, clause 2(l)(2)(A) previously read that, "No measure or recommendation shall be reported from any committee unless a majority of the committee was actually present . . . ."[132] In 1993, the Democratic Caucus modified the rule so that "actually present" need not mean "actually present at the same time." Under the new "rolling quorum" rule, a majority of the committee is required to respond on a roll-call vote on a particular measure, but this majority need not have voted at one sitting.[133] Under this new system, a chairman may assemble the bare one-third quorum necessary to take preliminary votes and then simply leave a committee clerk in the room the rest of the day to record the votes of other members who choose to "drop by" and record their positions. This drop-by voting procedure has replaced the requirement that a majority of members actually be assembled at the same time to engage in even the final stage of collective decision-making: ordering legislation or recommendations to be reported to the House. These rule changes have undermined the deliberative process of House committees and subcommittees and have reinforced the power of committee and subcommittee chairmen.

IV. Unintended Consequences of Reform

Studies done on the effects of the reform revolution and the emergence of subcommittee government indicate a rise in the practice in the House of amending bills from the floor and a greater success rate for amendments opposed by the committee

[130] Rules of the House, *supra* note 16, at 451–56 (giving text of Rule XI, clause 2(f)).
[131] *See* Guide to Congress, *supra* note 25.
[132] Rules of the House, *supra* note 16, at 467.
[133] *Id.*

or subcommittee chairman managing the bill.[134] This declining support and respect for committee bills can be attributed in large part to the unrepresentative and antideliberative nature of subcommittee government, though it may also reflect heightened partisan floor activities.

To offset these centrifugal forces, certain centripetal (or unifying) forces have come into play, both by design and by evolutionary adaptation, in order to permit the House to process and complete its workload. These cohesive forces include the majority leadership, ad hoc legislative task forces and summits, and the House Rules Committee. Put another way, these mechanisms are a new variation on the old theme of party government, but their focus has shifted from the Speaker and the majority caucus.[135]

For the most part, however, the effects of these unifying forces have been anti-deliberative rather than deliberative in nature. In effect, more alternatives to deliberative democracy have developed, both in committee processes and in floor debate. While some argue that these alternatives are simply new forms of deliberation, they fail to meet any of the tests of deliberative democracy outlined earlier in this Article: the deliberations are not broadly representative of the House or the electorate, they are not conducted in the open, there is little or no accountability for members, and they neither serve to enlighten the public nor contribute to the development of a national consensus for the policy decisions made.

A. *Majority Leadership*

Just as Woodrow Wilson saw House party caucuses as the antidote to committee government, the modern House has gradually turned to the leadership of the majority party as the antidote to subcommittee government. As political scientist Barbara Sinclair observes,

> Since the late 1980s and early 1990s, the House majority party leadership has been more actively and more compre-

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[134] *See, e.g.*, Barry R. Weingast, *Fighting Fire with Fire: Amending Activity and Institutional Change in the Postreform Congress*, *in* THE POSTREFORM CONGRESS 142 (Roger H. Davidson ed., 1992); STANLEY BACH & STEVEN S. SMITH, MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES (1988).

[135] *See* Weingast, *supra* note 134, for a more thorough analysis.

> hensively involved in the legislative process than its predecessors of the post-World War II period. Today it is involved in a larger proportion of the major legislation and at more stages of the legislative process.[136]

Sinclair also notes that the majority leadership's involvement in the legislative process is no longer confined to building winning coalitions at the floor debate stage; those in leadership frequently broker agreements between committees on major bills and resolve House differences with the Senate and with the White House.[137] The leadership circle has expanded considerably in recent years. The Democratic whip organization was expanded from twenty members in the 1970s to 102 members in 1989–90, or forty percent of the entire Democratic Caucus in the 101st Congress. Barbara Sinclair provides one possible explanation for the expansion of the leadership circle:

> As the 1980s progressed, providing members with these opportunities became increasingly important because meeting their expectations for legislative output required leaders to curtail participation in more traditional forums and on some of the most important legislation of a session.[138]

The whip organization and the caucuses are frequently used as sounding boards on major legislation.

1. Legislative Task Forces

Two of the most controversial alternatives to committee legislative action are leadership task forces and budget summits. The caucuses often create task forces to draft legislative policies. The whip organization also creates its own task forces to monitor and marshal support for legislation.

Congressional reporter Richard E. Cohen observes that Woodrow Wilson "would hardly recognize Congress these days" because the power of structures such as leadership task forces and budget summits in the legislative process overwhelms the once-dominant committees.[139] Cohen describes the decline in committee power:

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[136] Barbara Sinclair, *House Majority Party Leadership in an Era of Legislative Constraint*, *in* THE POSTREFORM CONGRESS, *supra* note 134, at 91, 92–93.
[137] *Id.* at 92.
[138] *Id.* at 94.
[139] Richard E. Cohen, *Crumbling Committees*, 22 NATIONAL J. 1876, 1876 (1990).

> In recent years . . . internal changes have quietly revolutionized the sources of legislative power on Capitol Hill, eroding the influence of once all-powerful committees and of their bosses. Today, committees are often irrelevant or, worse yet, obstacles.[140]

Cohen cites the House campaign reform bills, the ethics/pay raise bills and the 1989 and 1990 budget summits as examples of how Congress has circumvented the committee system to handle key legislation.[141]

The 1989 ethics legislation[142] produced minimal grumbling and opposition, even though the Rules Committee rushed it to the floor only two days after it was made public without formal review, hearings, or markup by the committees with jurisdiction over the bill.[143] In contrast, the final version of the campaign reform bill of 1990[144] was the work of the Democratic half of a formerly bipartisan leadership task force that had been unable to resolve its differences. This bill was brought to the floor one day after it was drafted; the hurried writing of the bill was the source of considerable strife both between the parties as well as within Democratic ranks. Ways and Means Committee Chairman Dan Rostenkowski (D-Ill.) joined Republicans in complaining that the task force had short-circuited the committee process, particularly since the task force had bypassed his own committee, which was one of four having jurisdiction over the bill.[145]

As a result of the controversy over such task force legislating, the Democratic Caucus of the 102d Congress adopted the following rule:

> RULE 50. COMMITTEE REVIEW OF LEGISLATION DEVELOPED BY CERTAIN AD HOC TASK FORCES. The standing committee or committees of jurisdiction of the House of Representatives shall have the right, for a period of not less than five legislative days, to consider, review, and report on any legislative measure developed by any ad hoc Task Force ap-

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[140] *Id.*

[141] *Id.*

[142] H.R. 3660, 101st Cong., 1st Sess. (1989).

[143] *See Congress Hikes Pay, Revises Ethics Law*, 45 CONG. Q. ALMANAC 51, 57 (1989).

[144] H.R. 5400, 101st Cong., 2d Sess. (1990).

[145] Despite initial opposition, the bill passed, 255–155; only three Democrats voted in opposition, and Rostenkowski voted "yes." The bill later died in conference. *See Partisanship Dooms Campaign Bills*, 46 CONG. Q. ALMANAC 59, 69–71 (1990).

> pointed or designated by the Speaker or other officer of the House or Democratic Caucus.[146]

Notwithstanding the adoption of the new rule, several powerful House committee chairmen were not satisfied that the task force problem had been adequately addressed. Four committee chairmen—Dan Rostenkowski (D-Ill.) of Ways and Means, Jack Brooks (D-Tex.) of Judiciary, William Ford (D-Mich.) of Education and Labor, and John Dingell (D-Mich.) of Energy and Commerce—expressed their concern over the growing reliance by the House on task forces for legislative purposes. The *Washington Post* described their reactions:

> Upset by what they see as an increasing reliance by some House Democratic leaders on ad hoc issue task forces, four of the most powerful chairmen in the House got together last week to see what they can do about the perceived threat to the traditional committee structure and its control over the legislative process.[147]

These chairmen were particularly angry at Democratic Caucus Chairman Steny Hoyer (D-Md.), who favored the establishment of eight or nine task forces to allow more junior members the opportunity to participate in the process of developing party agendas on such issues as health care, education, crime, the environment and government waste.[148] According to Rostenkowski, "This task force disease has become contagious. It's one thing for a task force to make recommendations in the shadow of anonymity, but I have to lay something before my committee and get the votes."[149]

A more dispassionate observer, former top Senate Democratic aide Thomas Sliter, sees both advantages and disadvantages to leadership task forces. On the one hand, Sliter argues that task forces provide individual members with powerful leverage against committees and the powers of their chairmen. "Task Forces can be more democratic in their operation and can prod a chairman not to be autocratic."[150] On the other hand, Sliter notes:

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[146] HOUSE DEMOCRATIC CAUCUS, PREAMBLE AND RULES OF THE DEMOCRATIC CAUCUS, 102d Cong., 1st Sess. 19 (1991).

[147] Tom Kenworthy, *House 'Bulls' See Red Over Task Forces*, WASH. POST, Apr. 18, 1991, at A19.

[148] *Id.*

[149] *Id.* An aide to one of the complaining chairmen was quoted as saying, "if God had wanted there to be task forces, why would he have created committees in the first place?" *Id.*

[150] *See* Cohen, *supra* note 139, at 1877.

> The committee process is designed to weed out problems. But when bills are put together on an ad hoc basis, the trouble can be that there are no hearings and more staff control, which increases the risk of unintended consequences.[151]

2. Budget Summits

Budget summits between the President and congressional leaders generally produce agreements on legislation, but such summits have not escaped the complaints raised regarding legislative task forces. According to congressional commentator John B. Gilmour, the secrecy of budget summit negotiations is at once the primary strength and primary weakness of such a process. He notes that budget summit negotiations "allow politicians to avoid blame for controversial decisions because the summit format obscures the origin of proposals. The summit, rather than any party or individual, can be blamed for unpopular policy choices; but a summit, unlike a person, cannot be held responsible."[152]

Gilmour disagrees with the conclusion that because such summits shield elected leaders from accountability, they are therefore contrary to democratic theory. He explains that "summits have no authority to implement agreements, only the capacity to negotiate them. Whatever they produce must later be voted on in Congress and signed into law by the president. Thus those who support a summit agreement must later defend their actions to their electorates."[153]

This narrow view of democratic accountability ignores the vital role public deliberation plays in enlightening public opinion and forging a national consensus to support government action. The general disgust that followed the prolonged, yet largely unsuccessful, 1990 secret budget summit negotiations is evidence that the public does care about the legislative process, especially with respect to issues they perceive as directly affecting them.[154]

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[151] *Id.* at 1877.

[152] John B. Gilmour, *Summits and Stalemates: Bipartisan Negotiations in the Postreform Era, in* THE POSTREFORM CONGRESS, *supra* note 134, at 233, 255.

[153] *Id.* at 255.

[154] FINAL REPORT OF THE JOINT COMMITTEE, *supra* note 125, at 193. In polls conducted by Gallup, CBS News/New York Times, and ABC News/Washington Post, in response to the question, "Do you approve or disapprove of the way Congress is handling its job?", 42% of respondents approved of Congress's performance in January 1990, while only 24% approved of Congress's performance by late October 1990. *Id.*

The closed budget summit process angered members of Congress who felt excluded from crucial decisions. Janet Hook, a reporter for *Congressional Quarterly*, comparing budget summits to the secretive, "smoke-filled room" of days past, observes that the rallying cry in Congress following the 1990 budget summit was "No more summits":

> The exclusive, secretive talks didn't sit well with a generation of politicians who in the 1970s helped smash the seniority system and institute government-in-the-sunshine reforms.[155]

Hook notes that the open government reforms of the 1970s failed to rid the Congress of its back rooms.[156] Conference committee decisions, while ostensibly made in open session under the new rules, are still in practice left to a few select players operating behind closed doors. Appropriations Committee meetings and Ways and Means Committee tax bill markups are still held in executive sessions. As Hook describes:

> But what matters most to members of Congress is not whether the door is open or closed but who is in the room. The problem for today's power brokers is that, unlike a generation ago, even the most junior members expect to have access to the inner circles.[157]

While the major congressional objection to the budget summit was more a matter of power than secrecy, Hook argues that since the budget summit circumvented the established institution of the committee system, the summit's secrecy raised a more significant issue: political accountability.[158] She concludes:

> The bipartisan budget talks were expressly designed to produce a deficit-reduction plan for which neither party would be responsible . . . In the process, then, the summit may have represented another, perhaps somewhat more disturbing use for the secrecy of the back room: Not to cloak dirty deeds, but to obscure responsibility for difficult decisions.[159]

Alternatives to committee deliberations may have certain advantages for leadership and members alike. However, the increasing reliance on these alternatives has eroded the informed, thoughtful, and representative sifting of ideas and options that

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[155] Janet Hook, *The Modern Congress' Smoke-Filled Room*, 49 CONG. Q. WKLY. REP. 210, 210 (1991).
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

an established committee system is, theoretically, best suited to undertake. Because they lack the features of public accountability and public deliberation, these alternative mechanisms incur the wrath of the members of Congress they exclude, and they undermine public confidence in and support for the decisions of the Congress.

B. *The Rules Committee: A Tool in the Hands of the Majority*

The majority leadership is also increasingly relying on the House Rules Committee to counter the effects of subcommittee government. The Rules Committee designs special rules providing for the consideration of bills and thus paves the way for bills on the House floor.

1. Restrictive Rules

The most common device the Rules Committee uses to protect committee bills against serious challenge or weakening on the House floor is the so-called "restrictive rule" which limits amendments. The House used restrictive rules sparingly during much of its history, even in the early years of the post-reform Congress.[160] In the 95th Congress (1977–78), the House allowed an open amendment process for eighty-five percent of the bills brought to the floor through the Rules Committee.[161] During the 1980s, however, the House's use of rules restricting amendments increased dramatically. By the 100th Congress (1987–88), only 54% of bills were considered under "open" amendment rules, while 46% were considered under rules limiting the ability of members to offer amendments.[162] In the 102d Congress (1991–92), 66% of the rules were restrictive.[163] At the end of the first session of the 103d Congress, fully 77% of the rules applied to bills were restrictive, while only 23% were open.[164]

The 1992 survey by the Joint Committee on the Organization of Congress asked House members the question: "Would you agree or disagree there have been too many limitations on debates

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[160] *See* 139 CONG. REC. H26–27 (daily ed. Jan. 5, 1993) (Table 4).
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *See* HOUSE COMM. ON RULES, LEGISLATIVE CALENDAR, 103d Cong., 1st Sess. (1993).

and amendments on the House floor this year?"[165] The survey results showed that 67.9% of all respondents strongly agreed or agreed, while only 25.4% strongly disagreed or disagreed. As might be expected, Republicans agreed to a larger extent than Democrats, 98.3% versus 41.4%.[166]

Nevertheless, the high percentage of "agreeing" Democrats is an indication that even the advantages of such restrictive rules may be wearing thin as Democrats as well as Republicans are precluded from full participation in the process of amending bills from the House floor. When a moderate junior Democrat, Representative Tim Penny of Ohio, announced in late 1993 that he would retire at the end of the 103d Congress, he cited his dissatisfaction with the Rules Committee as one of the main reasons for his decision. He told the *Washington Post* that "his decision had been 'brewing for over a year' as he found himself fighting losing battles against a House leadership that increasingly . . . tried to 'predetermine the outcome' of votes by manipulating the process in the Rules Committee."[167] Penny stated, "'Frankly, I was frustrated within six months after I got here, because it took no longer than that to figure out that this place doesn't operate on the level.'"[168]

It seems that the most important and controversial bills are the most likely to be considered under highly restrictive rules. In the current Congress, for instance, the first ten bills taken up by the House were all considered under restrictive rules.[169] The rule for the Family and Medical Leave Act[170] only permitted three amendments;[171] the rule for the National Voter Registration Act[172] permitted just one amendment.[173] No amendments were allowed on the Unemployment Compensation Act[174] or the public debt limit increase bill.[175] The House considered the President's controversial, $19.5 billion economic stimulus bill, the Emergency Supple-

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[165] FINAL REPORT OF THE JOINT COMMITTEE, *supra* note 125, at 274.

[166] *Id.*

[167] Lloyd Grove, *Tim Penny: The Bitter End*, WASH. POST, Aug. 18, 1993, at B1.

[168] *Id.*

[169] *See* 139 CONG. REC. H10,723–24 (daily ed. Nov. 22, 1993) (statement of Rep. Solomon) [hereinafter *Statement*].

[170] H.R. 1, 103d Cong., 1st Sess. (1993).

[171] *See Statement*, *supra* note 169.

[172] H.R. 2, 103d Cong., 1st Sess. (1993).

[173] *See Statement*, *supra* note 169.

[174] H.R. 920, 103d Cong., 1st Sess. (1993). *See Statement*, *supra* note 169.

[175] H.R. 1430, 103d Cong., 1st Sess. (1993). *See Statement*, *supra* note 169.

mental Appropriations Act,[176] under a rule that restricted amendments to one, to be offered by the chairman of the Appropriations Committee.[177] This rule reserved the amendment to the chairman even though he had not presented the amendment to the Rules Committee or requested that he be allowed to offer it on the House floor.[178] At the same time, the rule denied all thirty-seven of the amendments that had been filed with the Rules Committee—eight by Democrats and twenty-nine by Republicans.[179] While H.R. 1335 passed the House by a vote of 235–190, the House leadership's decision to limit the opportunity for changes to this massive appropriations bill may have backfired in the Senate. After extended debate and amendments, the Senate eventually stripped the bill of all but its unemployment compensation provisions.[180]

The House similarly restricted other important bills championed by the Clinton administration. The omnibus budget reconciliation bill[181], which purported to reduce the deficit by $500 billion over five years, was considered under a rule allowing only eight amendments, seven by Democrats and just one by a Republican.[182] Moreover, the rule inserted into the bill a self-executing comprehensive revision of the Budget Act that had not been reported by any committee.[183] The rule on the striker replacement bill[184] allowed for only two amendments, one by a Republican and one by a Democrat.[185] The Brady handgun bill[186] was subject to just four amendments.[187] The campaign reform bill[188] was restricted to just one Republican substitute.[189] The rule for the "reinventing government" bill[190] injected a self-executing and entirely new substitute for the bill reported by committees, and then allowed for just three amendments.[191] One of these

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[176] H.R. 1335, 103d Cong., 1st Sess. (1993).
[177] *See Statement, supra* note 169.
[178] *Id.*
[179] *See* 139 CONG. REC. H1497–99 (daily ed. Mar. 18, 1993) (statement of Rep. Dreier).
[180] *See* 51 CONG. Q. WKLY. REP. 1001 (1993).
[181] H.R. 2264, 103d Cong., 1st Sess. (1993).
[182] *See Statement, supra* note 169.
[183] *Id.*
[184] H.R. 5, 103d Cong., 1st Sess. (1993).
[185] *See Statement, supra* note 169.
[186] H.R. 1025, 103d Cong., 1st Sess. (1993).
[187] *See Statement, supra* note 169.
[188] H.R. 3, 103d Cong., 1st Sess. (1993).
[189] *See Statement, supra* note 169.
[190] H.R. 3400, 103d Cong., 1st Sess. (1993).
[191] *See Statement, supra* note 169.

amendments was the Penny-Kasich amendment;[192] another was identical to the language of the self-executed substitute.[193]

2. Substitute Amendments

Another device House leadership and the Rules Committee use to offset the effects of subcommittee government is that of substituting entirely new base text, or a "substitute," for amendment purposes. In making such substitutions, the Rules Committee bypasses the committees of jurisdiction. While the Rules Committee often introduces substitute base text to resolve differences between competing committees that have reported different versions under the multiple referral process,[194] the Rules Committee can also use the device to make changes for political purposes at the last minute. Such substitutes disadvantage members who wish to draft amendments based on the bill as it was reported by the committee of jurisdiction. Substitutes also confuse House members about what it is they are voting on, since no committee report is available to explain the changes. The text simply appears in the Rules Committee report, which is not available until the day the bill is to be taken up.[195]

Even more frequently, the Rules Committee introduces into the base text of a rule a self-executing further amendment; by adopting the rule, the House also adopts the amendment to the bill. The Rules Committee used this device in seventeen, or thirty-two percent, of the fifty-three rules providing for the original consideration of bills in the first session of the 103d Congress.[196] While at one time the Rules Committee used self-executing amendments only for making technical changes, the Rules Committee increasingly uses such amendments to make substantive changes in bills without subjecting the changes to separate debate and votes.[197]

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[192] *Id.*
[193] *Id.*
[194] *See supra* note 109 and accompanying text.
[195] The Rules Committee applied this substitution process to the "reinventing government" bill. Other examples include the Goals 2000: Educate America bill (H.R. 1804), the expedited rescissions bill (H.R. 1578), and the Family and Medical Leave Act (H.R. 1). *See Statement*, *supra* note 169.
[196] Don Wolfensberger, *Waivers of Points of Order in Special Rules: 103d Congress* (Nov. 26, 1993) (unpublished research, on file with the author).
[197] *Id.*

3. Waivers of Points of Order

The Rules Committee affects the nature of the deliberative process in the House by waiving points of order raised against bills or amendments which violate various House rules. One of the most important House rules often waived by the Rules Committee is the requirement that committee or conference reports be available three days prior to House consideration of the bill on the floor. The Rules Committee specifically waived this rule in eleven instances in the first session of the 103d Congress.[198] In another twenty-eight instances involving the original consideration of bills, the Rules Committee waived all points of order, including those raised in response to violations of the three-day report availability requirement.[199] Taken together, these waivers represent thirty-nine potential violations of the House's three-day availability rule. In fact, the Rules Committee waived violations of this House rule for seventy-three percent of the bills brought to the floor for original consideration.[200]

Increasingly, the Rules Committee protects appropriations bills by waiving points of order raised against unauthorized programs or legislative provisions. In the first session of the 103d Congress, the Rules Committee used the waiver provision of clause 2 of Rule XXI for ten of the thirteen regular appropriations bills on original consideration.[201] Such protection is a further indication of the erosion of the authority of authorizing committees, which are unable or unwilling to secure early enactment of legislation under their jurisdiction.

4. Suspension of the Rules

Another device that the House leadership is increasingly using to avoid extensive floor deliberation and amendments is the "suspension of the rules" procedure.[202] Under suspension of the rules, no amendments are allowed to the bill being considered unless they are offered by the bill's floor manager—usually the chairman

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[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] House Rule XXVII. Under this Rule, the Speaker may entertain motions to suspend the rules and pass bills on Mondays and Tuesdays of each week, and during the last six days of a session. *Id.*

of the committee that reported the bill—at the time the motion to suspend the rules is made.[203] Debate on motions to suspend the rules is limited to forty minutes, equally divided between those favoring and those opposing the motion.[204] A two-thirds vote "of the Members voting, a quorum being present," is required to suspend the rules and pass the measure.[205]

a. *Early practices.* In the early Congresses, a motion to suspend the rules was in order on any day of the week and was not debatable.[206] House members used the motion primarily to call up bills outside the regular order of business. Once the motion to consider a matter out of order was adopted, the measure was considered under regular House procedures for debate and amendment.[207] In 1880, however, the rule was changed to permit forty minutes of debate on a motion to suspend, and the motions were only in order on the first and third Mondays of each month.[208] The provision for debate time on suspension motions paved the way for motions not just to consider a bill, but to consider it and pass it as well, thereby precluding any amendments beyond those presented by the floor manager as part of the motion.[209]

b. *Reforms of the 1970s.* The legislative chaos wrought by the House reform revolution of the 1970s brought increased pressure to consider more measures under suspension to protect them from being attacked by amendments on the floor. In 1973 the House changed the rule to allow suspension motions on the first and third Monday and Tuesday of each month;[210] in 1975, the House began to allow suspension motions every Monday and Tuesday.[211] In 1979, the House gave the Speaker authority to postpone votes on suspension motions until later in the day.[212] In 1981, the House gave the Speaker the authority to delay suspension votes for up to two legislative days.[213] The House amended the rule in 1979 to prevent a "demand for a second" on a suspension bill, thereby forcing a vote on whether to consider the

[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] RULES OF THE HOUSE, *supra* note 16, at 695.
[207] *Id.*
[208] *Id.* at 695, 699.
[209] *See* 6 DESCHLER'S PRECEDENTS IN THE U.S. HOUSE OF REPRESENTATIVES, ch. 21, §§ 9–16 (1977).
[210] RULES OF THE HOUSE, *supra* note 16, at 695.
[211] *Id.*
[212] *Id.* at 327–29.
[213] *Id.* at 329.

matter, unless the measure or amendment to be offered had not been available to members for at least one legislative day.[214] In 1991 the House completely abolished the "demand for a second" on a suspension bill.[215]

c. *Modern uses.* As it now stands, the suspension process has separated whatever limited debate there may be from the actual vote in cases where a recorded vote is demanded.[216] It is not unusual in modern times for the House to consider up to twenty bills on a Monday, when few members are even in town, and for the votes to be postponed until the end of business on Tuesday, after further suspension bills are considered. While the suspension process is a convenient way to dispose of relatively noncontroversial bills, it is also becoming an increasingly popular mode of considering significant bills that might otherwise be controversial if brought to the floor under a special rule with the opportunity for amendment.

Whereas at the beginning of the postreform era in the 95th Congress (1977–78), only 38% of the 1027 bills and joint resolutions the House passed were passed under suspension of the rules, by the 102d Congress (1991–92), 52% of the 970 bills and joint resolutions the House passed were passed under suspension.[217] By the end of the first session of the current 103d Congress, the percentage of bills passed under suspension of the rules was even higher. Of the 364 bills and joint resolutions the House passed, 216 measures, or 59.3%, were passed under suspension of the rules. Moreover, 86 of the suspension bills and joint resolutions constituted 41% percent of the 210 measures enacted into law in the first session.[218]

A survey of the 219 measures considered under suspension of the rules in the first session of the 103d Congress reveals that only 26, or 12%, were so-called commemoratives establishing, for example, national days or weeks to recognize worthy causes and events. The vast majority of the bills were still what can be

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[214] *Id.* at 698.
[215] *Id.*
[216] Eighty-two percent of the suspension measures considered in the first session of the 103d Congress were passed by voice vote. Record votes are less likely when only the handful of majority and minority committee bill managers are present for the "debates," which on average last less than 15 minutes per bill. *See, e.g.*, 140 CONG. REC. 32 (daily ed. Mar. 21, 1994). On March 21, 1994, the House debated thirteen measures under suspension of the rules in less than three hours. *Id.* at H1558–1625.
[217] *See* 139 CONG. REC. H26–27 (daily ed. Jan. 5, 1993) (Table 9).
[218] Data derived from search of LEGIS (Jan. 3, 1994) (unpublished research, on file with author).

considered minor measures. Forty-one of the measures, or 19%, were under the jurisdiction of the Natural Resources Committee, and most were minor in nature.

Roll-call votes were demanded on only 39, or 18%, of the 219 measures considered under suspension. Of that 18%, only four garnered more than 100 votes in opposition, and only three failed the requisite two-thirds vote for passage, though all received majority votes and later passed under special rules.

d. *Potential for abuse.* Although the suspension process is not being abused in the majority of cases, one should not assume that abuses do not occur. The suspension of the rules process is a convenient way to expedite the consideration of a large number of noncontroversial bills. The separation that the suspension of the rules process allows between the actual consideration of bills and the vote on those bills opens the process to manipulation. The process is a tempting route for committee chairmen who wish to avoid having to defend their failure to adequately oversee agencies and programs under their jurisdiction.

One occasional abuse of the suspension of the rules process occurs when committees use it to eschew broad legislation. Such an abuse occurred in the first session of the 103d Congress when the Judiciary Committee introduced under suspension five relatively minor crime bills, as well as amendments, to avoid reporting a more comprehensive omnibus crime bill. The Judiciary Committee seems to have taken this course to avoid such controversial matters as the death penalty and habeas corpus reform while preserving its ability to go to conference with the Senate on its omnibus crime bill. Under considerable pressure, an omnibus crime bill was considered in the second session, combining nearly two dozen minor bills.[219]

Committee chairmen may submit amendments to their bills at the time they offer a motion to suspend the rules.[220] This is an increasingly dangerous authority since there is no requirement that such amendments be available in printed form at least one legislative day in advance. The amendments offered by chairmen need not be the amendments to which the committee agreed in reporting the bill; they could involve subsequent deals cut with other committee chairmen or individual members in order to

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[219] H.R. 4092, 103d Cong., 2d Sess. (1994).

[220] RULES OF THE HOUSE, *supra* note 16, at 696.

avoid floor controversy. This ability to control the content of amendments constitutes a further erosion in the kind of informed debate that should characterize a deliberative body.[221]

V. THE ROAD TO REFORM

In December of 1993, the Joint Committee on the Organization of Congress issued three reports: a report by the House members, a report by the Senate members, and a joint report.[222] This section will be confined to analyzing those findings and recommendations of the Joint Committee that relate to committee and floor deliberations in the House.

A. *The Joint Committee's Reform Proposals*

The Joint Committee of 1993 was formed "to address how to make Congress more effective, accountable and credible."[223] The final report of the House committee members notes that "[t]he credibility issue is largely dependent on how well improvements in Congress' effectiveness and accountability translate into improvements in its policymaking performance."[224]

The findings and recommendations of the House members support the argument that the House needs to make substantial improvements in the deliberative process to make the House a more effective and accountable policy-making body. The Joint Committee's recommendations to the House include the following:

- Institute a two-year budget cycle to permit committees to take more time to review how laws are working and to engage in more long-term planning;
- Require committees to prepare an oversight agenda at the beginning of each Congress;

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[221] For example, the Senate's Lobbying Disclosure Act of 1994, S. 349, was considered under suspension of the rules on March 24, 1994. One of the amendments to the bill had been approved only by a subcommittee of the Senate Judiciary Committee. 140 CONG. REC. H1966 (daily ed. Mar. 24, 1994).

[222] JOINT COMM. ON THE ORGANIZATION OF CONGRESS, FINAL REPORT OF THE HOUSE MEMBERS OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, 1 H.R. REP. No. 413, 103d Cong., 1st Sess. (1993) [hereinafter FINAL REPORT OF THE HOUSE MEMBERS]; JOINT COMM. ON THE ORGANIZATION OF CONGRESS, FINAL REPORT OF THE SENATE MEMBERS OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, 1 S. REP. No. 215, 103d Cong., 1st Sess. (1993); FINAL REPORT OF THE JOINT COMMITTEE, *supra* note 125.

[223] FINAL REPORT OF THE HOUSE MEMBERS, *supra* note 222, at 1.

[224] *Id.* at 2.

- Limit members to no more than two committee and four subcommittee assignments;
- Limit major committees to no more than five subcommittees and nonmajors to no more than four;
- Require the Rules Committee to consider a resolution to abolish any committee that falls below half the membership it had in the 103d Congress;
- Encourage the Speaker to designate a "primary" committee of jurisdiction in multiple referral cases and to place time limits on reporting by secondary committees after the primary committee has reported;
- Prohibit subcommittees from meeting when a full committee is meeting except by written permission of the chairman; and
- Require committee reports to include rollcall votes on reporting a measure, and publish committee attendance and voting records at least twice annually in the Congressional Record.[225]

On the matter of floor deliberations, the report notes that "[m]anaging floor procedures in the House is a balancing act between allowing for full deliberation of measures in a timely manner while preserving the ability of the majority to work its will . . . . [A] better balance can be reached between these values."[226] Yet, the House report has only one specific recommendation for accomplishing this balance—a provision that the minority be "guaranteed an alternative to all bills considered on the floor of the House through the motion to recommit with instructions" if offered by the minority leader or a designee.[227]

The House report claims that this guarantee of a minority alternative will help to give greater balance between full floor deliberation and timely action on bills. Nevertheless, this right (which dates back to 1909 and which has only recently been denied by the Rules Committee), taken alone, is no substitute for the kind of full deliberation that occurs under an open amendment process in the Committee of the Whole. Furthermore, it should not be used as an excuse for further restricting amendments in the Committee of the Whole. It is ludicrous to think that deliberative democracy can be satisfied by offering the House a choice between a majority bill and one minority alternative,

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[225] *Id.* at 4–6.
[226] *Id.* at 6.
[227] *Id.* A motion to recommit may be made in the House prior to final passage of a bill. The "instructions" may include a final amendment to the bill. *Id.*

especially since motions to recommit with instructions are subject to only ten minutes of debate.[228]

In order to "focus on and fully debate legislative activities," the House report recommends four-day work weeks with exclusive periods during which only floor or committee sessions would be permitted.[229] The House report also proposes a new House rule requiring that the Congressional Record be a substantially verbatim account of words actually spoken in the House.[230]

The House report underscores the integral nature of an open and accountable deliberative process in a democracy:

> [A] democracy depends on an informed, knowledgeable citizenry. Previously mentioned reforms will make legislative branch information more accessible to the public and will make it easier for the public to hold Members accountable for their work and to judge their effectiveness.[231]

To these ends, the House report recommends a non-binding, "sense of the House resolution" that "legislative information be more readily available . . . to Members and the public" through computer technology, and that "bills, committee reports, conference reports and amendments should be available for review at least 24 hours before consideration."[232] In addition, "the in-house, cable broadcast system should be enhanced to provide all committee hearing rooms and party cloakrooms with on-screen summaries of pending legislation."[233] The House report observes that, even though "Congress is the most open branch of government, its complexity often makes it difficult for the public to follow."[234] Accordingly, the House report recommends introducing alternative debate forms on the floor, such as Oxford Union style debates; creating a privately funded congressional education center; developing a central telephone line for information on the congressional agenda; creating civic education programs; and enhancing orientation programs for journalists covering Congress.[235]

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[228] House Rule XVI, clause 4, *reprinted in* RULES OF THE HOUSE, *supra* note 16, at 554.

[229] FINAL REPORT OF THE HOUSE MEMBERS, *supra* note 222, at 6.

[230] *Id.*

[231] *Id.*

[232] *Id.* at 8.

[233] *Id.*

[234] *Id.*

[235] *Id.*

B. *The Republican Response*

Many of the reforms proposed by the House report should enhance the deliberative process in the House. Indeed, many have long been a part of the reform agenda the House Republican Conference has offered at the beginning of each Congress for the past several decades.[236] Nevertheless, the recommendations of the Joint Committee of 1993 fall short of its original mandate "to make Congress more effective, accountable and credible."[237]

The Joint Committee's greatest omission was its failure to change House committee jurisdictions. As Joint Committee co-vice chairman David Dreier (R-Cal.) points out in his additional views in the House report, more than eighty-four percent of the members responding to the Joint Committee survey "indicated that major improvements are needed in the committee system."[238] According to Dreier:

> Deliberation is the essential element of democratic government and, as Norm Ornstein of the American Enterprise Institute points out, "The committee system is the linchpin of the deliberative process."[239]

Dreier characterized the existing committee jurisdiction system as "one of the most critical institutional impediments to the ability of Congress to respond effectively to the contemporary issues facing the Nation," and refusal to address it as the "the Joint Committee's greatest failure."[240] He attributed this failure to "pressure from a strong faction of the Democratic Caucus" on the House Democratic members of the Joint Committee.[241] Dreier concluded that if the House and Senate do not address their jurisdictional problems now, Congress "may drift for years without resolving this major cause of organizational gridlock."[242]

At the Joint Committee's request, the Congressional Research Service presented the Committee with fourteen options for restructuring House and Senate committee jurisdictions.[243] Yet, the

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[236] *See, e.g.*, 139 CONG. REC. H17–24 (daily ed. Jan. 5, 1993) for the text of the Republican Substitute to the House Rules for the 103d Congress; many of the reforms described in subpart V.B can be found in this substitute.
[237] *Id.* at 1.
[238] *Id.* at 156.
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*

chairman's markup document proposed no changes to committee jurisdiction. Moreover, on a six-six party-line vote, the Joint Committee rejected Rep. Dreier's proposal to reduce from twenty-two to sixteen the number of House standing committees and to rationalize, streamline, and modernize their jurisdictions.[244]

The Joint Committee rejected another significant reform proposal along party lines: the abolition of proxy voting. Joint Committee members offered three separate amendments on this issue: (1) to abolish all committee and subcommittee proxy voting; (2) to abolish it only at the full committee level; and (3) to prohibit it in cases in which the proxies would be decisive.[245] Joint Committee member Robert S. Walker (R-Pa.) described the impact of proxy voting on the deliberative process:

> By not participating in the debate which leads to the reporting of a measure to the House floor, Members are demeaning the deliberative process, with the anomalous result that absent Members who know little about the measure on which they are voting by proxy can and often do overturn the votes of these informed Members who did fully join in the debate before their committee.[246]

Joint Committee members rejected other proposed reforms of committee procedures that were designed to enhance representative deliberation. The rejected proposals included: requiring committee party ratios to reflect the party ratio of the House, abolishing one-third quorums, prohibiting closed committee meetings except for national security or personal privacy reasons, allowing for broadcast coverage of any public hearing or meeting, and providing the minority with one-third of committee staff.[247]

House members rejected proposals that would enhance the deliberative value of floor debates. These proposals included: (1) requiring a three-fifths House majority to waive House rules relating to such important requirements as the three-day layover requirements on committee and conference reports; (2) requiring a three-fifths vote to adopt any special rule restricting the offering of germane amendments to bills; (3) allowing the minority to offer one amendment directly to a special rule and make

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[244] *Id.*

[245] *Id.* at 158.

[246] *Id.*

[247] *See* JOINT COMM. ON THE ORGANIZATION OF CONGRESS, BUSINESS MEETINGS ON CONGRESSIONAL REFORM LEGISLATION, S. DOC. NO. 320, 103d Cong., 1st Sess. 347–667 (1993).

additional amendments in order; (4) requiring rollcall votes on final passage of appropriations, tax and debt limit bills, budget resolutions, and conference reports on such measures; (5) prohibiting the consideration of a bill under suspension of the rules unless: (a) the committee of jurisdiction or the chairman and ranking minority member have authorized it, (b) the measure does not authorize or appropriate more than $50 million in any fiscal year, and (c) advance written notice is given in the Congressional Record, and printed copies of the measure and any amendments are available at least one calendar day in advance of consideration.[248]

VI. CONCLUSION

One of the greatest ongoing challenges confronting Congress is adapting to an increasingly complex and burdensome workload while retaining its representative, deliberative, and democratic character. Within the first quarter-century of the Republic, Congress found that delegating a major share of the workload to standing committees was a necessary response to this challenge. Ensuring that the committee system remained responsive to the full Congress and to the public has been a central objective of congressional reform efforts since the beginning of the committee system.

With the fall of both Czar Speaker Joseph Cannon and the so-called King Caucus in the first two decades of the twentieth century, committee government once again became the dominant mode in the House, much as it had been prior to 1890. Woodrow Wilson's criticism of congressional committees in 1885 remains true today: the work of the committees has become government by committee chairmen. The process is fragmented and not responsive to party leadership or doctrine. Congressional committees are criticized as neither deliberative nor democratic; autocratic committee chairmen rule both in committee and on the floor.

The House reform revolution of the 1970s radically altered the committee system by reining in committee chairmen while giving more freedom to subcommittee chairmen. Subcommittees proliferated as did members' assignments, jurisdictional overlap,

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[248] *Id.*

and conflict among committees. The rise of subcommittee government shifted more of the deliberative burden to the full House; members saw the subcommittee system as even more fragmented and less representative than the old committee system and felt little obligation to respect and support subcommittee actions once legislation reached the House floor.

The post-reform House of the 1980s and 1990s gradually concentrated more authority in the majority leadership through new scheduling flexibility, party policy task forces, and the Rules Committee. The object was to reduce floor deliberation and conflict by providing a means to include majority party members in leadership's efforts to resolve legislative problems at the early stages of the process.

The victim of these post-reform changes has been deliberative democracy, or the open and accountable exchange of ideas and alternatives that ideally leads to consensus-building within the Congress and among members of the public. Meaningful deliberation on major issues has largely been driven underground, out of sight of the public and the press. It can be found neither in the committee rooms nor on the House floor. As decision-making has retreated behind closed doors, congressional decision-making has become rule by the majority leadership, who effectively prevent members of the minority party from making significant changes to the majority agenda. Because the minority party is excluded, deliberative democracy and public confidence in the Congress have declined.

The restoration of deliberative democracy must begin with the restoration of a strong, effective, representative, responsive, and open committee system. The choice need not be made between party government and committee government. Both the President and the party leadership in Congress have a responsibility for initiating policies and setting legislative agendas. However, neither can replace the role of committees in sifting and refining those policies or the role of the full House in openly and honestly debating and perfecting the work of committees. The ultimate test of any congressional reform effort is its ability to reconcile and integrate the essential roles played by the Executive, the congressional leadership, the committees, and the two Houses in forging national policies that effectively deal with current problems and are acceptable to and supported by the public. Congressional commitment to return to deliberative democracy will be measured by the openness of congressional

debates over institutional reform. In 1974, the decisive deliberations on another House reform effort were conducted behind the closed doors of majority party caucuses; deliberative democracy and meaningful House reform were the losers.

The Joint Committee on the Organization of Congress of 1993 has taken some important steps in the direction of meaningful congressional reform that meet this test. As the House report of the Joint Committee concedes, however, its recommendations are merely "the first step in making the institution more effective, accountable, and credible."[249] These efforts "must continue as the recommendations proceed through full Chamber deliberation, and as reform efforts on other aspects of the institution move forward."[250]

The current Congress could overcome the failures of past reform efforts if the lessons of the past and the challenges of the future impress the House with the need to restore deliberative democracy in order to preserve America's grand experiment in self-government.

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[249] *Id.* at 8.
[250] *Id.*

ARTICLE

STITCHING THE HOLE IN THE PRESIDENT'S POCKET: A LEGISLATIVE SOLUTION TO THE POCKET-VETO CONTROVERSY

CONGRESSMAN BUTLER C. DERRICK, JR.*

After surveying the historical use of the pocket veto and analyzing Supreme Court and lower federal court precedents, the author concludes that the pocket veto is unavailable to the President during intrasession and intersession adjournments because the President retains the ability to return the bill to an agent of the house of origin. He argues that the pocket veto is only available when Congress has adjourned sine die *at the end of a term. Although the federal courts have thus far adhered to this interpretation of the Constitution's pocket-veto clause, the author seeks more permanent resolution of the controversy. The Article closes with a discussion of the author's proposed legislation to codify and clarify the availability of the pocket veto.*

During the past seventy years considerable confusion and controversy have surrounded the question of precisely when a President of the United States may constitutionally disapprove acts of Congress by use of the "pocket veto."[1] Although the Supreme Court addressed the issue in the 1929 *Pocket Veto Case*,[2] a subsequent decision only nine years later[3] so undermined the Court's previous ruling that both Houses of Congress reacted by passing a bill to repeal several acts previously pocket-vetoed in case those acts might be considered viable.[4]

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[1] "Non-approval of a legislative act by the president or state governor, with the result that it fails to become a law. Such is not the result of a written disapproval (a veto in the ordinary form), but rather by remaining silent until the adjournment of the legislative body, where that adjournment takes place before the expiration of the period allowed by the constitution for the examination of the bill by the executive." BLACK'S LAW DICTIONARY 1403 (5th ed. 1979).

[2] 279 U.S. 655 (1929).

[3] Wright v. United States, 302 U.S. 583 (1938).

[4] H.R. 3233, 76th Cong., 1st Sess. (1939). President Roosevelt vetoed the bill on June 11, 1940, and the House of Representatives sustained his veto on August 5, 1940. *See infra* notes 42–53 and accompanying text.

In the last twenty-five years abuses of the pocket veto have led members of Congress to try to resolve the controversy, both through litigation and legislation. The lower federal courts have generally upheld Congress's position that the pocket veto is not available during brief intra- and intersession adjournments where the House of origin appoints an agent to receive veto messages from the President.[5] Only one of these lower-court rulings has reached the Supreme Court. In the mid-eighties the Court had an opportunity to resolve the controversy via a suit brought by several members of Congress,[6] but the Court avoided the issue, dismissing the case as moot.[7]

In recent years members of both Houses have introduced legislation defining the type of adjournment that prevents the President from returning a bill.[8] Although the Senate passed such legislation in 1868,[9] since then no similar legislation has reached the floor of either House. As the House sponsor in the present and the past three Congresses of legislation to clarify the law governing the President's use of the pocket veto, I believe the time has come for Congress to act and, hopefully, to settle the controversy once and for all.

Part One of this Article examines the pocket-veto controversy in light of the veto's history and purpose and reviews the current status of the impasse between the Congress and the President. Part Two analyzes the author's proposed legislative solution and exhorts the Congress to assert itself in spirited defense of its constitutional rights.

I. The Pocket-Veto Controversy

The pocket-veto controversy stems from ambiguity inherent in a key sentence in the Constitution. The so-called "veto clause" states in pertinent part:

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[5] *See* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976); Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated and dismissed sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

[6] Barnes v. Kline, 759 F.2d 21.

[7] Burke v. Barnes, 479 U.S. 361.

[8] *See* S. 1642, 92d Cong., 1st Sess. (1971); H.R. 6225, 92d Cong., 1st Sess. (1971); H.R. 7386, 93d Cong., 1st Sess. (1973); H.R. 3141, 100th Cong., 1st Sess. (1987); H.R. 849, 101st Cong., 1st Sess. (1989); H.R. 851, 101st Cong., 1st Sess. (1989); H.R. 3462, 101st Cong., 1st Sess. (1989); H.R. 849, 102d Cong., 1st Sess. (1991); S. 422, 102d Cong., 1st Sess. (1991); H.R. 849, 103d Cong., 1st Sess. (1993).

[9] S. 366, 40th Cong., 2d Sess. (1868); Cong. Globe, 40th Cong., 2d Sess. 2078 (1868).

> Every Bill which shall have passed the House of Representatives and Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law . . . . *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.*[10]

The fundamental question is this: which adjournments of Congress, if any, "prevent" the return of a bill within the meaning of the last sentence of the clause? Pocket vetoes are absolute; the Congress by definition has no opportunity to override. Thus, the question goes to the essence of Congress's role in our system of government.

That the Constitution grants the President veto power at all is remarkable considering the historical context of the drafting process. As one justification for the Revolution the founding fathers cited the refusal of King George III to grant his "Assent to Laws most wholesome and necessary for the public Good."[11] Several delegates to the Philadelphia convention, fearing the absolute veto possessed by the king and exercised repeatedly against their interests by colonial governors, sought to give the President no veto power at all.[12] Only two states had direct experience with the veto power; the constitutions of New York and Massachusetts granted their chief executives a qualified veto.[13] Nonetheless, the delegates assented quickly to some form of presidential veto, and the debate that followed focused upon whether the veto should be limited or absolute.

[10] U.S. CONST. art. I, § 7 (emphasis added).

[11] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[12] THE RECORDS OF THE FEDERAL CONVENTION OF 1787 98–99 (Max Farrand ed., 1911) [hereinafter 1787 CONVENTION].

[13] Richard A. Watson, *Origins and Early Development of the Veto Power*, 17 PRESIDENTIAL STUD. Q. 401, 405 (1987). *See* N.Y. CONST. of 1777; MASS. CONST. of 1780.

Alexander Hamilton, the leading proponent of a strong chief executive and central government, argued in favor of an absolute veto, but that concept was unanimously rejected.[14] James Madison and others pressed successfully for a qualified veto, believing that the President would rarely use it unless he had at least some support in the Congress.[15] After some equivocation, the convention settled upon two-thirds as the margin needed in each House to override a veto.[16]

The new presidential veto devised by the delegates resembled New York's gubernatorial veto power in all respects but one: under the federal system bills received by the President within ten days prior to adjournment could be absolutely vetoed, rather than returned to the reconvened legislature as was done in New York.[17] This departure had the effect of granting the President an absolute veto whenever the House of origin adjourns before the ten-day period elapses.

The purpose of this departure from the New York model was not to broaden the President's veto power; it was to defend the President against the possibility that Congress, which controls its own calendar, could adjourn, thereby cutting short the President's ten-day period for consideration of bills.[18] Thus, the veto clause imposes reciprocal obligations on the President and Congress: the President must decide within a relatively brief period whether to sign or veto a bill, and may not postpone a decision indefinitely (which would lead to a *de facto* absolute veto); conversely, Congress may not deprive the President of the benefit of that review period, or foreclose his option to veto, by adjourning suddenly.[19]

As President, James Madison cast the first pocket veto in 1812 and cast another in 1816; these first pocket vetoes attracted little attention.[20] The next President to use the pocket veto, however, created a firestorm. Andrew Jackson used the pocket veto in seven of his twelve vetoes;[21] in fact, the term "pocket veto" was

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[14] 1787 CONVENTION, *supra* note 12, at 103.
[15] *Id.* at 99–100.
[16] *Id.* at 587.
[17] ROBERT J. SPITZER, THE PRESIDENTIAL VETO 16 (1988).
[18] Charles L. Black, Jr., *Some Thoughts on the Veto*, LAW & CONTEMP. PROBS., Spring 1976, at 87, 101.
[19] *See* Pocket Veto Case, 279 U.S. 655 (1929).
[20] SPITZER, *supra* note 17, at 107.
[21] *Id.*

coined during the Jackson Administration.[22] Critics denounced Jackson's use of the pocket veto to deprive "Congress . . . of their constitutional right of passing on [a] bill, after the President had exercised his powers."[23]

Use of the pocket veto persisted and grew more frequent. Between 1812 and 1929, when the Supreme Court first issued a ruling on the pocket veto, Presidents used the pocket veto a total of 478 times.[24] Throughout that period, congressional and executive practice suggested that both branches generally construed the veto clause to permit pocket vetoes only at the end of a congressional session.[25] Presidents used the pocket veto during intrasession recesses and adjournments only seven times between 1812 and 1929, and even those uses stirred controversy. For example, President Andrew Johnson used the pocket veto to block four bills presented to him shortly before intrasession adjournments.[26] The Senate Judiciary Committee responded by reporting a bill to regulate the presentation of bills and their return to Congress.[27] The legislation passed the Senate[28] but died in a House committee. In 1892 President Benjamin Harrison consulted his Attorney General about whether he could pocket-veto a bill during a thirteen-day adjournment of the 52nd Congress. The Attorney General advised the President that the recess qualified as an "adjournment," but recommended that he return any bills with objections after Congress reconvened and let the courts settle any disputes.[29]

In 1929 the question finally reached the Supreme Court. The facts of the *Pocket Veto Case*[30] were as follows: the 69th Congress had passed a Senate bill authorizing certain Indian tribes in the state of Washington to present claims to the Court of Claims.[31] The Senate presented the bill to President Coolidge on June 24, 1926. On July 3, 1926, the Congress adjourned its first

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[22] Clement E. Vose, *The Memorandum Pocket Veto*, 26 J. POL. 397, 398 (1964).

[23] 10 CONG. DEB. 18 (1834) (quoted in SPITZER, *supra* note 17, at 107).

[24] SENATE LIBRARY, PRESIDENTIAL VETOES, 1789–1988, 102d Cong., 2d Sess. ix (1992) [hereinafter PRESIDENTIAL VETOES, 1789–1988]. The total includes all pocket vetoes by Presidents Madison through Coolidge.

[25] Note, *The Pocket Veto Reconsidered*, 72 IOWA L. REV. 163, 169 (1986).

[26] PRESIDENTIAL VETOES, 1789–1988, *supra* note 24, at 36–37.

[27] S. 366, 40th Cong., 2d Sess. (1868). *See* CONG. GLOBE, 40th Cong., 2d Sess. 1204 (1868).

[28] CONG. GLOBE, 40th Cong., 2d Sess. 2078 (1868).

[29] 20 Op. Att'y Gen. 503, 507–08 (1892).

[30] 279 U.S. 655 (1929).

[31] S. 3185, 69th Cong., 1st Sess. (1926).

session; the second session would not convene until December of that year. Consequently, neither House was in session on July the tenth day (excluding Sundays) after the bill was presented to the President. Coolidge neither signed the bill nor returned it to the Senate, and the bill was not published as a law.

The following year the tribes filed a petition in the Court of Claims as authorized by the prior legislation. The government opposed the petition on the grounds that the bill had not become a law. The tribes contended that the measure had become a law without the President's signature.

The Supreme Court ruled that the bill had not become a law, thus upholding the pocket veto's use during a lengthy adjournment between two sessions of a Congress.[32] The Court rejected the argument that the President, by returning the bill to an officer or agent, could give Congress the opportunity to override at the start of the next annual session.[33] The Court noted that Congress had never enacted a statute authorizing an agent to accept returned bills, and that even if it had, such a delivery "would not comply with the constitutional mandate."[34] The Court also objected to a bill being kept "in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid."[35]

In 1936 the Supreme Court reached a different result in the next decision interpreting the pocket veto. *Wright v. United States*[36] addressed the issue of vetoes during intrasession adjournments. The case involved a Senate bill that granted jurisdiction to the Court of Claims to adjudicate certain claims against the United States.[37] The Senate presented the bill to President Roosevelt on April 24, 1936, and then recessed from May 4 to May 7 while the House remained in session. On May 5 the President returned the bill to the Secretary of the Senate with a message outlining

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[32] 279 U.S. at 691–92.

[33] *Id.* at 683–84. The Court explained that the House, which was not in session when the bill was delivered to the agent, could not have received the bill and objections at that time, nor entered the objections upon its journal, nor proceeded to reconsider the bill, as the Constitution requires. The Court further noted that nothing in the Constitution authorizes either House to make a *nunc pro tunc* record of the return of a bill as of a date on which it had not, in fact, been returned. *Id.* at 684.

[34] *Id.*

[35] *Id.*

[36] 302 U.S. 583 (1938).

[37] S. 713, 74th Cong., 1st Sess. (1936).

his objections. On May 7 the Senate reconvened and the Secretary advised the body of his receipt of the bill and the President's message, both of which were referred to the Senate Committee on Claims.[38] The Senate took no further action on the veto message.

When Wright subsequently petitioned the Court of Claims, the government opposed the petition on the grounds that the bill had not become law. The Supreme Court held that the bill had been returned properly to the Senate but had failed to become law in the absence of a successful override vote. The Court specifically stated that return through an agent, previously considered insufficient in the *Pocket Veto Case*, would now suffice:

> The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.
>
> Nor was there any practical difficulty in making the return of the bill during the recess. The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill . . . . There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence . . . . To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.[39]

The *Wright* Court held that the veto clause has two fundamental purposes: to provide the President with an opportunity to consider legislation presented to him, and to afford Congress the opportunity to consider presidential objections to bills and to pass such bills over his veto if its members can muster the requisite two-thirds vote in each House.[40] The Court wrote that it "should not adopt a construction which would frustrate either of these purposes."[41]

The *Wright* Court's practical analysis, which upheld delivery of a vetoed bill to an agent during brief recesses, undermined

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[38] 302 U.S. at 585–86.
[39] *Id.* at 589–90.
[40] *Id.* at 596 (citing Edwards v. U.S., 286 U.S 482, 486 (1932)).
[41] *Id.*

the rationale of the decision in the *Pocket Veto Case.* In 1939 the House reacted by approving[42] legislation proposed by the chairman of its Judiciary Committee, Representative Hatton Sumners of Texas (who had appeared as *amicus curiae* in the *Pocket Veto Case*), "to repeal certain Acts of Congress [previously pocket-vetoed]."[43] Chairman Sumners feared that the *Wright* Court's approval of delivery to an agent, which had been expressly rejected in the *Pocket Veto Case,* could lead to a future determination that at least some of the bills pocket-vetoed between the two decisions were viable.[44] So Sumners proposed legislation to repeal the bills as of their date of enactment, in order to ensure that they "stay[ed] dead."[45] In its favorable report on the bill, the Judiciary Committee said that the legislation would

> remove any uncertainty as to the vitality or lack of it of measures passed by both Houses of Congress . . . and which were pocket vetoed, both . . . during sessions of Congress and after the adjournment of such sessions.[46]

The committee also wrote:

> [I]t is considered as not too much to hope for that if [H.R. 3233] becomes law, thus removing all possibility of reviving these pocket-vetoed bills, and each of the Houses of Congress will designate an official to receive for it bills to which the President may object, the Court upon a reexamination . . . may hold that recesses and adjournments during the life of a Congress are not such adjournments as "prevent" a return by constructive delivery to the House of origin of an objected-to bill.[47]

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[42] 84 CONG. REC. 2761 (1939).

[43] H.R. 3233, 76th Cong., 1st Sess. (1939).

[44] *See* 86 CONG. REC. 9886 (1940) (statement of Rep. Sumners).

[45] *Id.*

[46] H.R. REP. No. 16, 76th Cong., 1st Sess. 1 (1939).

[47] *Id.* at 2. The House debate on H.R. 3233 reveals that Chairman Sumners and his committee hoped the Supreme Court was moving toward the view that the pocket veto applied only after the final *sine die* adjournment of a Congress, the position the Chairman had advocated as *amicus curiae* in the *Pocket Veto Case.* The committee clearly sought to facilitate such a movement via H.R. 3233. The Chairman noted during debate on the bill that one of the difficulties he had faced in 1929 was the "119 pocket-vetoed bills . . . which a determination favorable to [the Committee's] position in theory, at least, would vitalize." 84 CONG. REC. 2760 (1939) (statement of Rep. Sumners). The Chairman explained that the purpose of the bill was

> to eliminate any embarrassment which might result from the possibility of reviving bills which have long since been considered as dead, and to make it possible for the Court to consider the issue *de novo* . . . without any embarrassment as to contingent consequences.

Id. at 2761.

The Senate passed H.R. 3233 on May 28, 1940, without debate or amendment.[48]

On June 11, 1940, President Roosevelt vetoed the Sumners bill. In his message[49] the President suggested that he had vetoed the bill because it was

> based on an interpretation of the constitutional pocket-veto power . . . much narrower than that which has been placed upon it by continuous usage for over a century and which has met the express sanction of the Supreme Court. In fact, it would render the authority of the President to pocket veto bills almost nugatory.[50]

Roosevelt argued that the legislation assumed that the President has no power to pocket-veto except after a final adjournment of a Congress,[51] a point he was obviously unwilling to concede.[52] On August 5, 1940, a sparsely attended House sustained the veto by a nine-vote margin.[53]

Between 1938 and 1970, Presidents pocket-vetoed seventy-one bills during intrasession adjournments, notwithstanding the *Wright* decision.[54] Congress acquiesced in each of the vetoes, probably because of the relative insignificance of the legislation involved.[55]

The controversy lay dormant until 1970, when President Nixon vetoed the Family Practice of Medicine Act[56] during the Senate's five-day intrasession Christmas recess. The bill had passed both Houses overwhelmingly and probably would have been enacted over a regular veto had the President used one.[57] Senator Edward M. Kennedy of Massachusetts, a leading proponent of the act,

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[48] 86 CONG. REC. 6996 (1940).

[49] H.R. Doc. No. 828, 76th Cong., 3d Sess. (1940).

[50] *Id.* at 1.

[51] *Id.* at 2.

[52] But the President was willing to concede as much of his pocket-veto power as the *Wright* decision appeared to take away. His veto message suggested "an entirely different question would be presented" had H.R. 3233 been limited to the bills which had been pocket-vetoed during short recesses within sessions of Congress. *Id.*

[53] 86 CONG. REC. 9885, 9889 (Aug. 5, 1940). The vote was 185–105, with 141 not voting.

[54] *See generally* PRESIDENTIAL VETOES, 1789–1988, *supra* note 24, at 297–455.

[55] Comment, *The Veto Power and* Kennedy v. Sampson*: Burning a Hole in the President's Pocket*, 69 NW. U. L. REV. 587, 602 (1974).

[56] S. 3418, 91st Cong., 2d Sess. (1970).

[57] Edward M. Kennedy, *Congress, the President, and the Pocket Veto*, 63 VA. L. REV. 355, 378 (1977). The Senate passed the bill by a vote of 64-1. 116 CONG. REC. 31,508 (1970). The House passed a companion measure, H.R. 19599, 91st Cong., 2d Sess. (1970), by a vote of 346-2. 116 CONG. REC. 39,379–80 (1970). Both votes easily exceeded the two-thirds margin needed to override a return veto.

sued for a declaratory judgment that the bill had become law and for a mandamus ordering that it be promulgated as a statute.[58]

The U.S. District Court for the District of Columbia held for the Senator, ruling that the defendants were under a "ministerial, nondiscretionary duty to publish said law . . . ."[59] The U.S. Court of Appeals for the District of Columbia Circuit affirmed and held the pocket veto unconstitutional, relying on the logic in the *Wright* decision to lay down a general rule:

> [A]n intrasession adjournment of Congress does not prevent the President from returning a bill which he disapproves so long as appropriate arrangements are made for the receipt of presidential messages during the adjournment.[60]

The circuit court distinguished the *Pocket Veto Case* on two grounds. First, the court said that modern intrasession adjournments are much shorter than the intersession adjournment at issue in the *Pocket Veto Case*. Second, the court noted that

> [m]odern methods of communication make it possible for the return of a disapproved bill to an appropriate officer . . . to be accomplished as a matter of public record accessible to every citizen. The status of such a bill would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session.[61]

The *Sampson* court's expansive decision extended the Supreme Court's reasoning in *Wright* and effectively limited the pocket veto to intersession adjournments. The Nixon Administration declined to appeal the ruling; the bill was published as a law in 1975[62] and backdated to December 25, 1970, the expiration of the ten-day period.[63]

After President Nixon's purported pocket veto that led to the *Sampson* decision, legislation was introduced in both Houses of

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[58] The defendants in the suit were the Acting Administrator of General Services and the Chief of White House Records. Kennedy v. Sampson, 364 F. Supp. 1075 (D.D.C. 1973), *aff'd* 511 F.2d 430 (D.C. Cir. 1974).

[59] Kennedy v. Sampson, 364 F. Supp. at 1087.

[60] Kennedy v. Sampson, 511 F.2d 430, 437 (D.C. Cir. 1974).

[61] *Id.* at 441.

[62] Pub. L. No. 91-696, 84 Stat. 2080-1 (1970).

[63] LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 152 (1985).

Congress to resolve the issue; however, no such legislation was enacted.[64]

Almost simultaneously with his victory in *Sampson*, Senator Kennedy challenged two other pocket vetoes, one during a twenty-nine-day intersession adjournment in January 1974 and another during a thirty-one-day intrasession adjournment in October 1974. In the first instance, Congress passed a mass-transit bill[65] and presented it to the President on December 22, 1973, the same day the 93rd Congress adjourned its first session *sine die*. On January 3, 1974, President Nixon issued a statement announcing he had pocket-vetoed the bill, which he did not return.[66] Later that year Congress enacted similar legislation and President Ford signed it into law on August 22, 1974.[67]

In the second instance, Congress presented to President Ford an aid-to-the-handicapped bill[68] on October 17, 1974, and that same day adjourned for thirty-one days for the 1974 congressional elections. On October 29, 1974, the President returned the bill to the Clerk of the House with a message stating that by withholding his signature he had prevented the bill from becoming law.[69] On November 20, 1974, the House voted 398 to 7 to

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[64] In the Senate, Senator Sam Ervin, Chairman of the Judiciary Committee, introduced S. 1642, 92d Cong., 1st Sess. (1971), "to implement article I, section 7 of the Constitution." The bill would have defined "adjournment" as used therein as a *sine die* adjournment. Representative Emanuel Celler, chairman of the House Judiciary Committee, introduced a similar bill, H.R. 6225, 92d Cong., 1st Sess. (1971). Neither bill was reported by either committee. In May 1974, shortly before the *Sampson* decision was announced, the House Judiciary Committee approved a bill "to provide a rule in cases of the 'pocket veto' for the implementation of section 7 of article I of the Constitution of the United States." H.R. 7386, 93d Cong., 2d Sess. (1974). That bill also would have limited the pocket veto to *sine die* adjournments. One may assume that the House never took up H.R. 7386 in the belief that the *Sampson* case had settled the matter once the Administration declined to appeal.

[65] H.R. 10511, 93d Cong., 1st Sess. (1973).

[66] 119 CONG. REC. 43,328 (1974).

[67] Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 813(a), (c), 88 Stat. 633, 633–35 (1974).

[68] H.R. 14225, 93d Cong., 2d Sess. (1974).

[69] H.R. Doc. No. 381, 93d Cong., 2d Sess. (1974). The President also returned four other bills during this recess with similar messages. H.R. 6624, 93d Cong., 2d Sess. (1974), H.R. Doc. No. 378, 93d Cong., 2d Sess. (1974); H.R. 7768, 93d Cong., 2d Sess. (1974), H.R. Doc. No. 379, 93d Cong., 2d Sess. (1974); H.R. 11541, 93d Cong., 2d Sess. (1974), H.R. Doc. No. 382, 93d Cong., 2d Sess. (1974); and H.R. 13342, 93d Cong., 2d Sess. (1974), H.R. Doc. No. 380, 93d Cong., 2d Sess. (1974). In each case the House considered the veto a regular veto.

The President's return of these bills probably constituted a back-up strategy in the event of a court challenge. If Congress did not vote to override (as in fact was the case for each of the bills except H.R. 14225), the Administration could have claimed in court that the pocket veto issue was moot since the bill in question could not have become law. Kennedy, *supra* note 57, at 378 n.92.

pass the bill over the veto; the Senate voted 90 to 1 the following day. However, the Administration refused to publish the bill as a law.[70] Congress then passed an identical bill which the President signed into law on December 7, 1974.[71]

After disposing of threshold issues,[72] the trial court entered a consent judgment against the Administration, thus invalidating both disputed pocket vetoes.[73]

As the Administration considered its position during the suit, Attorney General Edward Levi advised President Ford that the Administration was unlikely to prevail and that continued use of the pocket veto during intrasession and intersession recesses or adjournments, where an agent had been authorized to receive return vetoes, was not consistent with the Constitution.[74] Levi recommended that the President authorize the Justice Department to accept judgment on the merits, and attached to his own memorandum an extensive memorandum prepared by Solicitor General Robert H. Bork that outlined the reasoning behind Levi's recommendation.[75] Levi concluded that return is prevented only

> (1) during a recess when no agent of the originating House is available to accept the return, or (2) during the period following the final adjournment of one Congress and preceding the convening of another. In all other cases, Congress would in fact be able to consider the President's objections

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The fact that the President was able to return bills to the Clerk of the House with messages claiming he had pocket-vetoed them demonstrated the absurdity of the President's position. Writing later about the litigation, Senator Kennedy described the Administration as a "victim of its own strategy; it was making the awkward claim that the adjournment of Congress had prevented the return of the bill even though the bill had in fact been returned to Congress." *Id.* President Ford may have returned the bills to prevent them from being declared laws in the event the attempted pocket vetoes were held invalid. Comment, *supra* note 55, at 603, 604 n.67. President Bush returned bills during intrasession recesses with messages making similar claims. *See infra* text accompanying notes 96, 106.

[70] *See* Kennedy v. Jones, 412 F. Supp. 353, 355 (D.D.C. 1976).

[71] Rehabilitation Act Amendments of 1974, Randolph-Sheppard Act Amendments of 1974, and White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, 88 Stat. 1617 (1974).

[72] The court rejected the Administration's claims that (1) Senator Kennedy lacked standing to challenge the actions and (2) since Congress had subsequently enacted identical legislation, which the President signed, the case was moot and no justiciable controversy existed. Kennedy v. Jones, 412 F. Supp. at 355–56.

[73] *Id.* at 356.

[74] Letter from Att'y Gen. Edward M. Levi to President Ford (Jan. 29, 1976) [hereinafter Levi Letter], *in Pocket Veto Legislation: Hearings on H.R. 849 Before the Subcomm. on the Legislative Process of the House Comm. on Rules*, 101st Cong., 1st Sess., at 140–42 (1989) [hereinafter *Rules Hearing*].

[75] Memorandum from Solicitor Gen. Robert H. Bork to Att'y Gen. Edward M. Levi (Jan. 26, 1976), *in Rules Hearing*, *supra* note 74, at 125–39 [hereinafter Bork Memorandum].

> and complete the legislative process by overriding or sustaining the veto. This construction is in accord with the clear intent of the Framers that the President exercise only a "qualified negative" over proposed legislation, and not the "absolute negative" implicit in the pocket veto.[76]

Under the terms of the consent agreement, President Ford announced that he would not use the pocket veto during intra- and intersession adjournments where Congress had appointed agents to receive veto messages.[77] President Carter also honored the terms of this agreement.

President Reagan, however, repudiated the consent agreement almost immediately. After the first session of the 97th Congress adjourned, President Reagan withheld his signature from H.R. 4353, a bill to amend the Federal Bankruptcies Act of 1978. He sent the Congress a message on January 6, 1982, asserting that he had pocket-vetoed the measure.[78]

After the 98th Congress adjourned its first session, President Reagan again failed to return a bill and claimed to have cast a valid pocket veto. The legislation in question, H.R. 4042, would have extended certain existing conditions on aid to El Salvador during fiscal-year 1984.[79]

Representative Michael Barnes, the chief sponsor of H.R. 4042, sued, claiming that the President's alleged pocket veto was ineffective. He was joined by thirty-three other Representatives, the Speaker of the House, the bipartisan House leadership, and the Senate.[80] The trial court upheld the President's action, relying on the *Pocket Veto Case*.[81]

On appeal, however, the circuit court reversed.[82] The U.S. Court of Appeals for the District of Columbia Circuit, relying on *Wright* and *Sampson*, held that modern intersession adjournments do not prevent the return of bills where authorized agents

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[76] Levi Letter, *supra* note 74, at 141 (citations omitted).

[77] *See* 122 CONG. REC. 11,202 (1976).

[78] *See* 127 CONG. REC. 31,894 (1982).

[79] H.R. 4042, 98th Cong., 1st Sess. (1983).

[80] Barnes v. Carmen, 582 F. Supp. 163 (D.D.C. 1984), *rev'd sub nom.* Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). The 33 Representatives sued individually and as House members. The Speaker and the bipartisan leadership group intervened in their official capacities. The Senate voted to intervene by resolution. S. Res. 313, 98th Cong., 2d Sess. (1984), 130 CONG. REC. 566–67 (1984).

[81] Barnes v. Carmen, 582 F. Supp. at 168.

[82] Barnes v. Kline, 759 F.2d 21, 40 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

are available to receive veto messages.[83] The court emphasized that changes in congressional practices have effectively eliminated the twin dangers of delay and uncertainty that troubled the Supreme Court in the *Pocket Veto Case*.[84] As to delay in reconsideration, the court observed that modern intersession adjournments are much shorter than in the 1920s, averaging only about four weeks (compared to the five-month adjournment in the *Pocket Veto Case*).[85] The court noted also that Congress can reconsider a bill returned during an intersession adjournment immediately upon reconvening since House and Senate rules provide for the carryover of unfinished legislative business of the preceding session.[86] As to public uncertainty over a bill's status, the court found that both Houses have now established procedures for agents to accept veto messages during adjournments, and that such returns may "be accomplished as a matter of public record accessible to every citizen,"[87] leaving it clear that a returned bill "has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority."[88]

The Administration appealed the decision. In early 1987 the Supreme Court vacated and dismissed the case as moot since the vetoed bill by its own terms would have expired on September 30, 1984.[89] By mooting the case, the Court may have intended to return the issue to the political branches for resolution.

After the *Barnes* dismissal the Justice Department advised Senator Kennedy that it regarded the three-day limit on adjournments without the concurrence of both Houses as the "constitutionally-specified dividing line" separating adjournments that pre-

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[83] Barnes v. Kline, 759 F.2d at 41.
[84] *Id.* at 35–36.
[85] *Id.* at 36.
[86] *Id.* See House Rule XXVI, which provides that "[a]ll business before committees of the House at the end of one session will be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place." Constitution, Jefferson's Manual and Rules of the House of Representatives, H. Doc. No. 405, 102d Cong., 2d Sess. 694 (1992). Although the rule by its terms addresses business before committees, the practice of continuing business not before committees has "become so well established that no question has ever been raised." *Id.*

Senate Rule XVIII provides that "[a]t the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place." Standing Rules of the Senate, S. Doc. No. 1, 102d Cong., 1st Sess. 18 (1992).
[87] Barnes v. Kline, 759 F.2d at 37 (quoting Kennedy v. Sampson, 511 F.2d at 441).
[88] *Id.*
[89] Burke v. Barnes, 479 U.S. 361 (1987).

vent the return of a bill from those that do not,[90] thus suggesting that the President reserved the right to use the pocket veto during any adjournment longer than three days. Soon thereafter I introduced legislation in the House of Representatives to clarify that the pocket veto was only available at the end of a Congress,[91] but the legislation did not emerge from the House Judiciary Committee before the final *sine die* adjournment.

The election of President Bush in 1988 suggested that Congress could expect a continuation of President Reagan's policy of aggressively asserting the executive pocket veto prerogative. In February 1989 I reintroduced my legislation[92] in a form that gave the House Committee on Rules concurrent jurisdiction over it, and scheduled a subcommittee hearing.[93] At that hearing the Justice Department, representing the Administration, reiterated the view that the pocket veto was available whenever the House of origin adjourned for more than three days.[94]

Soon after the hearing, President Bush demonstrated his aggressive attitude toward the pocket veto. On August 16, 1989, during the annual August recess, the President issued a "Memorandum of Disapproval"[95] claiming that he had pocket-vetoed House Joint Resolution 390.[96] Even President Reagan had never attempted a pocket veto during an intrasession recess—an action in direct defiance of the *Sampson* decision. The joint resolution, a non-controversial measure, simply would have waived in the case of another measure[97] a statutory requirement that legislation be "printed" (on parchment) prior to presentation to the President.[98] The joint resolution had become unnecessary because the House subsequently managed to print the bill quickly. Perhaps sensing an opportunity to create a precedent, President Bush declined to sign the measure and did not return it to the House.[99]

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[90] Letter from Ass't Att'y Gen. John R. Bolton to Sen. Edward M. Kennedy (Feb. 18, 1987) (on file with the *Harvard Journal on Legislation*).

[91] H.R. 3141, 100th Cong., 1st Sess. (1987).

[92] H.R. 849, 101st Cong., 1st Sess. (1989).

[93] I have the honor to chair the Subcommittee on the Legislative Process of the House Rules Committee.

[94] *Rules Hearing*, *supra* note 74, at 61 (statement of Ass't Att'y Gen. William P. Barr).

[95] PUB. PAPERS 1090 (Aug. 16, 1989).

[96] H.R.J. Res. 390, 101st Cong., 1st Sess. (1989).

[97] H.R. 1278, 101st Cong., 1st Sess. (1989).

[98] *See* 1 U.S.C. §§ 106–107 (1988). The Bush Administration had requested this waiver to facilitate the prompt enactment of H.R. 1278 and thus minimize the mounting daily costs of the savings-and-loan crisis.

[99] Even though both Houses had passed House Joint Resolution 390 unanimously,

Congress took no official action as a body to protest the President's action. However, the Speaker and Minority Leader of the House of Representatives objected strenuously to the President. By letter dated November 21, 1989, Representatives Foley and Michel stated their belief that the President should

> communicate any such veto by a message returning the resolution to the Congress since the intrasession pocket veto is constitutionally infirm . . . .
>
> We therefore find your assertion of a pocket veto power during an intrasession adjournment extremely troublesome. We do not think it constructive to resurrect constitutional controversies long considered as settled, especially without notice or consultation. It is our hope that you might join us in urging the Archivist to assign a public law number to House Joint Resolution 390, and that you might eschew the notion of an intrasession pocket veto power, in appropriate deference to the judicial resolution of that question.[100]

Just a few days later, on November 30, 1989, after the *sine die* adjournment of the first session of the 101st Congress, President Bush claimed to have pocket-vetoed the Emergency Chinese Adjustment of Status Facilitation Act of 1989.[101] However, in this case, he returned the bill to the Clerk of the House with a "Memorandum of Disapproval" asserting that he had pocket-vetoed the bill. When Congress convened its second session, the House interpreted the President's return of the bill, with his objections, as a regular veto, as it had done under similar circumstances in 1974,[102] and voted 390 to 25 to override.[103] But the Senate fell four votes short of two-thirds, which effectively rendered moot any issues concerning the validity of the President's pocket-veto claim.[104]

Congress probably would not have overridden a return veto because the measure had become superfluous. Therefore, one must assume that the President asserted the pocket veto based neither on policy nor on political concerns that Congress might override a regular veto, but that he had some other motive. One explanation is the possibility of establishing a precedent the Administration could cite later when Congress, faced with a pocket veto flouting the *Sampson* decision, failed to react. A court challenge to the alleged pocket veto of House Joint Resolution 390 probably was not sustainable by private or congressional plaintiffs since the issue became moot when Congress printed the bill.

[100] 136 CONG. REC. H3 (daily ed. Jan. 23, 1990).

[101] H.R. 2712, 101st Cong., 1st Sess. (1989).

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

[103] 136 CONG. REC. H66–67 (daily ed. Jan. 24, 1990).

[104] 136 CONG. REC. S382 (daily ed. Jan. 25, 1990).

On January 4, 1990, Attorney General Richard Thornburgh replied to the Speaker's and the Minority Leader's letter regarding House Joint Resolution 390. The Attorney General stated the Administration's belief that under the Constitution the joint resolution did not become a law because its return was prevented, and he advised the Representatives that the "Archivist has been instructed not to treat it as a law."[105] The Attorney General asserted that *Sampson* was "incorrectly decided," and suggested that the Bush Administration would "continue to follow the executive's traditional interpretation, which is fully in accord with the Supreme Court's teaching on the subject."[106]

Reacting to the Bush Administration's provocative actions, on March 7, 1990, the House Committee on Rules approved my legislation to define the type of adjournment that prevents the return of a bill.[107] After a hearing[108] the House Judiciary Committee approved the legislation on May 22.[109] The Rules Committee subsequently approved a resolution[110] providing for the consideration of the bill on the House floor. But the House failed to consider the measure prior to its final *sine die* adjournment in October.

As he had done two years before, in August 1991 President Bush withheld his approval of a measure[111] during the summer intrasession recess, but in this instance the President chose to return the bill to the House along with a message claiming he had pocket-vetoed it. The House referred the bill and message to committee and considered it a regular veto.[112]

In December 1991 the President issued a memorandum of disapproval[113] claiming that he had pocket-vetoed the Morris K. Udall Scholarship and Excellence in National Environmental Policy Act[114] during an intrasession recess of the Senate. The President did not return the bill to the Senate. On February 4,

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[105] 136 CONG. REC. H3 (daily ed. Jan. 23, 1990).
[106] *Id.*
[107] H.R. REP. No. 417, 101st Cong., 2d Sess., pt. 1 (1990).
[108] *Pocket Veto Legislation: Hearings on H.R. 849 Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *Judiciary Hearing*].
[109] H.R. REP. No. 417, 101st Cong., 2d Sess., pt. 2 (1990).
[110] H.R. RES. 472, 101st Cong., 2d Sess. (1990).
[111] H.R. 2699, 102d Cong., 1st Sess. (1991).
[112] 137 CONG. REC. H6419 (daily ed. Sept. 11, 1991), H.R. DOC. No. 129, 102d Cong., 1st Sess. (1991). Although the House considered the President's action to be a return veto, it did not attempt an override.
[113] PUB. PAPERS 1651 (Dec. 20, 1991).
[114] S. 1176, 102d Cong., 1st Sess. (1991).

1992, the Senate passed similar legislation, which contained provisions repealing the previous measure,[115] thereby asserting the Senate's view that the first bill had in fact become law when the President neither signed nor returned it within ten days. The House passed the Senate bill without amendment on March 3, 1992.[116] President Bush signed the bill on March 19, 1992,[117] but he also issued a memorandum stating that since S. 1176 had never become law, the repeal provisions had no effect.[118]

II. Stitching the Hole in the President's Pocket

As this historical account reveals, the pocket-veto issue remains confused and unresolved. The Clinton Administration's position on the matter is unknown because President Clinton has yet to veto any act of Congress.

Should the question of the President's pocket-veto power ever be presented squarely to the Supreme Court, I believe that the Court would hold the pocket veto unavailable during interim adjournments where an agent who may accept returned bills is available. As Attorney General Levi advised President Ford in 1976, no other construction of the veto clause is consistent with the Constitution.[119] If return is possible, then it is by definition not prevented. And in all cases where the Congress that passed a bill will meet again—and therefore will be able to consider a

[115] S. 2184, 102d Cong., 1st Sess. (1992).

[116] 138 Cong. Rec. H889 (daily ed. Mar. 3, 1992). I opposed passage of S. 2184 in the House, arguing that the circumstances of the alleged veto of S. 1176 presented an excellent opportunity for Congress to pursue a judicial resolution to the controversy. 138 Cong. Rec. H889 (daily ed. Mar. 3, 1992) (statement of Rep. Derrick).

I believe that Congress should have cured the defects in S. 1176 not by effectively mooting the pocket-veto issue, but in a manner that might have led to a judicial resolution of the pocket-veto issue. I viewed the President's failure to return S. 1176, again flouting the *Sampson* decision, as a deliberate challenge. Unlike the 1989 situation with House Joint Resolution 390, *see supra*, text accompanying notes 95–100, which was a minor administrative measure upon whose "veto" arguably no plaintiff could have maintained a viable action, S. 1176 accorded rights and responsibilities to parties who could have articulated valid claims. Moreover, Congress had already appropriated $5 million in anticipation of the bill's enactment, which further enhanced prospects for successful litigation. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 102-154, 105 Stat. 990, 1026 (1991). Congressional leaders could have preserved the pocket-veto issue by amending S. 1176 directly, and even might have added provisions facilitating expeditious judicial review. The failure of Congress to pursue judicial resolution makes the legislation described in part II of this Article that much more necessary.

[117] Pub. L. No. 102-259, 106 Stat. 84 (1992).

[118] Pub. Papers 472 (Mar. 19, 1992).

[119] *See* Levi Letter, *supra* note 74 and accompanying text.

veto message—the Framers clearly intended that it have the opportunity to do so.

The Congress could simply hope that President Clinton and his successors will respect both the reasoned judgments of the lower federal courts and the right of Congress to have the last word in cases of interim adjournment. Should that hope prove to be unfounded, the Congress could rely on the courts for protection, both upon its own motions and upon those of private parties. However, I believe that such a passive course would be foolish. The pocket-veto controversy arises because of an ambiguity in Article I of the Constitution, which created the Congress and vested all legislative powers therein. Therefore, Congress clearly has the power to define the type of adjournment that prevents the return of a bill[120]—and should exercise that power as soon as possible.

The legislation I have proposed, H.R. 849,[121] is quite simple. Section 1(a) would declare that "no adjournment of either House of Congress, other than an adjournment sine die to end a Congress, prevents the return of a bill by the President."[122] In this regard H.R. 849 merely restates current law as expounded by the lower federal courts. Under modern conditions[123] it is clear that only when Congress adjourns its final session *sine die* and its members disperse, never to meet again as an assembled body, could an adjournment possibly prevent the return of a bill.[124] Therefore, any attempt to use the pocket veto during an intersession or intrasession adjournment, when return to a sitting body is possible, would be invalid.

Section 1(b) of H.R. 849 authorizes the Clerk of the House of Representatives and the Secretary of the Senate to receive veto

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[120] *See* Arthur Selwyn Miller, *Congressional Power to Define the Presidential Pocket Veto Power*, 25 VAND. L. REV. 557 (1972); Charles J. Zinn, *The Veto Power of the President*, 12 F.R.D. 207 (1951); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).

[121] H.R. 849, 103d Cong., 1st Sess. (1993), reprinted *infra*, Appendix.

[122] *Id.*

[123] "Modern conditions" means the continuation of the congressional practices cited by the *Barnes* court in distinguishing the *Pocket Veto Case*: Congress sits virtually year-round, making intersession adjournments barely distinguishable from intrasession adjournments; authorized agents are available to receive messages from the President, and there are procedures for recording and preserving those messages; and unfinished legislative business is carried over from one session of the same Congress to another. *See supra* notes 84–88 and accompanying text.

[124] In this regard it is worth emphasizing what Section 1(a) of H.R. 849 does *not* provide. It does not state, or even imply, that a final *sine die* adjournment prevents return.

messages during adjournments of their respective Houses. Currently the Clerk of the House and the Secretary of the Senate derive such authority from House Rules[125] and by order of the Senate, respectively.[126] In the *Pocket Veto Case* the Supreme Court noted that Congress had never enacted a statute authorizing an officer to accept bills returned during adjournments.[127] I believe that the authority to receive messages, already vested in the Clerk and the Secretary, effectively precludes a President from claiming he is prevented from returning bills due to the lack of

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This is extremely important. Although most commentators have generally conceded that the President may always use the pocket veto after the final, *sine die* adjournment of the Congress that passed a particular bill, *see, e.g., The Pocket Veto Reconsidered, supra* note 25, at 171, it appears that the executive branch may itself now believe otherwise, at least under certain circumstances.

Several years ago, during the Bush Administration, the Justice Department's Office of Legal Counsel expressed the opinion that where the Congress that passed a bill adjourns within 10 days of the convening of the next Congress, the President may return the bill to the new Congress, which could then conduct an override vote. 14 Op. Off. Legal Counsel 116 (1990) (Preliminary Print) (Letter from Dep. Ass't Att'y Gen. John O. McGinnis to Rep. Tom J. Campbell (May 17, 1990)).

The Justice Department's letter to Representative Campbell and its testimony at the hearing expose problems with the Department's position. On the one hand, the Department says that even a final adjournment, if occurring fewer than 10 days before the convening of the next Congress, would not prevent a bill's return to the new Congress, which could then override. This would be a remarkably expansive reading of the veto clause. But on the other hand, the Department curiously maintains that an interim adjournment of more than three days prevents a bill's return to the same Congress that passed it, and thus prevents override. These statements reveal the folly of the Department's tortured attempts to harmonize the Court's decisions in the *Pocket Veto Case* and *Wright.*

As the Justice Department has now recognized (perhaps without realizing it), the availability of the pocket veto with respect to a particular bill is determined by the adjournment status of the House of origin when the 10-day period expires and the availability of agents to accept messages, *not* by the adjournment's length. If the House of origin has not finally adjourned *sine die* and an agent is available, then the President is by definition not "prevented" from returning a bill. He ought not be permitted to exercise an absolute veto under the pretense that return is prevented merely because the House of origin is temporarily adjourned for four days instead of three.

One commentator has suggested that when Congress creates arrangements such that an adjournment does not prevent return, the pocket veto no longer has any force. Black, *supra* note 18, at 101. Black also notes that the Constitution does not conclude that an adjournment must prevent return; it merely provides for cases where it does. *Id.*

It is conceivable that in time Congresses may sit virtually year-round, with post-election ("lame-duck") sessions becoming more frequent (if not routine). Should a Congress finally adjourn *sine die* within 10 days of the commencement of the next Congress, or so late as to cause some bills to be presented within 10 days of the start of the next Congress, I know of no reason why Congress should dispute the Justice Department's opinion that even a final, *sine die* adjournment would not prevent return. Congress should not act legislatively or otherwise to foreclose that possibility. I have drafted my legislation carefully so as to avoid such an effect.

[125] *See* clause 5, House Rule III; H. RES. 5, 103d Cong., 1st Sess. (1993).

[126] *See* 139 CONG. REC. S9 (daily ed. Jan. 5, 1993).

[127] 279 U.S. 655, 684 (1929).

an agent authorized to accept them. Congress should take the precaution of enacting a permanent statutory authorization.

My legislation is entirely consistent with the "fundamental purposes" of the veto provisions as identified by the Supreme Court in *Wright*. First, the provisions ensure that the President will have at least ten days to consider bills and that the bills will not become law if Congress, which controls its own calendar, adjourns so as to prevent their return. Second, the veto provisions guarantee Congress an opportunity to consider the President's objections and enact a bill over a veto. The *Wright* Court stated, "We should not adopt a construction which would frustrate either of these purposes."[128]

The construction advanced by the Justice Department does just that: it frustrates Congress's ability to enact a bill over a veto. The construction adopted in my legislation, on the other hand, neither shortens the ten-day period for presidential consideration nor deprives the President of the right to veto any bill. My legislation merely requires the President to use a return veto when he wishes to disapprove bills during interim adjournments, thus allowing the people's representatives the opportunity to consider the President's objections and override if they so choose. This is nothing more, and nothing less, than the Framers of the Constitution intended.

No simple act of Congress can increase or detract from the President's constitutional powers. Nor can it change the meaning of the Constitution's veto clause. Once enacted, the success of H.R. 849 in resolving the pocket-veto dispute will depend in large part upon the President's willingness to accept it as a clear statement of the law and to behave accordingly. If a President disagrees with the reasoning underlying H.R. 849, it is possible that the matter might not be resolved completely until the Supreme Court speaks definitively. But it is also possible that the enactment of this legislation would eliminate the need for further litigation altogether.[129]

Congress, which controls not only its own calendar but also the presentment of bills, could foreclose any opportunity for a pocket veto during interim adjournments simply by timing presentment so that the President's ten days will not elapse during

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[128] Wright v. United States, 302 U.S. 583, 596 (1938).

[129] *Rules Hearing*, *supra* note 74, at 114 (statement of Steven R. Ross, Gen. Counsel to the Clerk of the House of Reps.).

an adjournment.[130] While consummately effective, such a tactic would needlessly delay the enactment of legislation. More importantly, it would demean both the Congress and the presidency, evincing a mutual disdain between the branches that would not well serve the republic.

The days immediately prior to the longer adjournments during and between sessions are typically when Congress passes most of its substantial legislation. The Reagan and Bush Administrations' construction of the veto clause would give the President absolute veto authority over the most significant bills a Congress enacts during its entire two-year term.[131] Moreover, as a practical matter, when a President believes that the Congress could override a regular veto (i.e., when a bill has the greatest congressional support), the President has the greatest incentive to exploit the current confusion over the pocket veto and try to render his qualified negative absolute.[132] Thus, such a veto would profoundly and negatively affect the balance between the branches.

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[130] That Congress might so easily eliminate the President's ability to pocket-veto bills during interim adjournments suggests it is not actually a constitutional power at all. Bork wrote:

> This fact reduces the argument for the power to pocket veto during intra-session or inter-session recesses or adjournments to the level of constitutional triviality. The power would arise only by accident, oversight, or when Congress preferred a pocket veto to a return veto. These are not considerations that rise to the level of constitutional argument.

Bork Memorandum, *supra* note 75, at 129. Mr. Bork, who later served as a judge of the United States Court of Appeals for the District of Columbia Circuit and was nominated by President Reagan to be an Associate Justice of the Supreme Court, has reviewed the analysis contained in his 1976 memorandum to the Attorney General and continues to hold the views expressed therein. Letter from Robert H. Bork to Rep. Butler Derrick (July 18, 1989), *in Rules Hearing*, *supra* note 74, at 124.

[131] At our hearing my subcommittee heard testimony that the "three-day rule" advanced by the previous administrations could have resulted in pocket vetoes of 74% of the most important bills passed by the 1981–82 Congress. *Rules Hearing*, *supra* note 74, at 111 (statement of Steven R. Ross, Gen. Counsel to the Clerk of the House of Reps.).

Mr. Ross's figures are based on an inference that the "most important" bills passed by the 97th Congress were those requiring the creation of a formal "committee of conference" to resolve differences between the two Houses' versions of the bills. In my judgment the need for conference-committee action on a bill is a sound basis for an inference about its relative importance. Bills requiring a conference are nearly always lengthy, complex and controversial—all characteristics that indicate substantial importance. These characteristics also render it far more likely that such measures will receive final action in the days or even hours immediately prior to an adjournment of more than three days.

[132] A President's desire to convert his qualified veto into an absolute veto is especially noteworthy when one considers the historical power of the regular veto. Of the 1419 regular vetoes exercised by Presidents Washington through Reagan, Congress managed to override only 103, just over seven percent. PRESIDENTIAL VETOES, 1789–1988, *supra* note 24, at ix. The proportion of vetoes overridden falls to just over four percent when pocket vetoes are included in the total.

The Bush Administration argued that it would be "inappropriate" for Congress to express its interpretation of the Constitution via legislation.[133] I reject the argument that Congress may not legislate based upon its interpretation of the Constitution. Such action is hardly unprecedented. For example, the Constitution is silent regarding the veto clause's precise requirements with respect to the two-thirds margin necessary to override a veto.[134] Congress itself decided that the phrase required the concurrence of two-thirds of the members present and voting, and the Supreme Court upheld that decision.[135]

The Supreme Court observed in *United States v. Nixon*[136] that in the performance of its duties each branch must initially interpret the Constitution, and that each branch's interpretation of its own powers is due "great respect" from the others.[137] I believe that the Court would defer to Congress's judgment on the pocket-veto question, should the issue arise again after passage of H.R. 849. Hopefully, the President would also defer to the Congress.

I urge my colleagues in the House and the Senate to defend Congress by enacting H.R. 849 as soon as possible. I urge President Clinton to reject his predecessors' untenable position and renounce any contention that he may validly pocket-veto legislation during interim adjournments. I also urge him to support H.R. 849's passage. This legislation will guide his successors; but more importantly, it will enable the executive and legislative branches to confront the many problems facing our country—instead of confronting each other.

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[133] *See Rules Hearing*, *supra* note 74, at 61; *Judiciary Hearing*, *supra* note 108, at 25.

[134] *See supra*, text accompanying note 12. The requirement that "two thirds of that House" agree to pass a bill over a veto could be construed to mean two-thirds of the members present, or two-thirds of the members present and voting, or two-thirds of the total membership.

[135] *See* Missouri Pacific Railway Co. v. Kansas, 248 U.S. 276 (1919) (the concurrence of two-thirds of the members present and voting suffices to override a presidential veto); *Rules Hearing*, *supra* note 74, at 33 (statement of Louis Fisher).

[136] 418 U.S. 683 (1974).

[137] *Id.* at 703.

APPENDIX

H.R. 849
103D CONGRESS, 1ST SESSION

A BILL

To amend title 1 of the United States Code to define the type of adjournment that prevents the return of a bill by the President, and to authorize the Clerk of the House of Representatives and the Secretary of the Senate to receive bills returned by the President at any time their respective Houses are not in session.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENT TO TITLE 1, UNITED STATES CODE.

Chapter 2 of title 1 of the United States Code is amended by inserting at the end thereof the following new section:

"§ 115. Adjournment preventing return of bill; Clerk of the House of Representatives and Secretary of the Senate authorized to receive bills returned when their respective Houses not in session

"(a) No adjournment of either House of Congress, other than an adjournment sine die to end a Congress, prevents the return of a bill by the President.

"(b) The Clerk of the House of Representatives and the Secretary of the Senate are authorized to receive bills returned by the President at any time their respective Houses are not in session.".

SEC. 2. CLERICAL AMENDMENT.

The table of sections at the beginning of chapter 2 of title 1 of the United States Code is amended by adding at the end the following new item:

"115. Adjournment preventing return of bill; Clerk of the House of Representatives and Secretary of the Senate authorized to receive bills returned when their respective Houses not in session.".

ARTICLE

RECONSTRUCTION OF FEDERALISM: A CONSTITUTIONAL AMENDMENT TO PROHIBIT UNFUNDED MANDATES

CONGRESSMAN PAUL GILLMOR*
FRED EAMES**

Unfunded mandates are a serious problem burdening state and local governments. When Congress directs localities to comply with expensive mandates without offering financial assistance, states must often decrease crucial local services in order to meet the mandates' requirements. The authors are keenly aware of the profound effects unfunded mandates can have on states' budgets, decision making power, and autonomy. They suggest a constitutional amendment prohibiting these Congressional directives as the only way to solve the many difficulties resulting from the glut of unfunded mandates.

Conditions are ripe for a catastrophic shift in American federalism. Congress stands poised with virtually unchecked power to bury state and local governments with the cost of implementing and complying with mandated federal programs. Often the programs are unnecessarily expensive and inadequately tailored to a legitimate objective. These unfunded mandates[1] not only are helping to push many governments to perilous financial footing, but also are unduly enlarging the sphere of congressional dominion. This Article will explain why this is not the kind of cooperative governance our forefathers intended and will support a constitutional amendment as a remedy.

As an example of the notion of unfunded mandates, take the mandated federal regulations which require cities to keep atrazine levels in drinking water below three parts per billion.[2] A human would have to drink over 3000 gallons of water per day with three parts per billion atrazine to equal the dose found to be

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[1] For purposes of this Article, the term "unfunded mandate" refers to a federal requirement imposed upon a state or local government by the Congress, or by a federal agency acting under statutory authority, without full federal funding.

[2] National Primary Drinking Water Regulations, 40 C.F.R. § 141.61 (1993).

cancerous in rats, the dose on which the regulations were based.[3] The U.S. Environmental Protection Agency, using its congressionally delegated authority, set this level by using the "'Most Exposed Individual' ("MEI") risk assessment model, which assumes a person is exposed to atrazine every day for seventy years."[4] City officials in Columbus, Ohio, found that compliance with this regulation could require a new eighty million dollar water purification plant.[5] For the same amount of money required to protect the citizens of Columbus and their children from this federally defined risk, the city could hire an extra 2300 teachers at the average state teacher's salary.[6]

As another example, consider the mandated Medicaid expansions Congress enacted in 1988 and required the states to fund.[7] States like Ohio were forced to come up with deep budget cuts or large tax increases to simultaneously pay for the mandate and meet balanced budget requirements in state constitutions. The 1988 Medicaid changes cost Ohio over $50 million in 1992,[8] which is more than the state spent out of general revenue funds on the entire state Department of Health.[9]

Too many Members of Congress give no consideration to the impact of mandates. Whether the program being mandated is worthy or unworthy, it forces state or local governments to divert funds away from other worthwhile programs, such as those for education, the environment, the sick, and the elderly.

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[3] Columbus Health Department, Ohio Metropolitan Report Group, Ohio Metropolitan Area Cost Report for Environmental Compliance 118 (Sept. 15, 1992) (on file with the *Harvard Journal on Legislation*) (noting that "[t]he U.S. EPA has also developed a 'Health Advisory' for atrazine, which states that a child can drink water containing 100 ppb for 10 days or 50 ppb for 7 years with no adverse health effects! These levels are orders of magnitude greater than the [maximum contaminant level of 3 parts per billion]").

[4] *Id.*

[5] *Id.*

[6] Ohio Dep't of Educ., District Summary Report 2 (Oct. 20, 1993) (unpublished data from the Education Management Information System, on file with the *Harvard Journal on Legislation*) [hereinafter Ohio Department of Education].

[7] *See* State of Ohio Washington Office, The Need for a New Federalism: Federal Mandates and Their Impact on the State of Ohio 8 (Aug., 1993) (on file with the *Harvard Journal on Legislation*) (noting that the Family Support Act of 1988, 42 U.S.C. § 1396(a) (1988), requires that Medicaid services be extended for 12 months to families receiving Aid for Dependent Children that become ineligible for Medicaid because of an increase in employment income. It also requires continuation of Medicaid coverage for two-parent families with one unemployed parent.)

[8] *Id.*

[9] Ohio Office of Budget Management, State of Ohio Executive Budget for the Biennium July 1, 1993–June 30, 1995 (Jan., 1993) (on file with the *Harvard Journal on Legislation*).

These examples are the harbinger of a potentially tremendous problem in federal-state relations. According to one Congressman: "We face the real prospect of outright rebellion by Americans unwilling or unable to comply with the growing mountain of unattainable, unfunded mandates."[10] The number of unfunded mandates imposed by Congress is subject to debate, depending on what definition is used. However, most agree that Congress increasingly mandates that non-federal governments carry out and pay for new programs. The State of Ohio found 174 unfunded mandates enacted since the mid-1970s.[11] The U.S. Conference of Mayors estimates that seventeen unfunded mandates were enacted between 1960 and 1985.[12] However, the mayors' conference found that in the four years from 1988 to 1992 the federal government added eighty-eight unfunded mandates relating to toxics alone.[13] In 1993, no less than 156 mandates were proposed by a Congress full of avowed reformers and would-be reinventors of government.[14] Passing the buck is not reform.

The United States has a massive federal debt, a Congress with virtually unchecked powers to shift program costs to states, and a Constitution with no clear demarcation of the realm of state powers. In addition, the Supreme Court has recently refused to umpire the federalism issues that arise in the context of unfunded mandates. Specifically, the Court shies away from those issues that arise by virtue of Congress's use of the commerce power. The confluence of these conditions has led to a more-or-less permanent impetus for delegating program costs. This impetus frustrates the goals of good government and cannot be

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[10] Letter from Rep. Pat Roberts (R-Kan.) to Vice President Al Gore 1 (Sept. 21, 1993) (on file with the *Harvard Journal on Legislation*). *See also* 139 CONG. REC. H8568 (daily ed. Oct. 27, 1993) (statement of Rep. Gary Condit (D-Cal.) on National Unfunded Mandates Day) Condit said:

> I was told by the U.S. Conference of Mayors, which was the primary sponsor of the National Unfunded Mandate Day, that over 1,000 local officials around the Nation held events in which they singled out unfunded Federal mandates as the biggest problem they face.
>
> In these communities, the message to the Congress was clear: Stop approving legislation that imposes requirements on local governments without containing the resources necessary to carry out that mandate.

[11] State of Ohio Washington Office, *supra* note 7, at 1.

[12] William Tucker, *Cities Aim to Stop Federal Buck-Passing*, INSIGHT, Sept. 6, 1993, at 20 (citing Jerry Abramson, mayor of Louisville, Ky., and director of the U.S. Conference of Mayors).

[13] *Id.*

[14] National Conference of State Legislatures, Hall of the States Mandate Monitor (Nov.-Dec., 1993) (on file with the *Harvard Journal on Legislation*).

removed by less dramatic means than a Constitutional amendment.

I. NATIONAL AND LOCAL GOVERNMENTS: A PARTNERSHIP OR MASTER-SERVANT RELATIONSHIP?

The federal government may legitimately distribute federal tax funds to and cooperate with non-federal governments on issues of local and national interest. In the atrazine case mentioned above, Congress might create a program where state and local governments could choose to share the costs of reducing atrazine in drinking water with the federal government, provided the federal money is effectively spent. Often, Congress enacts this type of program. Such programs can be quite beneficial and even essential to local governments that would otherwise be forced to raise their own funds to remedy the problem. One advantage of a federal program is that funds can be redirected from richer communities to the poorer communities where federal assistance is more valuable. Also, the federal government may bring experience and expertise to a problem that few local communities can match.

A disadvantage of such a program is that it can displace local programs already carefully crafted to fit the specific local need. A federal program designed to serve the entire country cannot possibly anticipate local conditions that might make the program ill-suited to efficiently serving a particular community's needs. It seems logical that Congress should have some burden to meet before displacing local wisdom,[15] yet the only bar Congress need pass is the often misplaced hurdle of political viability.

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[15] *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 545 (1954). Professor Wechsler noted:

> Should a national program have been continued when New York and every other state was competent to launch a program of its own, adapted to special needs? Under such circumstances national action has consequences that are plainly undesirable. On the one hand, it is likely to impose control in areas where the politically dominant local judgment finds control unnecessary. On the other hand, it is likely to attenuate the rigor of control in areas where it is really needed. For if the need is not severe the country over, the terms of national legislation will be shaped by a Congress in which the hostile sentiment has a large influence, rather than by a legislature more generally sensitive to the need. The political logic of federalism thus supports placing the burden of persuasion on those urging national action.

Id.

The legitimacy of such cooperative efforts is strained when the burden of the federal conditions becomes disproportionate to the aid received. For example, the Clean Air Act ("CAA") and the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA") have combined to impose dramatic new requirements for the receipt of highway construction funds.[16] Few would argue that the billions of dollars in highway funds disbursed annually to states are not worth the conditions attached. However, states unhappy with the grant conditions may be coerced into continued participation in the federal aid program by reliance on steady cash flows and the unsavory prospect of wasted efforts at half-finished construction projects. Ask a state or local government official about how an essential service like highway and bridge maintenance would be funded without federal aid, and you might receive a blank stare in reply. When local participation is not truly voluntary, "intergovernmental cooperation" becomes an illegitimate phrase.[17]

Cooperation is further strained when there is only a tenuous relationship between the grant conditions and the purpose of the grant. For example, Congress has conditioned receipt of a portion of highway construction funding on a requirement that states adopt laws mandating use of seat belts and motorcycle helmets.[18] These conditions relate to highway safety rather than facilitation of transportation. Such conditions allow Congress to accomplish by "voluntary means" what it cannot accomplish by mandate.[19] This type of coercion should be rendered constitutionally impermissible.

It is an illegitimate use of congressional power and contrary to federalist purposes for Congress to *require* a local government

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[16] Transportation improvement plans created by local planning entities under the ISTEA, Pub. L. No. 102-240, 105 Stat. 914 (1991) (codified as amended at 23 U.S.C. § 135 (1992)), in conjunction with a statewide transportation plan, must conform with state improvement plans for air quality created under the CAA, 42 U.S.C. § 7410 (1988). Cities that do not comply with federal air quality limits can be required to reduce their total emissions by up to three percent per year, an amount which has never been achieved. Noncompliance with federal standards in a single city can result in a loss of highway funding for the entire state.

[17] *See* National League of Cities, The State of America's Cities (Jan., 1994) (on file with the *Harvard Journal on Legislation*) (discussing the concerns of local governments).

[18] 23 U.S.C. § 153 (Supp. 1993).

[19] *See* Letter from Barbara L. Marley, Mayor, City of Fostoria, Ohio, to Rep. Paul Gillmor (R-Ohio) 1 (Nov. 29, 1993) (on file with the *Harvard Journal on Legislation*) (noting that unreasonable conditions on the receipt of federal grants are akin to "federal government blackmail to get our tax dollars").

to implement and pay for national policy, regardless of cost, regardless of reimbursement, regardless of local need, regardless of local support for the program, and regardless of the effect on essential local services. Consider the unpleasant possibility where the local government would not even run the program, but would pay for the federal government to do so. The local government would lose all power to contain costs, yet it would be required to pay whatever expenses are amassed. When a local government is forced to pay for national policy, the local government becomes a servant of the national government, rather than a partner in federalism. Mandate reform opponents have argued that, by prohibiting unfunded mandates, the federal government would no longer be able to achieve important policy objectives.[20] But this criticism misapprehends what mandate reform would really do. The question is not how to define the policy objective, nor how to best serve that policy objective. The question is whether one government should be able to design a program to serve the objective and require another government to pay for it.

Congress has a self-interested basis for enacting unfunded mandates, because Members of Congress realize that it is much easier to take the credit for a program and pass on the costs and requirements to someone else than to make the tough policy and budgetary choices themselves. Unfunded mandates foster a culture of irresponsibility in which members of Congress take the credit for enacting allegedly worthy programs while avoiding the blame for the resultant tax increases or spending cuts required to pay for the new programs.

II. Court Approval of Congressional Pass-the-Buck Behavior

Until modern times, Congress and the courts acknowledged and abided by tighter limits on the role of the national govern-

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[20] *See* Letter from John Adams, Executive Director, Natural Resources Defense Council, to Members of Congress 1 (Nov. 10, 1993) (on file with the *Harvard Journal on Legislation*). Adams said:

> If the Condit bill [to prohibit unfunded federal mandates] is passed, the ability of the Federal government to set reasonable minimum standards for health and safety will be significantly reduced. This bill would negate all federal regulatory control over states and localities unless these programs are fully funded, and would effectively end the federal government's ability to pass regulations aimed at protecting citizens.

Id.

ment in our federalist system. Congress long sought to respect the sanctity of traditional areas of state involvement, not daring to run afoul of perceived Tenth Amendment limitations.[21]

However, since the New Deal era, and most particularly in the post-Great Society era, congressional self-restraint has failed, and Congress has created a program for nearly every cause. Modern federalism permits the federal government to dispense its wisdom upon local communities for nearly every purpose. Individually and cumulatively, federal grant programs produce the coercion discussed above. Thus, Madison's analysis now seems to have lost its thrust: "The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former."[22] During the Depression, many welcomed the expanded federal role in social welfare programs. The year 1932 has been referred to as a "geologic fault line" in American federalism because of the blossoming of transfers of funds from the federal government to local and state governments.[23]

> The Great Depression was the catalyst for a major expansion of amounts of federal transfers to state and local government. This expansion reflected a powerful shift in social philosophy occasioned by the inability of state and local governments to deal with obvious relief and welfare needs. As late as 1931, the Mayor of Hartford, Connecticut, was echoing a common sentiment: "We believe in paying our own way. It is cheaper than to bear the cost of federal bungling." But by 1932, the crises had exhausted local resources. The 1930s thus saw a major intergovernmental redistribution of expenditures for civil purposes with the federal government greatly increasing its share of the expenditures. This redistribution was facilitated by the Supreme Court's decisions, which "accepted a reading of the general welfare clause that places no discernible judicial limits on the amounts or purposes of Federal spending." During the 1960s and early 1970s federal grants again experienced a major expansion. There was a net increase of more than 200 categorical grants from 1963 to 1966. From 1968 to 1972 categorical grant funding levels doubled.[24]

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[21] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[22] THE FEDERALIST No. 45, at 288 (James Madison) (Lodge ed. 1888).

[23] ROSCOE C. MARTIN, THE CITIES AND THE FEDERAL SYSTEM 111–12 (1965).

[24] Bruce J. Casino, *Federal Grants-in-Aid: Evolution, Crisis, and Future*, URB. LAW., Winter 1988, at 25, 30–33 (citations omitted).

But by the mid-1970s, waste, duplication, high administrative costs, and "the willingness of Congress to establish national programs in virtually any area, even those that were predominantly or exclusively within state or local domain" had taken a toll on state and local governments.[25] Disenchantment with alphabet-soup politics struck a sympathetic chord in the Reagan White House, leading the President in his 1982 State of the Union address to criticize federal interference in local financing.[26]

As its exercise of the commerce power continued to grow, the federal government increasingly shifted the cost of programs to state and local governments. This cost shifting was not only a financial burden, but also a clear challenge to principles of federalism outlined in the Constitution. The Supreme Court provided some relief for the states in 1976 in *National League of Cities v. Usery*,[27] finding grounds for a defined sanctuary of state powers where federal power could not intrude. Justice Rehnquist wrote that insofar as Congress's enactments "directly displace the States' freedom to structure integral operations in areas of traditional [state] governmental functions, they are not within the authority granted Congress by Article 1, Section 8, clause 3."[28] The Court found that Congress could not impose federal minimum wage standards on state employees because to do so "would impair the States' 'ability to function effectively within a federal system'"[29] and destroy the states' "'separate and independent existence.'"[30] The Court also cited the potential threat to state funding for essential services as one reason why there should be a substantive limit to the federal commerce power.[31]

However, in 1985, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metro. Transit Auth.*[32] The Court cited considerable difficulties in identifying "traditional func-

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[25] Carl Stenber, *The State's Role in the New Federalism*, *in* THE NEWEST FEDERALISM: A NEW FRAMEWORK FOR COASTAL ISSUES 41, 43 (1982).
[26] *See id.* at 42.
[27] 426 U.S. 833 (1976).
[28] *Id.* at 852.
[29] *Id.* at 851 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).
[30] *Id.* (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).
[31] While I agree with criticisms that the "traditional state functions" test may lend itself more to ad hoc state protections than a principled delineation of the state role, at least the *National League of Cities* Court recognized the necessity of a continued role for the judicial branch in reviewing Tenth Amendment challenges brought by the states.
[32] 469 U.S. 528 (1985).

tions" for purposes of state immunity as required by *National League of Cities*. The *Garcia* Court ruled that, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[33] It continued:

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in the discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[34]

By word and effect, the Supreme Court has decided that the states have no defined inviolate sovereign area. Apparently, Congress could even set state budgets if it could find justification in the Commerce Clause for doing so, unless states mustered a sufficiently loud outcry against it.

Garcia encourages a clearly unworkable vision of the relationship between Congress and the states, one presenting a virtually unobstructed path for Congress to destroy the states' role in a federalist system. The term "federalism" is inapt if the courts will not guard the states from intrusion by Congress, and the states are impotent to prevent it.

The Court lists a variety of "constitutional" elements which protect the states, including the states' control over eligibility requirements for election to federal office and their equal representation in the Senate.[35] However, to cite these as reliable power for the states to curb harmful, intrusive legislation is to grossly misconceive of the practical function of such structural elements. Aside from the limited usefulness of these "constitutional pro-

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[33] *Id.* at 550.

[34] *Id.* at 552.

[35] In *Garcia*, the Court said:

> The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections. U.S. Const., Art. I, Sec. 2, and Art. II, Sec. 1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, Sec. 3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V. 469 U.S. at 551.

tections" for the states, non-federal officials also face practical limitations on their ability to influence federal actions.[36] Thus, despite the Court's assertions to the contrary, judicial review is the only element of the structure of government that can effectively prevent destruction of the states' "separate and independent existence" by the federal government.[37] Congress could, in effect, make statehood little more than an arbitrary delineation of geographic boundaries.[38]

III. Local Problems Arising from Federally Unfunded Mandates

It is essential to limit the federal government by prohibiting unfunded mandates because such mandates threaten to bankrupt local governments.[39] A 1993 survey conducted for the U.S. Conference of Mayors revealed that local governments must often cut infrastructure development and fire and police services in response to the demands unfunded mandates place on local budgets. "For city governments throughout the nation," the survey concluded, "having to pay for unfunded federal mandates means

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[36] *See* Paula Easley, Municipality of Anchorage, Alaska, Paying for Federal Environmental Mandates: A Looming Crisis for Cities and Counties 2 (Sept. 1992) (on file with the *Harvard Journal on Legislation*) (noting that a nationwide survey of mayors listed five practical difficulties in battling intrusive federal legislation: (1) mayors are too busy with local priorities to devote time to federal policies; (2) mayors might not be aware that other communities are having the same problems; (3) mandates often do not become problems until after implementing regulations have been written; (4) mayors have inadequate budgets and staffs to effectively lobby Congress; (5) mayors lack public support for lobbying Congress).

[37] In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819), Chief Justice Marshall wrote: "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." Little would he have imagined that his successors on the Court would effectuate the corrosion of statehood.

[38] Election of Senators by the state legislatures may have been intended as a mechanism for states to check federal power, but the Seventeenth Amendment removed Senatorial elections from state legislatures and gave them to the people. U.S. Const. amend. XVII, cl. 1 declares in relevant part: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ." This language overrides the provision in U.S. Const. art. I, § 3, cl. 1 that states: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ." Thus, "[t]he continuous existence of the states as governmental entities and their strategic role in the selection of the Congress and the President" is ignored. Wechsler, *supra* note 15, at 544.

[39] Mayor Victor Ashe of Knoxville, Tennessee commented to *Insight* Magazine on the unfunded mandate problem: "Carried to its logical extreme, it's going to drive us all into bankruptcy." Tucker, *supra* note 12, at 19.

that local revenues are not available for other programs and services that may be needed."[40]

The difficulty faced by a small town fire department in my congressional district provides another example of the unfunded mandate problem. A U.S. Department of Transportation regulation requires the Van Wert, Ohio Fire Department to replace fiberglass air tanks that firemen use when entering smoke-filled areas.[41] Not one of the department's tanks is worn out, and apparently there have been few or no problems with the tanks anywhere in the country, yet the Van Wert fire department will be compelled to spend $9,500 to replace them.[42] To those accustomed to reading about government programs costing hundreds of millions or billions of dollars, this amount might seem inconsequential; however, this seemingly insignificant substitution of federal decision making for local expertise has genuinely adverse consequences to the delivery of necessary services to Van Wert residents. For the same amount of money, the fire department could train an extra fifteen volunteers to help fight fires, thereby quadrupling a volunteer force depleted by three straight years of budget cuts.[43]

Finally, take the example of the so-called "motor voter" legislation Congress enacted in 1993.[44] This law required states to allow people to register to vote when they apply for driver's licenses or public assistance programs. The State of Ohio scrambled to come up with the estimated $20 million per year it will cost Ohioans to implement this bill. Though Ohio's budget is large enough to absorb this cost without significant disruption of services, the state legislature's ability to direct funds toward other priorities is nevertheless reduced. The $20 million could have been used in Ohio to hire an extra 574 teachers at the average state teacher's salary; to increase by nearly sixty-five percent the number of tutors and small group instructors; to double the number of preschool special education teachers; or to pay forty percent of the state budget for elementary school

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[40] PRICE WATERHOUSE, IMPACT OF UNFUNDED MANDATES ON U.S. CITIES C-1 (Oct. 26, 1993) (report prepared for the U.S. Mayors' Conference, on file with the *Harvard Journal on Legislation*).

[41] The Research and Special Programs Administration's Safety Advisory Notice 93-22 limits the use of composite air cylinders to 15 years. 58 Fed. Reg. 60,899 (1993).

[42] Letter from Ronald Rank, Chief, Van Wert Fire Dep't, to Rep. Paul Gillmor (R-Ohio) 2 (Sept. 22, 1993) (on file with the *Harvard Journal on Legislation*).

[43] *Id.*

[44] National Voter Registration Act of 1993, 42 U.S.C. § 1973 (1993).

counselors.[45] The state could have hired more than 400 extra highway patrolmen, increasing its number of patrolmen by nearly twenty-five percent. It could have increased its drug traffic interdiction team tenfold,[46] significantly impacting the war on drugs. The state could also have offered full one-year scholarships to nearly 2000 students to attend The Ohio State University.[47] These examples serve to highlight the central incongruity of federal unfunded mandates—that local funds are conscripted to pay for federal programs at the expense of traditionally local concerns, such as education, law enforcement and infrastructure.

It is not politically feasible for local governments to simply raise taxes to cover the costs each new federal mandate imposes. Few constituents could possibly connect the enactment of federal programs to worsening local budget woes. Thus, the political risk of raising taxes to fund the federal mandate falls on local officials, not on the Members of Congress who supported the program. Local officials should not bear the burden of convincing their electorate that tax increases are due to unfunded federal mandates. Instead, Congress should be directly accountable for the costs of the programs it mandates. There is no principle more central to representative democracy than representative accountability. Citizens are entitled to an unclouded view of the actions of their representatives.

Furthermore, it might be almost impossible to raise taxes at the state or local level—the impetus for the congressional action might have been to remedy a national problem not present in a state or a local community. For example, the Safe Drinking Water Act has been widely criticized for its requirement that communities nationwide test their water supply for a banned pesticide that was primarily used on pineapples.[48] Citizens of communities where pineapples cannot be grown would be unlikely to support a tax increase to pay for such governmental "services" that fail to provide any improvement to their own quality of life. The citizens would also be unwilling to reduce local programs in order to pay for a non-beneficial federal man-

[45] Ohio Department of Education, *supra* note 6.

[46] Telephone interview with Eric McKinnis, Ohio State Highway Patrol (Feb. 28, 1994).

[47] Letter from Richard S. Stoddard, Director of Federal Relations, The Ohio State University, to Rep. Paul Gillmor (R-Ohio) (Mar. 1, 1994) (on file with the *Harvard Journal on Legislation*).

[48] Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-9 (1988).

date. Congress does not have the narrow focus to be able to effectively legislate in such instances.

IV. POSSIBLE SOLUTIONS TO THE PROBLEM

Constitutional amendments certainly should not be undertaken lightly. Accordingly, we must review the possibility of solving the problem of unfunded mandates by some means other than by reordering the very framework of our government. However, the gravity of the problem, combined with the lack of other useful alternatives, demonstrates that a constitutional amendment is required to combat unfunded mandates effectively.

One possible alternative to an amendment is raised by the *Garcia* case.[49] *Garcia* can be read to hold that the Constitution provides no authority for the Court to review congressional enactments displacing state authority, and that the Framers envisioned a system in which Congress could overrule the states on virtually any commerce clause question, even if the legislation affected integral state functions. *Garcia* might also be read to imply that the states have ample inherent powers to check harmful congressional enactments without judicial review.

In support of a view that the states do indeed retain ample power to thwart congressional encroachments, critics of my call for a constitutional amendment might note the recent enactment in Alabama aimed at members of Congress and unfunded mandates.[50] This state law requires members of Congress from the

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[49] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[50] *See* 1992 Ala. Acts 94-643 (statute concerning accountability of members of Congress for unfunded federal mandates). South Dakota and California have passed similar legislation, while a number of other state legislatures are considering it. The Alabama legislation reads:

> WHEREAS, the number of unfunded federal mandates imposed upon the states by the United States Congress has alarmingly increased in recent years; and
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> WHEREAS, this continuing imposition places Alabama and her sister states in the precarious position of either attempting to fund the federal requirements with diminishing amounts of available revenue or jeopardizing eligibility for certain federal funds; and
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> WHEREAS, states and the United States Congress should engage in earnest discussions regarding the difficult posture in which the states have been cast and the urgent necessity of the states to receive monetary assistance for these mandates or relief from the enforcement of these unfunded decrees; and
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> WHEREAS, the members of the Legislature of Alabama desire to personally communicate with the Alabama Delegation to the United States Congress concerning this critical problem so that our representatives may be completely cognizant of the effect the actions of the federal government have at the state

state to appear before the state legislature and account for their votes on legislative issues. The response to those who tout such legislation as evidence of state power is obvious: this resolution does not oblige Congress to repeal a single statute, or even to overturn a single burdensome regulation imposing an unfunded mandate. It only requires that Alabama's delegation to Washington appear before the state legislature. Therefore, it is hardly likely to be an effective political safeguard. Even if all fifty states were to enact such laws, it is doubtful that an annual tongue-lashing would deter Congress from continuing to burden the treasuries of state and local governments.

Judicial review is also an inadequate alternative to a constitutional amendment. It is impossible to predict whether the Supreme Court will change course once again and decide that *National League of Cities*[51] was right, that the judicial branch should have at least a minimal role in determining the validity of congressional commerce clause action displacing state action.[52] Both *National League of Cities* and *Garcia* were five-four opinions, and the shift in majority opinion was occasioned by the change of heart of only one Justice.[53] Thus, we cannot rule out the possibility of jurisprudential limitations on unfunded mandates, but we certainly cannot rely on it either.

Uncertainty on this point is particularly perilous because many governmental programs could be affected by a new decision; uncertainty thus creates the potential for turmoil. A constitutional amendment is preferable to entrusting the protection of

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> legislative level and may be more sensitive to the difficulties unfunded federal mandates create; now therefore,
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> BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA, BOTH HOUSES THEREOF CONCURRING, That all members of the Alabama Delegation to the United States Congress are respectfully requested to appear before a joint session of the Legislature of Alabama to discuss the problems related to unfunded federal mandates . . . .

Id.

[51] National League of Cities v. Usery, 426 U.S. 833 (1976).

[52] For a commentary generally supporting the *National League of Cities* opinion, *see* William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

[53] Justice Blackmun joined the majority in *National League of Cities* with the understanding "that it adopts a balancing approach, and does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856. Writing for the majority in *Garcia*, however, Justice Blackmun opined that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental functions' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which [*National League of Cities*] is purported to rest." 469 U.S. at 531.

state and local autonomy interests to a Court which has declared its ambivalence toward deciding the scope of the commerce power.

Furthermore, if the Court decides to reengage in reviewing this aspect of Congressional power to legislate, it might have some difficulty articulating a constitutional foundation for a fiscally-based limitation that could adequately address the unfunded mandate problem. Professor William Van Alstyne of Duke University suggested in a 1985 article that "traditional government functions" could include any priority the local government has already decided to serve. He also suggested that the Court could require of Congress "a suitable justification [for the use of its power], quite parallel to what the first amendment requires in its field of concern." These suggestions might be helpful, since congressional enactments that take away funding from state and local governments impair those governments' ability to serve existing priorities.[54] However, the breadth of his comments could take us well beyond the problem at hand into areas the Court may rightly prefer to avoid.

Similarly, enactment of a statute would fail to solve the unfunded mandate problem. A statutory "solution" to the unfunded mandate problem would most probably recount the shameful history of the Gramm-Rudman-Hollings budget balancing mechanism and its supposedly binding multi-year deficit reduction targets. Congress statutorily required itself to reduce the deficit to zero by setting declining deficit targets, but when the spending cuts became too politically painful, it simply passed a new statute raising the targets and giving itself more time to reach a zero deficit.[55]

Finally, holding the Executive Branch out as a block against unfunded mandates does not adequately address the mandate problem either. Executive Order 12,612, issued by President Reagan on October 26, 1987, outlined nine "fundamental federalism principles," including the principle that a national government limited in size and scope is the best protection for our political liberties.[56] The Order required federal agencies to account methodically for federalism concerns in carrying out leg-

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[54] *See* Van Alstyne, *supra* note 52, at 1716–19.

[55] ALLEN SCHICK ET AL., CONGRESSIONAL RESEARCH SERVICE, MANUAL ON THE FEDERAL BUDGET PROCESS 91-902 GOV (Dec. 24, 1991).

[56] Exec. Order No. 12,612, 3 C.F.R. 252 (1987), *reprinted in* 5 U.S.C. § 601 (1988).

islative enactments. President Reagan's well-intentioned efforts notwithstanding, the Executive has been a partner, rather than an effective check, in the growth of unfunded mandates by signing them into law.

Other constitutional amendments currently under consideration, particularly a balanced budget amendment, could increase the pressure for Congress to impose unfunded mandates.[57] If a balanced budget amendment passed, Congress would be forced to search harder for spending cuts or new sources of money. Spending "cuts" in the form of unfunded mandates relieve this pressure by cutting nothing while passing costs to other governments.

V. THE SOLUTION: A CONSTITUTIONAL AMENDMENT

Since the states, the Supreme Court, the Executive and Congress itself are either powerless or too unreliable to address the unfunded mandates problem, the only option left is an amendment to the Constitution. The relevant text of my constitutional amendment is as follows:

> Section 1. The Congress shall not enact any provision of law that has the effect of requiring any State or local government to expend non-Federal funds to comply with any Federal law unless the Congress reimburses the State or local government for the non-Federal funds expended to comply with that Federal law.
> Section 2. Section 1 shall not prohibit the Congress from enacting a provision of law that permits a State or local government to choose to expend non-Federal funds in order to receive Federal funds.[58]

Under this proposed amendment, cost analysis of legislation would, of necessity, improve. The Congressional Budget Office ("CBO") is charged with the duty of estimating the cost of legislation. A recent experience of mine illustrates the CBO's

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[57] H.R.J. Res. 103, 103d Cong., 1st Sess. (1993), introduced by Rep. Charles Stenholm (D-Tex.), reads in relevant part:

> SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.
> SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for an increase by a roll call vote.

[58] H.J. Res. 282, 103d Cong., 1st Sess. (1993).

present inability to inform Congress of the cost of mandate legislation with sufficient precision. A CBO memorandum estimated the cost of nationwide compliance with the National Voter Registration Act of 1993 at $20 million yet the State of Ohio alone has estimated its compliance costs at close to that figure.[59] In fact, compliance costs per state could be close to $20 million. Although a CBO spokesman later admitted to my staff that the nationwide estimate presented to Congress was "probably low," reliance on such poor arithmetic by congressional appropriators would doom a statute on constitutional grounds under my amendment. There is an incentive for Congress to hide the costs of mandates as it passes them down to the states and localities because a low or vague cost estimate allows passage of mandate bills with even less public objection than if the full costs were disclosed. With an amendment banning unfunded mandates, this unfortunate incentive structure would be eliminated. Not only would an inaccurate cost estimate constitutionally doom an enactment, but it would also frustrate Congress's ability to plan its budget, because to remain constitutionally valid the program's costs would have to be borne by the federal government.

Under the shadow of this amendment, members of Congress would also be less likely to introduce mandate legislation. Absent the ability to pass off the costs through mandates, Congress might instead be drawn to grant conditions, when grants are affordable. The same problems would still exist at the local level, and Members of Congress would still have the same self-interest in enacting programs. Conceivably, since Congress might be without sufficient funds to serve every goal, there could be a renewed shift toward more flexible "block grants," which are directed "chiefly to general purpose governmental units in accordance with a statutory formula for use in a variety of activities with a broad functional area largely at the recipient's discretion."[60] Congress could also pass laws in other forms that

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[59] In 1989, Congressional Budget Office Director Robert Reischauer estimated "that it would cost states and localities an average of $20 million to $25 million a year for the first five years of the program." H.R. REP. No. 243, 101st Cong., 1st Sess. 28 (1989) (on file with the *Harvard Journal on Legislation*). Representative William Dickinson's (R-Ala., retired) dissenting views on the bill in 1989 reveal that the Registrar of Voters/Recorder of Los Angeles County, California estimated the cost to the county of just removing duplications from the registration system at $4.5 million. *Id.* at 38.

[60] U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE INTERGOVERNMENTAL GRANT SYSTEM: AN ASSESSMENT AND PROPOSED POLICIES, SUMMARY AND CONCLUDING OBSERVATIONS 3 (1978).

would create a more cooperative partnership between federal and non-federal governments. For example, Congress might direct federal agencies with expertise in handling a certain problem to create model standards for local programs, or it could act to improve local and state access to federal expertise.

Additionally, this proposed amendment forces Congress to find funding early in the legislative process, a burden which must then be carried with the mandate proposal throughout its quest for enactment. It merges the price tag with the potential merits in the discussion of the program. It requires two things currently lacking in the unfunded mandates milieu: that Congress find the money to pay for these mandates, and that Congress establish an accurate system to assess their costs.

States and localities are paying billions of dollars each year to fund federally mandated programs.[61] Upon the amendment's ratification, Congress would immediately have to find the money to pay for mandated programs in full, or else risk having them struck down in court. To complicate matters, current federal budget rules divide spending between entitlements, which must be offset by spending cuts or revenue increases, and discretionary spending, which must not increase the budget total beyond a prescribed cap.[62] As a practical matter, every penny which may be spent on discretionary programs is in fact spent. Thus, with the constitutional prohibition of unfunded mandates, whether they involve entitlements or discretionary spending, Congress would immediately face the difficult funding decisions it has hitherto avoided by passing off program costs to other governments. Congress would then have to consider whether to raise revenues or cut other programs. Congress would also have the option of repealing an existing program or at least modifying it to reduce its cost. Much of the inefficiency and waste in federal programs that state and local officials complain of might be remedied to make mandated programs more palatable, so long as Congress is forced to pay the bill as an incentive for legislative caution. The substance of an unfunded mandate may be laudable; it is the lack of a requirement for full funding and the

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[61] House Republican Conference, Issue Brief 2 (Oct. 27, 1993) (on file with the *Harvard Journal on Legislation*).

[62] The budget caps and "pay as you go" entitlement provisions stem from the Omnibus Budget Reconciliation Act of 1990, H.R. 5835, 101st Cong., 2d Sess. (1990) (enacted), *as amended by* the Omnibus Budget Reconciliation Act of 1993, H.R. 2264, 103d Cong., 1st Sess. (1993) (enacted).

congressional indiscretion that follows that offends our notions of federalism.

An amendment to prohibit unfunded mandates would also affect existing and future regulations promulgated pursuant to specific congressional directives. In many instances, the cost of a mandate is strongly shaped by the regulations adopted to implement it. In such instances, the agency could be required to keep the regulation's cost within the estimate Congress has budgeted. This would require agencies to be more cost-conscious in promulgating regulations and would require them to give more attention to the intent of Congress since Congress could not intend to spend beyond the amount it budgeted for the program. The problem of regulatory mandates not specifically provided for by Congress but adopted through the more general authority of an agency is beyond the intended scope of my amendment, but there may be other means of addressing the issue.[63]

VI. Conclusion

Unfunded federal mandates are repugnant to our constitutional scheme, for they force state and local governments to be subservient to the federal government. These mandates' boundless power to usurp state and local authority runs afoul of our notion of federalism, and their significant effects on state budgets and decision making power can prove disastrous. State and local governments are left without the financial ability to serve local interests, and Congress is trusted with unchecked power to burden state and local governments with mandated costs. It is unfortunate that we must even consider curbing congressional power by constitutionally prohibiting unfunded mandates, but this cursory review illustrates both the gravity of the problem and the lack of less drastic measures to remedy it.

[63] President Clinton issued an Executive Order designed to reduce the burden of "any regulation that is not required by statute and that creates a mandate upon a State, local or tribal government." Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (1993). Compliance is required by departments and executive agencies but is voluntary for independent agencies.

ARTICLE

APPLYING FEDERAL OPEN GOVERNMENT LAWS TO CONGRESS: AN EXPLORATIVE ANALYSIS AND PROPOSAL

JAMES T. O'REILLY*

Congress has exempted itself from many of the laws which it has imposed on others. As part of the recent reexamination of this phenomenon, sources inside and outside Congress have raised serious questions about congressional accountability. Congress selected open government laws, such as the Freedom of Information Act and several more specific disclosure laws, as a means to keep federal administrative bodies accountable. In this Article, James T. O'Reilly addresses the question of whether accountability can be improved, within constitutional limitations, through the adaptation of open government laws to the Legislative Branch. The Freedom of Information Act, the source of most access policy, will be the primary focus of attention, with additional discussion of the Privacy Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act and their potential application as accountability devices for the public scrutiny of Congress.

Part I discusses constitutional constraints while Part II approaches enforcement issues related to the application of federal laws to Congress. Part III comprises the bulk of the Article, as it details the complexities of applying the Freedom of Information Act, which would be the cornerstone of open government in a legislative context. Parts IV, V, and VI consider the Privacy Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act, respectively, to provide an overview of other open government acts to which Congress might also be subject. Part VII suggests some recommendations for reform.

I. CONSTITUTIONAL LIMITATIONS IN APPLYING FEDERAL LEGISLATION TO CONGRESS

Many federal laws, including labor, civil rights, and open government statutes, explicitly or implicitly exempt Congress from their requirements.[1] In recent years, considerable attention

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[1] *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552(a)(1) (1988) (Privacy Act); Freedom of Information Act, 5 U.S.C. § 552(f) (1988) (FOIA); Government in the Sunshine Act, 5 U.S.C. § 552b(a)(1) (1988) (Sunshine Act); Federal Advisory Committee Act § 3(3), Pub. L. 92-463, 86 Stat. 770, *as amended by* Pub. L. 94-409 § 5(c), 90 Stat. 1247, Pub. L. 96-523 § 2, 94 Stat. 3040, Pub. L. 97-375 tit. II, § 201(c), 96 Stat. 1822, *reprinted*

has been devoted to the debate over including Congress within the scope of these statutes.[2] Legislation to accomplish this purpose has been widely supported,[3] and a joint committee explored the issue in great detail.[4]

The effort to bring Congress within the scope of generally applicable legislation is among the rare topics the electorate greets with immediate, visceral support. Discovering that Congress is not subject to its own enactments, the typical voter reacts with surprise or disgust.[5] The skeptical American voter generally disdains the rationales offered for exempting Congress from legislation, including the subtleties of congressional constitutional status and the feasibility of applying regulatory schemes to such a complex institution. The voter's natural response may be that Congress must learn to abide by the same rules as ordinary Americans, rules that small businesses and regulated industries have come to accept. Voter response has been so vocal that institutional reform has been considered very seriously by Congress.[6] Yet, as before, it is easier to create regulations for others than to endure such regulations and their related burdens oneself.

Congress is the constitutionally created Legislative Branch[7] composed of a Senate, a House of Representatives, and approximately 40,000 support employees in various agencies and offices. A law subjecting "Congress" to regulation would affect 535 elected officials along with entities including their committees, the General Accounting Office (GAO), the Government Printing Office (GPO), the Architect of the Capitol, the Library of Congress, the Office of Technology Assessment (OTA), and the Capitol Police.[8]

This Article focuses on issues involving the application of federal statutes to Congress. Most federal legislation expressly excludes Congress in a definition section.[9] State legislative en-

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in 5 U.S.C. app. at 1175, 1176 (1988)(hereinafter FACA); National Labor Relations Act, 29 U.S.C. §§ 151–168 (1988); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1988); Occupational Safety & Health Act, 29 U.S.C. §§ 651–678 (1988).

[2] *See, e.g.*, Ilyse J. Veron, *Congress Prepares to Close Legal Loopholes for Itself*, 51 CONG. Q. 2431 (1993).

[3] Congressional Accountability Act, H.R. 349, 103d Cong., 1st Sess. (1993).

[4] *Application of Laws and Administration of the Hill: Hearings Before the Joint Comm. on the Organization of Congress*, 103d Cong., 1st Sess. (1993).

[5] Eliza N. Carney, *Congress Could Have to Obey Its Laws*, 1993 NAT'L J. 2195, 2195.

[6] *Id.* More than 200 co-sponsors signed on the Congressional Accountability Act, H.R. 349, 103d Cong., 1st Sess. (1993).

[7] U.S. CONST. art. I, § 1.

[8] A total of 38,504 individuals worked within the Legislative Branch in 1991. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 343 (113th ed. 1993).

[9] *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 551(1)(a) (1988). The Admin-

actments have virtually no impact on Congress as an entity, except to the extent that employees of the Legislative Branch may be subject to civil or criminal actions. Members of the House or Senate are subject to the rules adopted by each body for its own governance.[10]

A. *Separation of Powers Doctrine*

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."[11] Constitutional constraints involving the enforcement of a law must be considered before applying laws to Congress. The enforcement of a regulatory statute can be divided into four phases: (1) definition of an offense; (2) investigation of a set of facts; (3) adjudication of an administrative decision maker to determine the legal significance of facts; and (4) judicial review. In a typical regulatory statute, Congress defines terms and offenses (or the executive does so through properly delegated rule-making authority), Executive-Branch officials (sometimes in independent agencies) conduct the investigation and adjudication phases,[12] and Article III courts perform judicial review under a "substantial evidence"[13] or similar deferential standard.

Direct enforcement of existing federal statutes on Congress raises difficulties, as it requires the intrusive involvement of the Executive Branch.[14] If expertise and experience alone were the criteria to be applied, the Executive Branch would be the natural choice as law enforcer in areas such as the uncovering of racially

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istrative Procedure Act's definition of "agency," which expressly excludes Congress, is incorporated in many open government statutes, such as Privacy Act, 5 U.S.C. § 552(a)(1) (1988), FOIA, 5 U.S.C. § 552(f) (1988), Sunshine Act, 5 U.S.C. § 552b(a)(1) (1988), and FACA, *supra* note 1, § 3(3), 5 U.S.C. app. at 1176.

[10] House and Senate rules have the force of statutes as to Congress members. Powell v. McCormack, 395 U.S. 486, 548 (1969) (holding that the power to discipline members for rule violations and other relevant misconduct is plenary, while power to exclude elected members from a new Congress is suspect).

[11] Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935).

[12] Such agencies include the National Labor Relations Board, the Merit Systems Protection Board, and the Occupational Safety and Health Review Commission.

[13] 5 U.S.C. § 706(2)(E) (1988).

[14] For purposes of this discussion, "executive" agencies include the noncabinet "independent agencies," which in policy terms are independent, but in practice depend on the Office of Management and Budget for their budgets.

discriminatory employment practices or the handling of work place safety studies. Yet, such involvement would implicate separation of powers concerns.

Congress has occasionally attempted to obtain oversight and veto power over seemingly administrative or executive actions through laws of general applicability. These attempts have foundered in the courts on separation of powers grounds. For example, the Supreme Court invalidated an act transferring control of two airports from the federal government to a separate local authority conditioned on the creation of a board of review composed of congressmen which retained veto power over the authority's actions.[15] The Federal Election Commission has experienced difficulty with the separation of powers doctrine due to its unique marriage of congressional involvement with administrative functions.[16] Courts even found a violation of the separation of powers doctrine when Congress sent delegates to an enforcement agency, though the delegates were limited to an advisory or informational role.[17] The courts have disallowed active congressional involvement in executive implementation or enforcement activities. Courts have routinely invalidated administrative actions on a finding of the undue influence of a member of Congress or congressional committee.[18]

During the 1980s, the Supreme Court defined some absolute limits for the powers of the Legislative Branch to engage in activities beyond traditional legislating. In *Immigration & Naturalization Service v. Chadha*,[19] the Court held a congressional veto of an executive regulation unconstitutional. In *Bowsher v. Synar*,[20] the Court held that Congress lacked the power to supervise actively "officers charged with the execution of the laws it enacts."[21] Courts were encouraged to impose strict limitations on

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[15] Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).

[16] Buckley v. Valeo, 424 U.S. 1, 118 (1976); National Rifle Ass'n of Am. v. Federal Election Comm'n, 854 F.2d 1330 (D.C. Cir. 1988).

[17] Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993).

[18] *Id.*; Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966); *see also* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (not invalidating, but cautioning agencies to take balanced view of congressional pressure); District of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1248 (D.C. Cir. 1972).

[19] 462 U.S. 919 (1983).

[20] 478 U.S. 714 (1986).

[21] *Id.* at 722.

Congress's enforcement role. While *Morrison v. Olson*[22] and *Mistretta v. United States*[23] appear marginally more hopeful as a basis for Congress's administrative power within the Legislative Branch, current constitutional trends cast doubt on the permissibility of direct congressional enforcement of a regulatory statute on persons other than members of Congress and employees. Although Congress can vest the appointment power in executive or judicial officers,[24] it cannot empower its own appointee to execute a law of general applicability.[25] Thus, Congress exceeds its legislative power when it appoints individuals to wield executive powers or to participate in an entity with executive powers.[26]

The conundrum, then, is to take a law affecting the public and to apply it to Congress so it allows (1) constitutionally acceptable structural independence from the other branches; (2) efficient enforcement within the walls of Congress; (3) management as effective, independent, and forceful as it would have been given executive implementation.

Representative Christopher Shays (R-Conn.) and other members recently suggested a legislative solution to the problem.[27] Under the auspices of their legislation, a Board of Directors of the Office of Compliance would be created as an internal congressional mechanism for the enforcement of applicable laws. The Board would assume the several distinct roles mastered by federal agencies outside the Legislative Branch. The Board's final actions would be reviewable in court;[28] presumably, judicial deference similar to that afforded to executive agencies would develop over time.

However, one could argue that by enforcing laws, the Board and Office would violate the separation of powers rule, discussed above, that prohibits Congress from appointing agents to use executive powers "beyond the legislative sphere."[29] Consider the following case. A citizen asks for access to a senator's ap-

[22] 487 U.S. 654 (1988).
[23] 488 U.S. 361 (1989).
[24] Freytag v. Commissioner, 111 S. Ct. 2631, 2638 (1991).
[25] Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993) (citing Bowsher v. Synar, 478 U.S. 714 (1986)).
[26] *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d at 826–27.
[27] Congressional Accountability Act, H.R. 349, 103d Cong., 1st Sess. (1993).
[28] S. Rep. No. 215, 103d Cong., 1st Sess., pt. 2 (1993).
[29] *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d at 827.

pointment calendar under a law patterned after FOIA, and the senator refuses. The congressional agents hearing the citizen's complaint would have to exercise judgment regarding facts (e.g., identifying the calendar), and the applicability of the law (e.g., whether the statute applies). These actions, coupled with the Board's police powers under a statute created for the benefit of persons outside Congress, would raise separation of powers concerns. This situation could be analogized to *Bowsher v. Synar*,[30] which involved the role of the Comptroller General in the balanced budget statute. In *Bowsher*, the Court held that the Comptroller General, a congressional "agent," functioned as an executive when he "interpreted a law enacted by Congress to implement the legislative mandate," and therefore his actions violated the separation of powers doctrine.[31] According to the Court, "exercis[ing] judgment concerning facts that affect the application of the Act" is the "very essence of execution of the laws."[32]

However, Congress may avoid the separation of powers problem by narrowly drawing the Board's powers. A mediation role, for example, would not raise the difficulties associated with an enforcement role. "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality."[33] Congress and the Executive Branch may "converse with each other on matters of vital common interest" without violating the separation of powers doctrine.[34] At least at the adjudicative stage, the proposed office may be able to function without unconstitutionally "administering" the execution of laws, in the role of ombudsman. Much depends on whether the proposed office commands obedience and punishes violators, or whether it acts as a type of mediator or ombudsman enabling the citizen to use the courts as a vehicle for any mandate of disclosure. At the judicial review stage, courts seem to be less concerned with the ability of the judiciary to deal with misconduct by the Congress.

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[30] 478 U.S. 714 (1986).

[31] *Id.* at 733. *But cf.* Ameron Inc. v. United States Army Corps of Engineers, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988).

[32] *Bowsher v. Synar*, 478 U.S. at 733.

[33] Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935)).

[34] *Mistretta v. United States*, 488 U.S. at 408.

B. *Practical Differences Warranting Different Treatment*

1. Elected Officials Individually Accountable

One may distinguish the need for oversight of 535 elected members of Congress from the need for oversight of the remote, unelected bureaucracy that conducts the detailed business of the government. The latter is traditionally suspect for unaccountable decisions that impact the public with little effective recourse. On the other hand, the public and press have great influence on members of Congress through the electoral process. Prior to the adoption of FOIA,[35] there was no similar leverage over the bureaucracy, and what leverage currently exists is attenuated.[36]

To reply to a separation of powers argument with the facile claim that what is good for the agencies will be good for the legislature ignores the differences in consequences for an individual who fails to disclose properly. In such a situation, a permanent civil servant will likely not be effectively punished, but elected officials face effective recourse through the press and in elections. The probability of a presidential reprimand of a subcabinet official who excessively withholds information[37] is much less than that of pre-election press attacks on an elected representative or senator for excessive secrecy.

2. Shorter Time Frame Needed for Congress

Documents become obsolete with the passage of time. As FOIA is not an "instant access on demand" law, agencies have been able to mitigate the damage of disclosure effectively by delaying the release of information. Thus, the bureaucracy has learned to stretch ten days sometimes to a year or more. Congressional staff can easily learn the same lesson. Advocates who wish congressional committees would disclose their draft mark-

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[35] 5 U.S.C. § 552 (1988).

[36] It is remotely possible that a FOIA denial could be so unreasonable that the withholding official could lose his or her position after a court-ordered referral for study of misconduct under 5 U.S.C. § 552(a)(4)(F) (1988). Of hundreds of thousands of FOIA requests—perhaps as many as 2 million since 1965—no such penalties have been imposed on any federal employee.

[37] President Clinton told all agency heads to enhance public access and renew their commitment to FOIA disclosure principles. Memorandum on the Freedom of Information Act, 29 WEEKLY COMP. PRES. DOC. 1999 (Oct. 4, 1993).

ups of legislative proposals would be dismayed to learn that FOIA at a minimum allows a ten-day response time and that the average disclosure delay is dozens of months when sensitive information is involved, such as that from the FBI and from certain activities of the Food and Drug Administration.[38] The documents most valued in the short term would probably be slow to emerge from committee staffs; by the time of their release, those documents might no longer be of value. Thus, for a disclosure requirement to be meaningful when applied to Congress, new time constraints not yet required of the agencies would need to be instituted.

3. Legislature Must Be Explicit for Court Enforcement

Sometimes the experiences of the states can offer instructive insights. FOIA law needs to be enacted specifically for the legislature. Indiana newspapers objected to the secrecy with which the clerk of the state House of Representatives withheld voting records. The clerk sought a writ of prohibition from the state supreme court to preclude a FOIA-like lawsuit under state laws, and the state supreme court granted the writ in October 1993.[39] The court held that to the extent that FOIA legislation empowered courts to inquire into internal operations of the legislature, such laws violate separation of powers principles: "If the legislature wishes to authorize sanctions against itself upon a claim by press or public alleging improper legislative secrecy, such sanctions would have to be determined and imposed solely by the legislative branch itself, without recourse to the courts."[40] Chief Justice Shepard of the Supreme Court of Indiana dissented, observing that the withheld records disclosed which legislators had voted for or against portions of the state budget, and that the records were so significant that the issues involved should have been contested through appellate processes without the rapid process of a prohibitory writ.[41]

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[38] Delay is endemic, and agencies rarely meet the 10-day statutory response times. 5 U.S.C. § 552(a)(6)(A)(i) (1988). *See* Freeman v. United States Dep't of Justice, 822 F. Supp. 1064 (S.D.N.Y. 1993) (FBI has a 10,000-request backlog; plaintiff asked expedited release so he could inform Congress; held, no relief, since Congress had other means to get information it needed); 1 JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 7.06 (2d ed. 1990 & Supp. 1993).

[39] State *ex rel.* Masariu v. Marion Superior Court, 621 N.E.2d 1097 (Ind. 1993).

[40] *Id.* at 1098.

[41] *Id.* at 1098–99.

C. *The Speech or Debate Clause*

The scope of the Speech or Debate Clause[42] of the Constitution is relevant to the effectiveness and enforcement of open government legislation. Currently, disclosure laws are enforced against administrative agencies through mandates to disclose records, explain the reasons for withholding records, compensate for improper dissemination of personal data, or otherwise respond to a court order.

The members of the Constitutional Convention were concerned with preventing the branches of government from encroaching on each other's powers, so they took pains to outline the powers delegated to each branch and the limits of those powers. The Speech or Debate Clause is an example of how the Constitution protects the Legislative Branch from "possible prosecution by an unfriendly executive and conviction by a hostile judiciary."[43] The Clause, in relevant part, provides that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place."[44] The purpose of the Clause, to preserve the separation of powers, is accomplished by barring an Executive-Branch prosecutor from hauling a legislator into court to be tried before an unfriendly court in retaliation for undesired or disfavored legislative actions.

The Supreme Court has consistently read the Clause broadly to protect anything "generally done in a session of the House by one of its members in relation to the business before it."[45] The purpose of the Speech or Debate Clause is to protect members of Congress not only from "the consequences of litigation's results, but also from the burden of defending themselves."[46] Courts have also extended the Clause to protect activities of certain legislative aides that would be protected if the member of Congress performed them him or herself. In other words, when the aide acts as the member's "alter ego," the protection of the Clause is available.[47]

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[42] U.S. CONST. art. I, § 6, cl. 1.

[43] United States v. Johnson, 383 U.S. 169, 179 (1966). The Supreme Court noted that the purpose of the Clause was "[t]o prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Id.* at 181.

[44] U.S. CONST. art. I, § 6, cl. 1.

[45] Kilbourn v. Thompson, 103 U.S. 168, 204 (1881), *quoted in* Gravel v. United States, 408 U.S. 606, 617 (1972); *United States v. Johnson*, 383 U.S. at 179.

[46] Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

[47] *Gravel v. United States*, 408 U.S. at 618.

Activities within the scope of the Clause are protected absolutely. A literal reading suggests that the scope of the Clause is quite narrow. However, the Supreme Court "has given the Clause a practical rather than a strictly literal reading which would limit the protection to utterances made within the four walls of either Chamber."[48] The Court's practical reading of the Clause is limited to the "objective of protecting only legislative activities."[49] To determine whether an activity constitutes legislative activity that the Clause contemplates, courts inquire whether it is an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[50] The Clause offers members of Congress very little protection for actions beyond its scope. Thus, the courts have applied the Clause to protect members of Congress in both criminal and civil actions.[51] However, they have denied protection to legislators for criminal conduct "in preparing for or implementing legislative acts."[52]

Thus, in *Powell v. McCormack*,[53] the Supreme Court held that the defendant members of Congress were immune in an action alleging that they unconstitutionally excluded the plaintiff member-elect to Congress from taking his seat in the House of Representatives.[54] The Court held that "[c]ommittee reports, resolutions, and the act of voting are things generally done in a session of the House by one of its members in relation to the business before it."[55]

Courts have drawn important distinctions that limit the protection of the Speech or Debate Clause. In *United States v. Brewster*,[56] the Supreme Court distinguished "legislative acts" from "political acts" when applying the Clause. The Clause protects "legislative acts," defined as "act[s] generally done in Congress in relation to the business before it." However, other "entirely

[48] Hutchinson v. Proxmire, 443 U.S. 111, 124 (1979).
[49] *Id.* at 125.
[50] *Gravel v. United States*, 408 U.S. at 625.
[51] *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975).
[52] *Gravel v. United States*, 408 U.S. at 626.
[53] 395 U.S. 486 (1969).
[54] *Id.* at 492–93.
[55] *Id.* at 502 (citing Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)).
[56] 408 U.S. 501 (1972).

legitimate" acts are not protected.[57] These activities, designated "political activities," include "preparing so-called 'news letters' to constituents, news releases and speeches delivered outside the Congress."[58] The Court found that "the range of these related activities has grown over the years" and that "they are performed in part because they are a means of developing continuing support for future elections."[59]

The Court drew a somewhat related distinction between communication within Congress and communication to outside parties. In *Gravel v. United States*,[60] a senator intervened in a grand jury proceeding with a motion to quash a subpoena served on one of his aides. The Court held that the Speech or Debate Clause would protect the senator from any questioning regarding the allegedly illegal introduction of classified papers into the public record during the subcommittee reading.[61] The Court described the claim for this protection as "incontrovertible."[62] However, the Court held that the Clause did not protect the senator for his alleged arrangement with a publisher to publish the same information for dissemination to the public.[63] The Court held that just because "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."[64] The Court found that dissemination of information to the public was not "an integral part of the deliberative and communicative processes by which Members participate" and was therefore not protected as a legislative act.[65]

Similarly, in *Doe v. McMillan*,[66] the Court held that introducing material to a congressional committee hearing and voting for the publication of such hearings were protected activities.[67] *Doe* arose after a congressional report on the District of Columbia school system was published. The report included "copies of absence sheets, lists of absentees, copies of test papers, and documents relating to disciplinary problems of certain specifically

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[57] *Id.* at 512.
[58] *Id.*
[59] *Id.*
[60] 408 U.S. 606 (1972).
[61] *Id.* at 615.
[62] *Id.*
[63] *Id.* at 622.
[64] *Id.* at 625.
[65] *Id.* at 625–26.
[66] 412 U.S. 306 (1973).
[67] *Id.* at 312.

named students."[68] The complainants sought injunctive and declaratory relief as well as damages for an alleged invasion of privacy through publication of the report. The named defendants included the chairman and members of the Committee on the District of Columbia. The Court found:

> Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries. . . . The acts of authorizing an investigation pursuant to which the subject materials were gathered, holding hearings where the materials were presented, preparing a report where they were reproduced, and authorizing the publication and distribution of that report were all "integral part[s] of [the legislative function]."[69]

In *Hutchinson v. Proxmire*,[70] the Supreme Court reiterated that the Speech or Debate Clause does not protect individual members of Congress who transmit information using press releases and newsletters.[71] Hutchinson brought an action against a senator for defamation as a result of a speech presented to the Senate which was then incorporated into an advance press release and sent to the media.[72] The senator's argument, rejected by the Court, was that in reality little actual debate is conducted on the floor and that therefore the Court should consider press releases and newsletters as necessary means for members of Congress to communicate.[73] The Court declined to broaden the protection of the Clause in this way, holding that as "valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process."[74]

Taken together, Speech or Debate Clause case law casts doubt on the validity of new controls affecting the public statements of members of the Congress. As suggested below in the Privacy Act discussion,[75] this line of cases makes it less likely that Congress can penalize a disclosure made by a member.

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[68] *Id.* at 308.
[69] *Id.* at 312–13 (citing Gravel v. United States, 408 U.S. 606, 625 (1972)).
[70] 443 U.S. 111 (1979).
[71] *Id.* at 130.
[72] *Id.* at 115–16.
[73] *Id.* at 124.
[74] *Id.* at 133.
[75] *See infra* part IV.D.

D. *Arrest Immunity Clause*

Members of the Congress will "in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . . ."[76] As Thomas Jefferson explained, the purpose of the Arrest Clause was not to treat legislators as if they were above the law, but rather to shield the process of legislation from interference: "'When a Representative is withdrawn from his seat by summons, the . . . people whom he represents lose their voice in debate and vote . . . .'"[77] In *Long v. Instill*,[78] a libel case against Senator Huey P. Long of Louisiana, the Supreme Court held that the privilege against arrest does not include a privilege against being served with a summons while Congress is in session. Rather, the grant of immunity was limited to immunity from arrest.[79]

The Supreme Court has limited Arrest Clause immunity to arrests in civil suits. In *Williamson v. United States*,[80] a congressman was convicted of a criminal misdemeanor.[81] The Court held that the exception to Arrest Clause protection for "Treason, Felony and Breach of the Peace" was intended to encompass all criminal offenses, both felonies and misdemeanors.[82] Citing *Williamson* in a later case, the Court explained, "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies."[83] Although the distinction of civil from criminal offenses is generally clear, civil and criminal contempt blur this distinction.[84] For example, a breach of a civil injunctive order compelling the opening of a closed caucus meeting under a statute paralleling the Sunshine Act[85] or the FACA[86] might raise issues implicating

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[76] U.S. CONST. art. I, § 6, cl. 1. This protection is not available to persons other than the members. JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 211 (1988).

[77] GRABOW, *supra* note 76, at 210 (quoting H.R. Doc. No. 279, 99th Cong., 2d Sess. (1987)).

[78] 293 U.S. 76, 82 (1934).

[79] *Id.*

[80] 207 U.S. 425 (1907).

[81] *Id.* at 445–46.

[82] *Id.*

[83] Long v. Ansell, 293 U.S. 76, 83 (1934).

[84] GRABOW, *supra* note 76, at 211, n.90.

[85] 5 U.S.C. § 552b(a)(1) (1988).

[86] FACA, *supra* note 1, § 3(3), 5 U.S.C. app. at 1176.

the Arrest Clause immunity of the members named in the injunction.

Civil immunity is especially relevant to a discussion of penalties of the FOIA, because a refusal to comply with a district court order can result in contempt proceedings as punishment for the responsible Executive Branch employee.[87] If FOIA were revised to include Congress, and criminal contempt charges were brought against a member of Congress for refusal to comply, the Arrest Clause would not protect against an arrest for criminal contempt while Congress was in session.

E. *Presentment Clause*

Any legislative act involving enforcement that has effect beyond members of Congress and their staffs requires compliance with the Presentment Clause—both chambers of Congress must pass such an act, and the President must sign it.[88] As held in *Immigration & Naturalization Service v. Chadha*,[89] an action of a single chamber of Congress cannot adversely affect the interest of a person outside Congress. Article I stipulates a "single, finely wrought and exhaustively considered, procedure" that must be followed in the legislative process.[90]

A Presentment Clause problem arises in open government contexts, for example, when a citizen seeks disclosure of Senate committee papers under the FOIA.[91] Even though a Senate rule may shield the document from dissemination generally, it is an adjudicative action of the proposed Board of Directors of the Office of Compliance[92] that specifically declares the access rights of a requesting citizen regarding the records. Under current FOIA law, that adjudication is the functional equivalent of "final agency action" denying a FOIA request.[93] Therefore, were the challenger to assert that the decision to withhold premised on a single-chamber rule is a "legislative act," there would be a question as

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[87] 5 U.S.C. § 552(a)(4)(G) (1988).
[88] U.S. CONST. art. I, § 7, cls. 2, 3.
[89] 462 U.S. 919 (1983).
[90] *Id.* at 951.
[91] 5 U.S.C. § 552 (1988).
[92] Congressional Accountability Act, H.R. 349, 103d Cong., 1st Sess. (1993); S. REP. No. 215, 103d Cong., 1st Sess., pt. 2 (1993).
[93] 5 U.S.C. § 552(a)(6)(A)(ii) (1988).

to whether the Presentment Clause, which would require bicameral approval and presidential signature, had been implicated.

A prudent congressional drafter must craft a hybrid process between legislative and executive to navigate the minefield of Separation of Powers Doctrine, Speech or Debate Clause, and Presentment Clause challenges in creating enforcement of laws on Congress.

F. *Waiver of Constitutional Privileges*

Congress may waive a privilege on behalf of its committees, leadership caucuses and support institutions. However, it is not clear whether the institution of Congress has the ability to waive the Speech or Debate Clause immunity of an individual member through the rules of a single chamber. For instance, when a member ignores a court order requiring the rehiring of a terminated employee or the disclosure of a document, it is unclear whether a plaintiff could point to an institutional waiver (express or implied) to convince a court that the individual member could not invoke Speech or Debate privileges.

Long-standing precedents seem to deny Congress the power to waive members' claims of immunity, although Congress can fix disclosure policies for entities subordinate to the elected members of the Legislative Branch, such as GAO fraud investigation teams.[94] Absent protection by virtue of their status as legislators, there is no reason members should not be subject to the same punishments for misconduct as are other citizens. In *United States v. Helstoski*,[95] the Supreme Court explicitly reserved the question of whether either Congress or individual members could waive the protection of the Speech or Debate Clause. In that case, the Court held that Representative Helstoski had not waived his Speech or Debate Clause protection by testifying for a grand jury. The Court stated that if waiver is possible, only the member's "explicit and unequivocal renunciation of the protection" could effect a waiver.[96]

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[94] Coffin v. Coffin, 4 Mass. 1, 27 (1808) (finding no waiver by House as to claim by elected member); Gravel v. United States, 408 U.S. 606 (1972) (holding that subordinate bodies do not have broad immunity enjoyed by members).

[95] 442 U.S. 477, 490–92 (1979).

[96] *Id.* at 491.

This result would follow naturally the *Helstoski* Court's holding that the original intention of the Clause was to protect the separation of powers and prevent persecution of members of Congress by the dominant political party in the Legislative and Executive Branches. The *Helstoski* Court quoted an early case, *Coffin v. Coffin*,[97] to assert the proposition that "the privilege secured . . . is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house."[98] Perhaps disallowing institutional waiver enables the exercise of strong individual leadership and encourages qualified individuals to seek public office.

The *Helstoski* explanation and the Court's reluctance to decide the issue suggest that the Court would hold that Congress cannot waive an individual member's privilege. However, if the Court were to allow such a waiver, it would most likely require it to be stated explicitly in a narrowly drawn statute supported by compelling reasons. Without such a waiver, courts would lack the power to impose penalties on members of Congress unless their conduct fell outside the scope of the immunity.

Institutional waiver could affect unelected employees of the Legislative Branch. Courts would probably punish congressional aides or employees unless they were acting as "alter egos" of members, and were thus entitled to derivative immunity.[99]

II. Enforcement Feasibility

Even after hurdling the constitutional obstacles to enforcement, an effort to apply open government legislation to Congress must still face concerns involving drafting and feasibility. The drafter must avoid vagueness problems and the delegation of functions to incorrect offices. As federal laws tend to have specific executive administrators or enforcers, statutes cannot be applied to the Legislative Branch with a simple "strike A and substitute B" approach.

First, the drafter must plot the flow of activity under the law, substitute Legislative for Executive Branch officials at appropri-

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[97] 4 Mass. 1 (1808).

[98] *United States v. Helstoski*, 442 U.S. at 493 (quoting Coffin v. Coffin, 4 Mass. 1, 27 (1808) (emphasis omitted)).

[99] Gravel v. United States, 408 U.S. 606, 616–17 (1972).

ate points, and determine whether those officials will be sufficiently independent for the legislation to be credible to the public while they remain within the *legislative* sphere.[100] This subjective element of sufficient independence must be evaluated with an eye to the probable responses of both political critics and the press. To persuade voters of the effectiveness of congressional self-policing, there must be a "kick" to the enforcer wherever situated, lest both the objects and beneficiaries of the regulation find that the new nonexecutive enforcer has no ability to execute its duties. A compliance office that issued advisory opinions without power over the member would likely be acceptable to critics only if the aggrieved requester could gain *de novo* judicial review of the member's behavior.

Well-informed observers do not expect an easy transformation of open government laws from general statutes to specifically congressional statutes. Although a parallel investigatory and adjudicatory system will require experienced attorneys, the cost will be justified. The drafter must ensure that systemic parallels are close enough to satisfy neutral scrutiny while at the same time negotiating a charged political atmosphere.

Judicial deference is desirable, but its achievement demands that a decision-making official develop a credible record prior to the court's involvement. The drafter of a regulatory statute should not expect the same depth of "administrative record" from the newly created parallel agency as could be expected from an established agency.[101] It would take years before such a new entity could routinely develop data, proofs, and findings with the same level of confidence as long-established and veteran-staffed administrative adjudicators. Courts simply do not defer to new entities with little expertise, even when statutory inference encourages them to do so.[102]

The drafter can encourage judicial deference with statutory language guiding judicial oversight. Although a standard of review of "substantial evidence" might seem too liberal to critics of a new law, a more stringent standard is dangerous.[103] First, *de*

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[100] Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (1993).

[101] The concept of the administrative record is discussed in detail in JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING ch. 6 (1983, Supp. 1993).

[102] *See, e.g.*, Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978) (rejecting two of regulatory commission's standards because of lack of substantial evidence required by federal statute).

[103] 5 U.S.C. § 706(2)(E) (1988).

novo judicial review[104] with complete evidentiary processes before the district court emasculates the administrative system. Cases such as *Citizens to Preserve Overton Park Inc. v. Volpe*[105] set conditions on a court's review of the record that have made *de novo* review a rarity except when Congress specifies such review, as it did with the FOIA.[106] Thanks to congressional suspicion of agency motives for document secrecy, FOIA gives little deference to agencies. An "arbitrariness" standard of review is politically undesirable: members would hate to see headlines that proclaim, "Senator X Found Arbitrary By Judge in Secret Files Case."

III. THE FREEDOM OF INFORMATION ACT AND CONGRESS

Applying laws to Congress is especially difficult in the open government field, because Congress twisted the original concept of this legislation to forge stricter standards for the agencies. With such an onus imposed on the agencies, it is less likely that Congress would accept extension of these same laws to its own internal processes. This Part will offer comprehensive analysis of FOIA; the subsequent three Parts will provide overviews of the three other principal open government statutes. Each Part will describe the difficulties of applying a particular open government statute to the Legislative Branch. As in regulatory and labor contexts, Congress would most likely not have been as harsh if it was subject to the law.

FOIA,[107] adopted in 1966 and amended in 1974 and 1986, has been the subject of dozens of major decisions of the Supreme Court and the D.C. Circuit.[108] FOIA was the product of media and congressional suspicion of agency secrecy; the processes of FOIA reflect that serious lack of trust.

Information held by agencies (other than Legislative and Judicial Branch entities) is presumptively available for disclosure unless one of nine exemptions applies. To avoid disclosing requested materials, an agency must (1) invoke its discretionary

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[104] The mechanism of *de novo* review is addressed at length in 1 O'REILLY, *supra* note 38, § 8.12.

[105] 401 U.S. 402 (1971).

[106] 5 U.S.C. § 552(a)(4) (1988).

[107] *Id.* § 552.

[108] Supreme Court precedent on this subject is discussed in 1 O'REILLY, *supra* note 38, § 8.

power to use one of the nine statutory exemptions and (2) convince a federal court that (A) the document is exempt and (B) the agency has properly invoked the exemption. If the court disagrees and orders disclosure, the requester wins attorney fees and costs. In egregious cases the court can refer the file to federal personnel officials for disciplinary actions against the individual responsible for withholding the documents. Presidential encouragement of disclosure in the current administration is expected to result in increased willingness to disclose records that may fall within one of the nine exemptions.

Exemptions in the current FOIA can be divided into three categories. The first category of exemptions relates to information likely to be protected in both executive and legislative contexts, such as military secrets, commercial trade secrets, banking audit reports, and oil well information.[109] These exemptions could easily be applied to the Legislative Branch. The second category needs special tailoring to fit the congressional context. This category includes a law enforcement confidentiality privilege,[110] an internal management exemption,[111] and an exemption for agency correspondence.[112] The third category allows for exemption of records covered by other special statutes whose terms forbid the disclosure of a type of record or describe "particular criteria" or "particular matters" to be withheld. This category includes laws such as the statutes protecting privacy of tax filings.[113] These exemptions must be adapted to the particular needs of Congress. Full legislative procedures for an exemption's enactment must be utilized; issues of bicameralism and Presentment Clause deficiencies will be used to attack an exemption claim if either chamber of Congress decides to mandate the secrecy of a class of records by adopting only a one-House rule and not a full statute.[114]

A. *Process Issues*

Four types of process difficulties would arise in the application of FOIA to Congress.

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[109] 5 U.S.C. § 552(b)(1), (4), (8), (9) (1988).
[110] *Id.* § 552(b)(7).
[111] *Id.* § 552(b)(2).
[112] *Id.* § 552(b)(5).
[113] *Id.* § 552(b)(3).
[114] Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); *see supra* part I.E.

First, an infrastructure to handle requests in a timely manner would need to be created; such an infrastructure does not now exist outside the largest Executive-Branch agencies. Requests must be funneled to a central facility in order to allow tracking and timely response. Agency experience demonstrates that decentralization slows the response process and adds to expense and frustration. The benefits of centralization include responsive service and increased ability to comply with deadlines. The negative aspects of centralization include the cost of new appropriations, including additional staff positions, staff difficulties in controlling papers that minority members hold, and burdens to those offices and committees most likely to receive requests (the GAO, GPO, and appropriations and finance committees). As Congress has long enjoyed institutional immunity from FOIA,[115] any organizational entity now created would be part educator, part mediator, and part enforcer—a difficult combination of roles in a difficult environment.

This infrastructure must meet FOIA's logistical needs. The rules of each chamber of Congress must, as a practical matter, direct the approximately 750 offices that are potential recipients of FOIA disclosure requests[116] to channel any such requests to a smaller number of access points, with those access points equipped to track receipt, review, response, and appeal.[117] The alternative seems a recipe for ruin. It would not be possible to educate each of the 750 potential recipient offices to bring each "up to speed" with the mechanisms of disclosure. Congress could lengthen the law's ten-day response time. Absent such a change, political restraints would prevent Congress from allowing itself more time than it allowed the agencies.[118] The case for altering the ten-day rule would become immediately apparent if senators' offices had to meet such deadlines on a daily basis.

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[115] *See* Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990); Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1416 (D.C. Cir. 1985); Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980); Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

[116] This estimate includes 535 member offices, more than 100 committees, and dozens of institutionally affiliated support entities such as the GAO. A more accurate number cannot be determined from outside Congress because requests might come to offices below the institutional level.

[117] Centralized agency FOIA operations are superior in each of these stages, based on more than 20 years of the author's experience as both a requester and an observer. The American Society of Access Professionals, the FOIA professional group, might be polled for a broader constituency substantiation of this belief.

[118] 5 U.S.C. § 552(a)(6) (1988).

Second, Congress would need to develop a standard for judicial review. The judicial review of an agency's FOIA decision to decline to disclose records is *de novo*, with a complete set of affidavits and possible discovery before a federal district court.[119] A Congress that applies FOIA to itself has three choices: it must (1) allow complete Judicial Branch fact-gathering by retaining FOIA's *de novo* standard of review despite separation of powers implications; (2) risk the ire of the news media by denying close scrutiny of its own withholding decisions, giving those decisions more weight in district courts than agency decisions have been given in several thousand case determinations;[120] or (3) eliminate all *de novo* review and reverse the history of FOIA as a safeguard against secrecy. Granting such weight to congressional determinations of withholding would mean omitting *de novo* judicial review from the statutory revision or appendage specific to Congress.

De novo review of disputed congressional document withholding could be dropped in order to avoid the separation of powers problems involved with courts probing the motives and intentions of Congress. However, such a "FOIA Lite" remedy would be vigorously challenged if the new law lacks the same level of qualitative Judicial-Branch involvement that agencies endure in FOIA cases; Congress seems to be uniquely vulnerable to media suspicion of covering up or hiding records.

Third, venue for FOIA lawsuits rests in district courts (1) where the requester resides or has a principal place of business, (2) where the agency records are situated, or (3) in the District of Columbia.[121] If the Legislative Branch is subject to FOIA, its legal counsel must be prepared to appear in ninety-six district courts upon the filing of a FOIA suit, because nothing in FOIA mandates transfer to a forum more convenient to the defendant. Congress could opt to have the Justice Department defend it in court with local U.S. Attorneys, but such an arrangement would raise separation of powers issues. Assignment of the defense role to the Department of Justice would be particularly sensitive due to the history of the Department's FOIA conflicts with Congress.[122]

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[119] *Id.* § 552(a)(4)(B). Discovery is rarely granted, and the courts frequently find that agency affidavits are unacceptably vague, requiring redrafting and resubmission.

[120] These cases are compiled in U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION CASE LIST (1993).

[121] 5 U.S.C. § 552(a)(4)(B) (1988).

[122] *See, e.g.*, Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980); "agency" disputes related in 1 O'REILLY, *supra* note 38, § 4.02.

Fourth, a problem arises because FOIA provides for an award of attorney fees when a requester "substantially prevails."[123] In Executive-Branch cases, funds are taken from the administrative agency's contingency budget. If a decision of the Legislative Branch's designated FOIA entity were defeated in court, there would presumably need to be a contingency fund created for payment of attorney fees and costs. If a member declined to disclose a record, even though Congress's FOIA institution approved of disclosure, it is not clear that the court could order the individual member to pay fees and costs from the member's own funds. Nor is it clear if there is a duty of each house of Congress to indemnify each of its 535 decision makers for individual decisions that courts find to have been legally incorrect. One member's counsel might pursue a refusal of disclosure as far as the Supreme Court, even though a majority of the House or Senate urges release. These questions parallel discussions of waiver authority for the individual member.

B. *Exemption Issues: Internal Deliberations*

The internal memorandum exemption[124] would be the least transferable FOIA exemption. The purpose of the exemption, to avoid the chilling effect of disclosure upon candid internal recommendations made by agency staff to agency decision makers, is well noted in the case law.[125] Only predecisional memos, not the "final" opinion of the decision-making official, can be thus exempted.[126] Such a provision would apply to senators and representatives because they are key constitutional decision makers. Their memos to colleagues, which traditionally have not been confidential, are in some cases internal recommendations for collective action. However, these same memos usually state a member's decision and position as well. If Congress subjects itself to FOIA, and if it wishes member documents to be confidential, it will need an exemption that recognizes a rationale for withholding other than the rationale of current Exemption Five.

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[123] 5 U.S.C. § 552(2)(4)(E) (1988).
[124] *Id.* § 552(b)(5).
[125] *See, e.g.*, NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975).
[126] Quarles v. Department of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990); Mead Data Central Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977). The case law is reviewed in 1 O'REILLY, *supra* note 38, §§ 15.07–15.12 (Supp. 1993).

Staff members would also be among the exemption's beneficiaries. Staff members are enormously powerful within Congress, but their roles are not "decisional." Without the benefit of an exemption from FOIA's provisions, staff opinions would likely be "chilled," i.e., made circumspect. For example, assume a controversial Supreme Court nominee will appear next week before the Senate Judiciary Committee, and an advocacy group that opposes the nomination files a FOIA request with the offices of senators who are expected to support the nominee, asking for copies of the staff's lists of questions to be used in the hearing. Premature disclosure might inhibit staff opinions, since the actual use of any of the questions would be solely up to the member.

1. Reasons for an Internal Advice Exemption

Advocates of Exemption Five have argued that disclosure would hamper frank, open discussion of legal or policy matters because individuals might temper their opinions for fear that they may be subject to public disapproval if their thoughts are revealed.[127] Another justification for the privilege is that it prevents disclosure of executive agency policy before it is actually adopted.[128]

Additionally, the exemption protects the public from confusion in two ways. First, as final decisions and rationales often depart from the suggestions of an internal memorandum, withholding prevents the public from relying on a predecisional proposal or proposed reasoning that was not ultimately adopted by the agency.[129] Second, open disclosure of predecisional documents might lead individuals to infer wrongly that those documents contain the reasoning of the agency, when in fact the predecisional reasoning had been rejected. The likelihood of such a misunderstanding would be high when the agency chose not to explain the reasoning of its final decision.

In order to be exempt, a record must be predecisional, i.e., created before an agency's final action.[130] A record explaining a

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[127] Access Reports v. Department of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1991). This effect has been a recurring theme for decades. *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

[128] *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d at 866.

[129] *Id.*

[130] City of Virginia Beach v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993).

final decision will not be exempt.[131] However, many documents both explain a final decision and give future recommendations. When determining exemption status for these documents, the key is ascertaining whether the primary emphasis of the subject matter is on the future or on the past. The courts have adopted a case-by-case analysis which examines several factors. First, courts look at the flow of the document within the organization. Documents that move from a subordinate to a higher official are more likely to be predecisional.[132] Likewise, a document is probably predecisional if it has no binding precedential value but is simply used as a persuasive authority in the decision at hand.[133]

The federal district courts have written approximately 275 opinions regarding Exemption Five,[134] but they have no experience interpreting such a privilege as it would apply to Congress. Courts would be forced to wrestle with the application of an essentially executive privilege to a legislative context. This could be daunting—particularly if Congress does not provide extensive guidance. Unlike an executive privilege, a legislative privilege has no recognizable standard, let alone a history or precedent upon which to build. Thus, the results of its application to situations including legislative drafting and vote trading would be unpredictable.

2. Final Decisions Terminate Internal Privilege

The courts would have to struggle with determining when a congressional decision is final, because at that point Exemption Five becomes inapplicable. A requester might assert that a decision is final as to the entity or member from whom information is requested. Determining exactly when a document evolves from being predecisional and deliberative to being final and explanatory poses problems within an agency. It is even more difficult within the congressional legislative process.

In agencies, a decision may be formally adopted or it may be informally used as the "working law." The difficulty with transferring this analysis to Congress is that a proposal winding its

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[131] Concrete Construction Co. v. United States Dep't of Labor, 748 F. Supp. 562 (S.D. Ohio 1990).

[132] Public Citizen v. Department of State, 787 F. Supp. 12, 14 (D.D.C. 1992). *See generally* 1 O'REILLY, *supra* note 38, § 15.08 (Supp. 1993).

[133] Schlefer v. United States, 702 F.2d 233, 237 (D.C. Cir. 1983).

[134] U.S. DEP'T OF JUSTICE, *supra* note 120, at 457–58.

way through Congress does not actually affect the public until both houses pass it and the President signs it.[135] Thus, until a bill is signed into law, its content and supportive documents would not be considered final. When applied to Congress, predecisional record exemptions could provide more protection and greater secrecy than agencies are currently allowed under FOIA.

It may sound almost philosophical to ask, "When is a decision final?" Nevertheless, the consequence of finality is the loss of exempt status. A court decision regarding finality—determining a nonexempt status that allows disclosure—means that an Article III court affects an internal function of the Article I Congress. This amounts to the judiciary's controlling the legislative process. It is highly doubtful that either branch of government would accept such judicial meddling.

3. Arguments Against an Internal Advice Exemption

FOIA, if applied to Congress, would not need an Exemption Five, especially because it would be so difficult to apply that exemption without major revisions.

The primary concern of Exemption Five, as expressed in foundational cases of executive privilege,[136] is the protection of free and open discussion of legal and policy matters within an agency. Congress already engages in sufficient, and perhaps excessive, debate. In the context of Congress, the *marginal additional* disclosure of information which could be considered "internal advice" would not actually harm the deliberative aspect of the legislative process.

For the most part, Congress is an institution that already operates in public view. Average citizens have many avenues by which to keep track of the legislative process. For example, bills, committee reports, floor speeches, debate statements, and conference reports are all public information. Unless the subject matter is sensitive or confidential in nature, most legislative proceedings are carried out orally and in scheduled public sessions. Members of Congress must often justify their positions to their constituencies, thus making those positions a matter of

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[135] U.S. CONST. art. I, § 7, cl. 7; Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

[136] Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 945–46 (Ct. Cl. 1958).

record. Furthermore, precedential interpretations of parliamentary rules are published.[137] Congress has also studied how to disclose more of the information that it now disseminates.[138]

The members' ability to express their views in a frank and open manner has not been stifled despite that presently, congressional disclosure is more extensive than disclosure in executive agencies. Thus, it would seem to matter little if the documents that members examine in reaching their decisions are made public as well. In fact, complete records of the documentation a committee considers in its deliberations are routinely published as prints and often contain staff summaries and recommended courses of action. Although these would be the quintessential documents protected under Exemption Five, there is no evidence that the disclosure of such records has adversely impacted the deliberative process.

The concern that increased disclosure will cause a member to temper his opinion is not convincing because the office is so public in nature. The difference in ultimate accountability between those who face the voters and those who only deal hierarchically with management within a federal agency is significant. Furthermore, it would seem incongruous to argue that the deliberative process would suffer by being made more accessible to the public. In summary, Exemption Five should not apply to the writings between and among members of Congress.

4. The Waiver Issue

Another difficulty Congress may encounter with Exemption Five is the FOIA waiver power that grants agencies the discretion to disclose internal memoranda. Because this is a discretionary waiver power, individual members of Congress would presumably be able to waive exempt status and disclose internal correspondence they had circulated among themselves, unless a central body asserted an institutional policy of nondisclosure. This Article's earlier discussion of waiver of constitutional Speech or Debate Clause immunity suggests the many problems waiver

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[137] 2 U.S.C. § 28 (1988).

[138] By statute, Congress created a Commission on Information and Facilities, 2 U.S.C. § 29(b) (1988), to study these needs and a Joint Committee on Congressional Operations to study systemic improvements, 2 U.S.C. §§ 411, 412(a) (1988).

poses for an institution whose members are separately elected by diverse constituencies.[139]

Agency waivers of exempt status constitute a significant loophole, which the expansion of FOIA to Congress would complicate. Courts have held that a document can be informally adopted—and the concomitant exemption waived—if it is used to explain a policy or if it has informally become the "working law" of an agency.[140] Privileged status can also be waived if an agency voluntarily discloses a document to a third party.[141] However, Congress does not qualify as a third party nongovernment recipient for purposes of FOIA case law's waiver-by-disclosure provision.[142] Disclosure to Congress does not make documents public because Congress has retained authority over the agencies.[143] This experience suggests that close attention be paid to the waiver provisions of any new statute on congressional disclosure.

5. The Senate Model

The Senate may already have a model by which to forecast how Congress would conduct itself under FOIA without Exemption Five. In Senate Rule 26.5(b), the Senate states its policy on open hearings and lists the specific criteria for closing a hearing.[144] The language used for these criteria is similar to language used in FOIA exemptions. The six categories by which the Senate may close its hearings correlate very closely with several of the FOIA exemptions.[145] It is arguable, then, that the Senate has examined its procedures and determined that its deliberative function, as carried out in hearings, is not impaired by public access. By closing hearings to the public when highly sensitive information is discussed, the Senate has apparently determined that it is able to deliberate in the public eye while still protecting information which should be kept secret.

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139 *See supra* part I.F.

140 Taxation with Representation Fund v. IRS, 646 F.2d 666, 683 (D.C. Cir. 1981).

141 Education/Instruccion Inc. v. United States Dep't of Housing & Urban Development, 471 F. Supp. 1074, 1081 (D. Mass. 1979), *aff'd*, 649 F.2d 4 (1st Cir. 1981).

142 Murphy v. Department of the Army, 613 F.2d 1151, 1155–58 (D.C. Cir. 1979).

143 Ryan v. Department of Justice, 617 F.2d 781, 785 (D.C. Cir. 1980).

144 SENATE COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. NO. 1, 102d Cong., 1st Sess. 53–54 (1992).

145 5 U.S.C. § 552(b)(1)(4), (7) (1988).

6. Protecting Staff Documents

There remains the question regarding an Exemption Five for protection of internal advice and drafts prepared by members' staff. The Supreme Court's decision in *Gravel v. United States*[146] protected staff members to a limited extent; the outcome of that 1992 case suggests that some recognition of such a privilege would be appropriate.

Like their executive counterparts, the employees of legislative support agencies (e.g., GAO, OTA, GPO, Congressional Research Service, etc.) make draft recommendations to members for concurrence before public release. Recent scholarly testimony before Congress has suggested that a distinction be made depending on whether the entity in question is acting primarily in an administrative or a legislative capacity.[147] Support agencies that act in an administrative fashion should have the equivalent of an Exemption Five, while those that are more legislative in character require an adapted Exemption Five or possibly no such exemption.

Congress probably needs to allow some sort of Exemption Five protection for those support entities that essentially operate as agencies within the Legislative Branch. A paradigm example of appropriate nondisclosure is found with GAO audits of bad management of public sector employees, which are not released until after drafts have been submitted to the person in Congress who sought the review.

7. Timing of Disclosure

Any consideration of Exemption Five must take timing into account. Although much of what a member does is public, it may not be wise *prematurely* to expose his or her analysis of voting and confirmation matters.

This is particularly true for controversial issues that legislators evaluate extensively with their consituencies' best interests in mind. This evaluation process might be blunted if the legislator were forced to disclose thoughts on an issue before making a

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[146] 408 U.S. 606 (1972).

[147] *Application of Laws and Administration of the Hill: Hearings Before the Joint Comm. on the Organization of Congress*, 103d Cong., 1st Sess. 233–35 (1993) (testimony of Professor Harold H. Bruff).

decision. Untimely publication of a legislative aide's memo that proposes an option to the legislator could lead the public to misinterpret a representative's thoughts and actions. The answer may be to exempt materials until a decision is made.

Another concern is that political opponents could harass a legislator by inundating his office with FOIA requests to distract the staff from other tasks. Furthermore, disgruntled voters who seek help against the bureaucracy unsuccessfully, and blame the senator or representative for their frustration, could become pro se litigants against the member by using FOIA for harassment just as prison inmates frequently do.[148] Disclosed memos or notes taken from office files could yield a misleading picture of the member. For example, it could be politically embarrassing for a representative to keep a draft of proposed legislation espoused by an extremist group, later to be exposed to the public as one favoring the legislation, despite having staunchly opposed such groups and their beliefs. Thus, guilt by association with documents might be used to attack a member.

These problems of abuse, the "law of unintended consequences," may lead Congress to favor a narrower version of Exemption Five that specifically delineates what types of documents are considered exempt as deliberative and what others must be disclosed.

If Congress decides to forego an Exemption Five, it would require a formal policy to waive the nondisclosure privilege for internal correspondence among members and staff. Tailoring a narrower exemption would reflect positively on Congress politically because Congress could claim that the exemption was even more prodisclosure than FOIA.

Congress would probably have to change several of its internal rules. Both chambers would need to change their respective rules from merely authorizing publication of hearings and the related materials to routinely requiring such publication. However, that requirement might need to be accompanied by exceptions similar to those that the Senate employs to close a hearing. The rules must also be amended to make disclosed materials available to

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[148] Prisoner FOIA cases brought pro se are among the largest sources of FOIA litigation. A Danbury Federal Penitentiary litigant brought dozens of actions. *See, e.g.*, Crooker v. Department of Treasury, 663 F.2d 140 (D.C. Cir. 1980); Crooker v. Department of Justice, 632 F.2d 916 (1st Cir. 1980); Crooker v. Department of State, 628 F.2d 9 (D.C. Cir. 1980).

the public, much like the House requires committee roll call votes to be accessible in committee offices.

Adoption of FOIA further requires drafting a publication and public access provision to parallel the little-noticed terms of FOIA's affirmative disclosure provisions, discussed below.[149]

B. *Law Enforcement Exemptions*

If FOIA were applied to Congress, congressional staff documents and externally sourced background documents supporting investigatory hearings of the House and Senate would become more accessible to the public. The current FOIA law enforcement exemption, Exemption Seven, would not work well for Congress,[150] because it would result in reduced informant cooperation.

The best argument for applying FOIA *without* Exemption Seven would be that public oversight will deter abusive use of congressional investigations. Increased access to records and documents utilized during investigatory hearings would reveal the biases that sometimes underlie congressional hearings. Congressional investigations arise for many reasons other than an actual felt need to look into matters of genuine national concern. These reasons include a congressmember's personal agenda and curiosities, as well as a special interest's desire to embarrass its opponents. The courts have perpetuated a perception that hidden motives drive investigations by consistently upholding each challenged investigation as serving a legitimate congressional purpose, while ignoring requests that ulterior motives be scrutinized. Disclosure of motives would reduce abuse of the investigatory process because it would expose financial donors to powerful chairmen who surreptitiously seek to influence investigatory hearings in their favor.

Public disclosures of documents underlying congressional investigatory hearings, without concealment of such documents under Exemption Seven, would diminish temptations to exploit investigatory power for arbitrary ends. In *Ashland Oil, Inc. v. FTC*,[151] Congressman John Moss, in his official capacity, requested data from the FTC pertaining to Ashland's lease exten-

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[149] 5 U.S.C. § 552(a)(1), (2) (1988).
[150] *Id.* § 552(b)(7).
[151] 409 F. Supp. 297 (D.D.C. 1976).

sions on federal lands.[152] Moss apparently disliked that company. When his request was denied by the Secretary of the FTC, Congressman Moss made a second request to the FTC—this time as Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The official investigation was begun five days after the FTC denied Congressman Moss's original request, the purpose of which was ostensibly to fulfill the Subcommittee's general oversight responsibilities.[153] The court ultimately mandated disclosure to the Subcommittee. As stated earlier, many investigations begin for personal reasons. Applying FOIA to Congress would require committees to disclose records that explain the background of information requests and their real motivations for those requests, thereby better informing targeted citizens, corporations, and others. FOIA would also serve to keep congressional power in check. The public has a right to know the reasons underlying the investigations conducted by congressional committees. Heightened accountability prevents congressional committees from abusing investigatory power by claiming exemption for documents that reveal their true motives. This is particularly true if Exemption Five on internal documents is not carried over to Congress, as discussed above.

FOIA could push Congress to act on findings or else not to hold investigations at all. *Badran v. United States Department of Justice*[154] involved the Immigration and Naturalization Service's (INS) denial of an alien's request for copies of all the documents in her immigration file. The INS withheld the documents, asserting that they were exempt from the reach of FOIA under 5 U.S.C. § 552(b)(7)(A) (1988), because the file contained information that someday could be used against the alien should she violate immigration laws. The court found the INS position indefensible and contrary to the purpose of FOIA. "If an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, FOIA would be meaningless; all information could fall into that category."[155]

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[152] *Id.* at 300.
[153] *Id.*
[154] 652 F. Supp. 1437 (N.D. Ill. 1987).
[155] *Id.* at 1440.

Although agencies are not allowed to withhold information indefinitely for "some" possible use, exemption from FOIA permits Congress to do so. Therefore, Congress may investigate and then withhold information from the subject organization or individual. FOIA was intended to protect the public from this very type of governmental abuse. Applying FOIA to Congress would further the goal of accountability and could make routine congressional investigations more reliable and fair to the parties involved, as the investigated could challenge findings. This is especially pertinent in Senate confirmation hearings, in which the nominee would be less likely to face politically inspired "surprises."

Some will argue that Exemption Seven could not apply to Congress without a textual adaptation. Under the separation of powers doctrine, Congress does not enforce laws; it employs hearings to oversee Executive Branch enforcers and to make new laws.[156] Exemption Seven of FOIA is not available unless the agency claiming exemption is collecting information "for law enforcement purposes."[157] As a threshold matter, Congress would need to revise Exemption Seven to incorporate documents other than law enforcement records or else accept that its records cannot be exempted.

Another problem occurs when Congress is asked to reveal information which could place an individual's personal safety in jeopardy. As many congressional investigations involve criminal allegations, allowing premature disclosure of information contained in an enforcement agency's criminal investigation file could place witnesses in grave danger. For several reasons, it is important that GAO auditors be able to protect key investigation witnesses. Hopefully, neither the courts nor Congress would be willing to place the personal safety of witnesses and informants in danger through FOIA requests.

Testimony given before a committee under a promise of confidentiality is not exempt from FOIA.[158] If FOIA were applied to Congress, convicts could identify witnesses who testified against them by requesting investigation files from Congress. This result

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[156] Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993).

[157] 5 U.S.C. § 552(b)(7) (1988). The earlier version of this exemption was more helpful to Congress as it spoke of "investigatory records." *See* 2 O'REILLY, *supra* note 38, § 17.06 (Supp. 1993).

[158] 5 U.S.C. § 552(b)(7)(D) (1988).

would distort FOIA policy. It would also mean that congressional counsel would have to appear in court[159] to assert Exemption (7)(D), the witness identity exemption.[160]

In addition to posing witness safety problems, access to congressional files could hamper the development of investigations by discouraging witnesses from participating in hearings. Witnesses who agreed to testify under a veil of confidentiality may change their minds if the information might be disclosed on judicial review of a denial of access. As noted in *Irons v. FBI*,[161] the willingness of a confidential informant to give testimony "does not amount to a waiver of [the] source's confidentiality so as to require disclosure of investigatory records of [the] agency that might tend to reveal [the] identity of [the] confidential informant."[162]

This same reasoning was set out in *Machin v. Zuckert*.[163] In that case, the Inspector General of the Air Force indicated that the success of the Air Force's flight safety program "depend[ed] in large part on the ability of the investigators to get full information on the cause of any accident. Lacking the power to compel testimony, the investigators encourage frank and full cooperation by means of promises that witnesses' testimony will be used solely for [internal inquiries]."[164] The absence of such assurances could make witnesses less eager to come forward.

In summary, an Exemption Seven analogue tailored to Congress is needed. Moreover, such an exemption must reach not only traditional law enforcement papers, but also the Legislative Branch's related activities.

C. *Military Secrets*

Military secrets should not be accessible to the general public through FOIA requests directed at congressional intelligence and defense committees, given that the hearings these committees hold are often classified. The emergence of similar privilege issues in agency disclosure situations led Congress to fashion a

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[159] 2 U.S.C. § 288(c) (1988).
[160] *Id.*
[161] 811 F.2d 681 (1st Cir. 1987).
[162] *Id.* at 681.
[163] 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963). This case will be discussed more fully *infra* notes 165–168 and accompanying text.
[164] *Machin v. Zuckert*, 316 F.2d at 339.

military secrets exception for FOIA. For example, *Machin v. Zuckert*[165] involved a challenge to executive privilege exercised by the Secretary of the Air Force following a B-25 bomber accident in 1956. Machin, the only survivor of the bomber crash, petitioned the Secretary of the Air Force for the investigatory file the Air Force compiled. The Secretary refused to release the file, merely allowing Machin to look at the contents. Machin subpoenaed the Secretary for the file, but the Secretary claimed that the file was under "privileged status" since "the production of the documents called for by the subpoena would prejudice the efficient operation of the Department and the defense interests of the United States."[166] The D.C. Circuit found that when the disclosure of investigative reports—received in good measure through assurances of confidentiality to witnesses—could hinder national security, "the reports should be considered privileged."[167] Congress followed this approach by creating a military and state secrets privilege under FOIA.[168]

National security will not, and should not, be compromised in the application of FOIA. Thus, while the general principles of FOIA can be applied to Congress, the exemption relating to national security issues[169] must remain in the Act. Congress should not be required to endanger the general population in order to provide documents for individual constituents.

However, separation of powers issues render application of FOIA Exemption One to Congress problematic. Because Exemption One is expressly tied to classified status determinations of the President enforced under an Executive order, Congress's ability and discretion to disclose is subject to the control of another branch of government.[170] The Senate cannot itself "classify" a missile diagram, for example. Congress's discretion to withhold under Exemption One can only be upheld if it follows the classification decisions of executive agencies. Any application of FOIA to Congress will need to be tailored either to accept a sharing of power between the branches or to create some declassification power in Congress as an institution. Lack-

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[165] 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963).
[166] *Id.* at 338–39.
[167] *Id.* at 339.
[168] 5 U.S.C. § 552(b)(1) (1988).
[169] *Id.*
[170] *Id.*

ing expertise and appropriate mechanisms to classify information, Congress may choose the former alternative.

D. *Special Statutes Exemption*

Probably neither house of Congress can use FOIA's Exemption Three,[171] which permits the passage of special exemption statutes, to adopt a one-house rule that excludes House or Senate files from FOIA. Under Exemption Three, FOIA does not apply to matters that are "specifically exempted from disclosure by statute, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[172] Under the Presentment Clause[173] as interpreted in *Immigration & Naturalization Service v. Chadha*,[174] any "statute" that would limit the rights of requesting persons requires the approval of both houses of Congress and the President's signature.

A wide range of statutes have qualified as (b)(3) exemptions under FOIA, including § 6103 of the Internal Revenue Code,[175] the Census Act,[176] the Ethics in Government Act, the National Security Act, the Patent Act, and the Federal Trade Commission Act.[177] Significantly, exemptions only apply if no discretion is left to the agency. Thus, all power to create these statutory exemptions is vested in Congress.

Upon judicial review, courts will examine the language[178] of the statute as well as its legislative history to determine if the statute qualifies as an exemption.[179] Additionally, Exemption Three

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[171] *Id.* § 552(b)(3).

[172] *Id.*

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

[174] 462 U.S. 919, 952 (1983) (holding that anything "legislative in its character and effect" requires the approval of both houses of Congress and the President).

[175] Church of Scientology v. IRS, 484 U.S. 9 (1987) (holding redaction of identifying data through the Haskell amendment does not change the status of "return information" which must remain confidential and cannot be released unless authorized by Title 26 of the U.S. Code).

[176] Baldridge v. Shapiro, 455 U.S. 345, 358 (1982) (holding "raw census data" protected from disclosure because clear language of statute and history of the Census Act revealed the Director of the Census had "no discretion to release data, regardless of the claimed effect of disclosure").

[177] These statutes are discussed at length in 1 O'REILLY, *supra* note 38, § 13.

[178] *See, e.g., Church of Scientology*, 484 U.S. at 15 (analyzing Congress's use of "in a form" language in Haskell Amendment).

[179] *See id.* at 16 (important reason for amendment was to tighten limitations on the use of return data by those other than IRS).

is interpreted narrowly to apply only when there is no doubt that Congress intended to restrict particular information.[180] However, it leaves the door open for Congress to restrict its disclosures by means of a fully bicameral statutory decision.

E. *Internal Procedures Exemption*

An agency is entitled to deny requests for access to matters of purely internal procedure which have little or no external effect.[181] In general, Exemption Two has been much less controversial than other FOIA exemptions. Documents relating to employee relations and routine internal workings are protected through this exemption.[182] However, because of the strong news media interest in "perks" and benefits made available to members of Congress, some will argue that Exemption Two should not be part of any version of FOIA that Congress applies to itself.

F. *FOIA Enforcement*

In the enforcement of FOIA, Congress faces the practical difficulty of having to punish members who do not disclose records in response to a valid request, after either an intermediate administrative office constituted by Congress or a court rejects their decision to withhold. Under FOIA, the presumption of disclosure is strong.[183] If a court orders disclosure of records that have been improperly withheld, a government employee must disclose the information or the withholding individual can be *both* held in contempt and (after further personnel reviews) disciplined by

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[180] *See* United States Dep't of Justice v. Julian, 486 U.S. 1 (1988). The Parole Act states that prisoners are to receive "reasonable access" to presentence reports. This does not express congressional intent to limit the power of a potential parolee to retain a copy of the report, nor exempt parts from disclosure. *Id.* at 10. With the exception of "confidential sources, diagnostic opinions, and other information that may cause harm to the defendant or third parties," the remainder of the report must be supplied to prisoner. *Id.* at 9.

[181] 5 U.S.C. § 552(b)(2) (1988). One hypothetical example would be agency employee parking space lists.

[182] *See, e.g.*, Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir. 1992); Schwaner v. Department of the Air Force, 898 F.2d 793 (D.C. Cir. 1990); Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983); *see also* 1 O'REILLY, *supra* note 38, § 12.03.

[183] Interestingly, the Clinton Administration recently urged agencies to expand disclosure. *See* Memorandum on the Freedom of Information Act, 29 WEEKLY COMP. PRES. Doc. 1999 (Oct. 4, 1993).

personnel administrators within the Executive Branch.[184] The former punishment is an Article III power, the latter an Article II power. There remains the issue of whether Congress will subject its elected members to one or both measures when they withhold records that are not lawfully exempt from disclosure.

Any discussion of imposing punishments on members of Congress for violations of statutes must address the question of the judiciary's power to impose penalties on members of a coordinate branch. The answer depends upon whether the members of Congress can waive their legislative immunity, either collectively or individually. If members are not protected from prosecution by their status as legislators, then they should be required to accept the same punishments for misconduct as other citizens. In *United States v. Helstoski*,[185] the Supreme Court explicitly reserved questions of whether an individual member could waive the protection of the Speech or Debate Clause and whether Congress as a body could waive the protection for individual members. The *Helstoski* court found that Representative Helstoski had not waived his Speech or Debate Clause protection by testifying for a grand jury,[186] stating that if it were possible to waive the protection, it could only be done after "explicit and unequivocal renunciation of the protection."[187]

A member not engaged in protected legislative activity could be held either civilly or criminally liable, implicating the Arrest Clause, described above.[188] This would involve novel constitutional issues surrounding FOIA contempt and refusal of disclosure. A separation of powers problem would arise if a district court, on motion of the requester, invoked the FOIA remedy of referral to an executive agency of allegations of unreasonable withholding.[189] If the misconduct of unreasonable withholding was found to be an act of a congressional committee chairman, the Executive Branch's Merit Systems Board would face a separation of powers problem; it would need to determine if any particular Legislative Branch employee were at fault and then to

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[184] 5 U.S.C. § 552(a)(4)(F), (G) (1988).

[185] 442 U.S. 477, 490, 492 (1979).

[186] *Id.* at 492.

[187] *Id.* at 491. This waiver issue is discussed as a threshold issue above. *See supra* part I.F.

[188] *See supra* part I.D.

[189] Under 5 U.S.C. § 552(a)(4)(F) (1988) the Merit Systems Protection Board would investigate any suspicions of arbitrary or capricious activity of an aide or other Legislative Branch employee.

order his or her termination. Obviously, some alternate punishment device tailored to avoid separation of powers difficulties is needed.

The judiciary may not be able to punish members of Congress for violations, however, because each house of Congress reserves the power to punish its own members. Fortunately, the houses of Congress have the power of subpoena against members at their disposal;[190] the privileges of a subpoenaed witness are limited in scope.[191] It is possible for the House or Senate to institute disciplinary actions on the basis of a member's violation of statutes such as FOIA.[192] However, a court may not order the removal of a member of Congress; that power is constitutionally reserved to Congress itself.[193]

G. *Affirmative Disclosures*

The little-noticed, noncontroversial affirmative disclosure clauses of the current FOIA[194] are distinct from its provisions concerning request-initiated searches for records.[195] The affirmative disclosure clauses require manuals and guidelines to be routinely available for inspection[196] and require regulations to be published in the *Federal Register*.[197] FOIA enforces these clauses by invalidating agency actions that are not published or made accessible as required, rendering them unenforceable for lack of adequate notice to those expected to comply.[198] Few plaintiffs have won direct challenges involving a failure of publication, but the stakes have been relatively modest.[199]

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[190] *See, e.g.*, Helen Dewar, *Panel to Seek Early Court Action on Packwood Diaries Subpoena*, WASH. POST, Nov. 4, 1993, at A4.

[191] *See* 2 U.S.C. § 193 (1988).

[192] U.S. CONST. art. I, § 5, cl. 2.

[193] United States v. Richmond, 550 F. Supp. 605, 608 (E.D.N.Y. 1982).

[194] 5 U.S.C. § 552(a)(1), (2) (1988).

[195] *Id.* § 552(a)(3).

[196] *Id.* § 552(a)(2).

[197] *Id.* § 552(a)(1).

[198] *Id.* § 552(a)(1), (2); *see, e.g.*, Northern Cal. Power Agency v. Morton, 396 F. Supp. 1187 (D.D.C. 1975) (finding incomplete and inaccurate actual notice insufficient to meet the requirements of § 552(a)(1)), *aff'd mem. sub nom.* Northern Cal. Power Agency v. Kleppe, 539 F.2d 243 (D.C. Cir. 1976).

[199] *See, e.g.*, Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991) (refusing to enjoin Army from reassigning sergeant to Persian Gulf before accepting his conscientious objector application, though that policy was established without publication).

If FOIA were applied literally to Congress and interpreted to allow the invalidation of a statute for failure to disclose, rapidly passed, end-of-session statutes might be vulnerable. District courts would be forced to second-guess the rulings of the parliamentarians and rules committees, a sensitive point for separation of powers proponents.

FOIA affirmative disclosure commands use Executive Branch methods such as the *Federal Register* as the vehicle for enhancing public awareness of agency actions,[200] applying a uniform set of norms across the board. By contrast, the House and Senate already have well-developed public access locations and publications. FOIA requirements should be reconciled with the current permissive rules on the disclosure of congressional hearings, prints, and voting tabulations.

Congress is much closer to the ideal of affirmative disclosure than the agencies were when FOIA's current sections (a)(1) and (a)(2) were adopted. There should be more public access, perhaps via electronic bulletin boards, to prints, reports, schedules, and calendars. If these two portions of FOIA are considered for application to the Legislative Branch, special drafting skills will be needed. This is another instance in which simply importing an executive statute into the legislative context would be unsuccessful.

H. *Congress Considers the Options*

A congressionally created study recommended in 1977 that Congress be subject to FOIA and Privacy Act disclosure, but this recommendation was never adopted.[201] Constitutional issues were thought to pose severe barriers, beyond practical problems in terms of enforcement and costs.[202] No changes to the statutes resulted from this superficial consideration of their possible application to Congress.[203]

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[200] 5 U.S.C. § 552(a)(1) (1988).

[201] U.S. NAT'L STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS, FINAL REPORT 34 (1977).

[202] *To Eliminate Congressional and Federal Double Standards: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 1 (1979).

[203] Harold C. Relyea, *The Rise and Pause of the U.S. Freedom of Information Act*, 10 GOV'T PUBLICATIONS REV. 19, 22 (1983).

When the Joint Committee on the Organization of Congress later produced a 345-page joint report, it only devoted four paragraphs to considering the applicability of FOIA to Congress and one paragraph on applying the Privacy Act to Congress. Because disclosure requests "implicate the privileges of the House and Senate," no legislative change was recommended, and no change was included in the proposed legislative package of changes.[204] Virtually identical language was used in a Congressional Research Service background report which decried the effect on congressional privileges of applying FOIA access norms.[205]

During the 103d Congress, more than 200 House members co-sponsored a bill that would have applied FOIA to Congress.[206] But, this bill by Rep. Christopher Shays (R-Conn.) was far more sweeping than the leadership of either Senate or House wished to consider.

I. *Summary: FOIA and Congress*

Tailoring FOIA to fit Congress will require, for reasons of constitutionality and feasibility, several significant changes, probably best adopted in a statutory amendment to the present version of FOIA. The new legislation should consider the following:

- The obligations of affirmative disclosure and notice, and the punishments for violations, should be carefully designed to meet the needs and practices of Congress. The requirements should be akin, but not identical, to FOIA's current §§ (a)(1) and (a)(2).[207]
- Access-upon-request opportunities similar to FOIA's current § (a)(3)[208] would help to improve the credibility of Congress. If Congress adopts a parallel to FOIA, the resulting change may be less dramatic for Congress than it was for agencies. Because so much data already flows out of Congress, a

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[204] 2 H.R. REP. No. 413, 103d Cong., 1st Sess., 141 (1993).

[205] JAY SHAMPANSKY ET AL., LIBRARY OF CONGRESS, CRS REPORT FOR CONGRESS: CONGRESS' EXEMPTION FROM SELECTED MAJOR LEGISLATION: A LEGAL ANALYSIS 18 (1992).

[206] Congressional Accountability Act, H.R. 349, 103d Cong., 1st Sess. (1993).

[207] 5 U.S.C. § 552(a)(1), (2) (1988).

[208] *Id.* § 552(a)(3).

centralized flow of requests should be encouraged. Additional records not already available from the members should be made accessible upon written request to a central access agent of Congress, perhaps an Access Commissioner of the Legislative Branch, reporting to the Board of Directors of an Office of Compliance or an independent agency that could administer the implementation of several of the statutes, including those portions of FOIA that are applied to Congress.[209]

- Congress should not recognize a blanket exemption for internal memos[210] but should allow a reasonable delay in response when a member has legitimate concerns about possible interference with voting on a specific resolution or bill to which the documents are reasonably related. The Access Commissioner should balance interference and workload considerations with public access in specific cases.
- The Compliance Office's Access Commissioner should centrally determine availability of committee documents, staff documents not addressed to members, and affiliated organization documents, such as those of GAO, using FOIA exemptions to the extent they are relevant.
- The Access Commissioner should submit an annual report on progress regarding access issues and needed changes to the respective house's leadership and the respective house's administration committees.
- The refusal of any legislative staff person to comply with the Access Commissioner's direction to disclose, or denial of access, should be appealed to the Board of Directors as a jurisdictional prerequisite to litigation.
- In order to avoid separation of powers issues involved with "enforcement" functions of the Legislative Branch, the Board of Directors should be carefully structured so that its activities are internal to the Legislative Branch.
- The Access Commissioner would enforce disclosure with a subpoena directed to the member, followed by release of the subpoenaed documents to the requester; this process should

[209]This builds upon the office described in S. Rep. No. 215, 103d Cong., 1st Sess., pt. 2 (1993) that would be set up under the auspices of the proposed Congressional Accountability Act, H.R. 349, 103d Cong., 1st Sess. (1993).

[210]*See* 5 U.S.C. § 552(b)(5) (1988).

be framed not as "enforcement" but as an internal activity of Congress.

- The vehicle for appealing citizen requests for records should be identical to current FOIA practice[211] except in two respects: (1)The standard of review should be "unsupported by substantial evidence,"[212] with court discretion to permit additional relevant factual submissions by either side for a limited time before decision; and (2)The court should be directed to transfer venue to the District Court for the District of Columbia upon motion of the defendant, with plaintiff's reasonable travel costs chargeable to the moving party. The former replaces *de novo* FOIA judicial review,[213] for constitutional reasons, but allows new data to be presented for *in camera* review by the judge—a functionally fair equivalent of the normal FOIA process for the requester. The latter helps the House and Senate legal counsel geographically; as most cases are argued through paper cross motions for summary judgment, the Legislative Branch counsel can either waive oral argument or pay for the challenger's trip to Washington.
- The Access Commissioner should examine each statute falling under Exemption Three[214] to determine whether it would be appropriate for a member or other entity of Congress to invoke. Any determination that an Exemption Three statute does not apply should be reported to the congressional committee having jurisdiction so that the committee could consider any amendment it deemed necessary.

IV. The Privacy Act and Congress

The Privacy Act subjects federal Executive Branch records in a narrowly defined class to maintenance, collection, and disclosure requirements through regulation and paperwork requirements.[215] This 1974 legislation is widely regarded as a victim of poor drafting—a hasty end-of-term response to Watergate-era privacy invasion problems. The inadequacies of its language

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[211] *Id.* § 552(a)(4), (6).
[212] 5 U.S.C. § 706(2)(E) (1988) ("unsupported by substantial evidence" standard currently applicable to review of agency hearings).
[213] 5 U.S.C. § 552(a)(4)(B) (1988).
[214] *Id.* § 552(b)(3).
[215] 5 U.S.C. § 552a (1988). *See generally* 2 O'Reilly, *supra* note 38, § 20.

have made it a disappointment; it had potential to be a far better piece of legislation. Nations that have studied our openness laws have opted not to follow the Privacy Act's example, though many have embraced the FOIA model.[216]

The Privacy Act requires that executive agencies separately handle files containing sensitive personal data.[217] Agency disclosures must follow specific protective requirements to avoid excessive release of private data,[218] and individuals can review files about themselves held by an agency.[219] Congress is expressly excluded from the provisions of the Act.[220] Furthermore, medical, personnel, investigative, or benefits records that are shielded under the Act are accessible by Congress without reservation, upon request of any subcommittee, committee, or the House or Senate.[221]

A. *Scope of the Act*

The Privacy Act of 1974[222] has been virtually unamended and often underappreciated since its adoption. Because the Privacy Act excludes Congress,[223] any application of the law to Congress would begin with a definitional change to expand the law's coverage.

Only those agency "records" in a statutorily defined "system of records" are covered by the Privacy Act. Unlike the Freedom of Information Act's general access provisions, which apply to nearly all agency "records,"[224] a much more limited and structured set of files is subject to the Privacy Act. The "records" that would probably be in a congressional "system of records" covered by the Privacy Act include: (1) information on nominees to be confirmed for public office; (2) casework files developed in response to constituent calls and letters; (3) internal personnel

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[216] Canada, for example, relied heavily on FOIA in adopting its Access to Information Act but did not choose to model the Canadian Privacy Act on its U.S. counterpart. Access to Information Act, R.S.C., ch. A-1 (1985) (Can.); Privacy Act, R.S.C., ch. P-21 (1985) (Can.).

[217] 5 U.S.C. § 552a(e) (1988).

[218] *Id.* § 552a(b).

[219] *Id.* § 552a(d).

[220] *Id.* § 552a(a), (b)(9).

[221] *Id.* § 552a(b)(9).

[222] *Id.* § 552(a) (1988 & Supp. IV 1992).

[223] *Id.* § 552a(b)(9) (1988).

[224] *Id.* § 552(a)(3).

files of the various Legislative Branch entities; and (4) investigatory files of congressional committees.

If the Privacy Act operates properly, medical information, personnel discipline, and mental health records are among the information it should protect from unconsented disclosures. Litigation under the Privacy Act has not involved Congress directly because of its exemption. Instead, the courts have woven protection for individual privacy into FOIA. For instance, in *Arieff v. United States Department of the Navy*,[225] the D.C. Circuit required the release of aggregated records of prescription drugs that the National Naval Medical Center delivered free of charge to the Legislative Branch's Office of the Attending Physician, but remanded the case to allow the district court to withhold any information which might have disclosed the medical condition of any individual.

B. *Noteworthy Provisions of the Act*

One of the most interesting mandates of the Privacy Act is the new restraint on the collection of personal information. In particular, congressional staff formulation of mailing lists, which are crucial for constituent communications and re-election activities, could certainly be affected by this change. Members, committees, and subcommittees would incur new paperwork obligations for reporting the existence and creation of systems of personal records. Once files are created, the maintenance of those files must be accurate, relevant, and complete, to ensure fairness (though these terms are rather loosely defined).[226] The member, committee, or other entity would need to establish limits on the disclosure of files absent either consent or a statutory exemption; serious penalties for improper disclosure would apply to the aide who discloses personal information gathered in a senator's files about an opposing candidate, for example.[227] The use of such a remedy is not remote, as recently shown by allegations of a Defense Department nominee who claimed that a senator had

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[225] 712 F.2d 1462 (D.C. Cir. 1983).

[226] 5 U.S.C. § 552a(e)(5) (1988).

[227] Section 552a(e)(6) limits dissemination of any personal records maintained in an agency's recordkeeping system. *Id.* § 552a(e)(6). If the Privacy Act applied to the Senate and a senator created a secret set of files containing personal information, that senator would be guilty of a misdemeanor. *Id.* § 552a(i)(2).

colluded with a newspaper columnist in using files against the nominee.[228]

The mechanisms needed to implement the Privacy Act within Congress would probably include a central office to handle the necessary system classification, relevant public notices, initial and updated systems recordkeeping, and the steps of request processing. Matters of efficiency and responsiveness similar to those discussed above in the context of FOIA make a central office appropriate.[229] However, the Privacy Act role of the Office of Management and Budget, as the central policy setting and coordinating body,[230] would probably not be carried over to Congress because of separation of powers concerns discussed earlier in this Article.[231]

Each Legislative Branch office that retains individual private information, such as files on Social Security disability cases on which a member's help has been requested, will need to prepare a statement about each of its systems of recordkeeping privacy. These descriptive statements would involve at least 1,070 systems of case service records, one such file for each district and Washington office of 435 representatives and 100 senators. GAO records concerning individuals, mailing lists of the GPO, and various compilations of personal data regarding nominees for Senate confirmation will be among the files likely to be classified as Privacy Act "records."[232] It is unclear whether financial privacy considerations would apply to donor lists, since they are routinely accessible in the Federal Election Commission reports of federal elected officials.[233]

C. *The Need for Change*

Because the Privacy Act was hastily passed in the last few hours of the turbulent Watergate-era 1974 Congress, with no conference committee report,[234] a few "loose ends" of half-con-

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[228] R.W. Apple, Jr., *Inman Withdraws as Clinton Choice for Defense Chief*, N.Y. TIMES, Jan. 19, 1994, at A1.

[229] *See supra* part III.I.

[230] 5 U.S.C. § 552a(v) (1988).

[231] *See supra* part I.A.

[232] 5 U.S.C. § 552a(a)(4) (1988).

[233] 11 C.F.R. § 104.3 (1993) includes financial transactions of individual donors, normally a Privacy Act matter. 5 U.S.C. § 552a(a)(4) (1988). Privacy Act exemptions from the withholding commands do not now seem to allow exemption of these financial transactions because Privacy Act exemptions are quite limited. *Id.* § 552a(k).

[234] An account of this rushed history is contained in 2 O'REILLY, *supra* note 38,

sidered intentions need to be dealt with in any application of the Act to Congress. Reopening the Act is warranted whether or not the Congress adds itself to the coverage of the statute. One practical difficulty is that very few groups actively lobby Congress on the details of privacy-related matters, and Congress gives privacy issues only minimal institutional attention. Thus, the topic is an insider's game rather than a broadly debated theme of public discourse. Breaking into that inside ring of advocates attuned to the long-dormant Privacy Act is not a simple task for would-be reformers.

The right to petition Congress is a constitutional right, but Legislative Branch offices (and those of individual members) will need either specific consent or statutory authority to compile records "describing how any individual exercises rights guaranteed by the First Amendment."[235] It seems ironic to define constituent correspondence as a forbidden subject for the records of the recipient. This set of "records" might or might not include special interests and targeted correspondence list systems, so a statutory exception will probably be needed. For files that are already in the congressional office database when the Privacy Act is extended, each file system manager will need to show "reasonable efforts to assure that such records are accurate, complete, timely and relevant."[236] One can imagine a rejected nominee for confirmation litigating the accuracy and relevance of an office file maintained by the nominee's chief Senate opponent.

The consent requirements that apply to file collection will be an important area for tailoring. One or more exemptions should allow Congress to release individual files when necessary and proper to the legislative process and the confirmation function. The public use of an investigatory file to confront a witness has often been a tool of Senate and House hearings such as Watergate, Iran-Contra, and other televised hearings. Absent adjustment to the Privacy Act, the gathering of personal data on persons who are being investigated will require either investigation for a designated law enforcement purpose, consent of the indi-

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§§ 20.01–20.03 (2d ed. 1990). Further details are found in SENATE COMM. ON GOV'T OPERATIONS & SUBCOMM. ON GOV'T INFORMATION AND INDIVIDUAL RIGHTS OF THE HOUSE COMM. ON GOV'T OPERATIONS, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974, S. 3418 (P.L. 93-579): SOURCE BOOK ON PRIVACY (Joint Comm. Print 1976).

[235] 5 U.S.C. § 552a(e)(7) (1988).

[236] *Id.* § 552a(e)(6).

vidual subject of the file, or the availability of a statutory exception.[237] The lobbying pressure against such permissive disclosures will be intensely felt because "privacy" is a topic that draws visceral responses from civil liberties lobbying groups.

D. *Criminal Jeopardy of Members*

The Privacy Act offers misdemeanor criminal penalties for misconduct more egregious than the civilly remediable activities that occur by the inadvertence or nonfeasance of record-handling agencies.[238] Congress may modify the Act's criminal coverage to protect itself and its staff. Knowing and intentional collection of personal information without consent of the subject (and without exceptions such as that for the FBI)[239] is a criminal offense,[240] as is using misleading statements to acquire personal data.[241] Today, Congress is exempt. However, if the exemption is removed, a member might be accused by critics or prosecuted in federal district court.

Of the many issues that congressional committees should ponder before amending the Privacy Act, the issue of member jeopardy to possible criminal prosecution should be considered especially closely by members of investigatory subcommittees that deal with law violators in their hearings. Whether past practices of "digging dirt" have been fair is for others to judge, but at a minimum the prospect of being charged with a crime for discovering individuals' flaws would "chill" the more aggressive investigators on Senate and House committee staffs and at the GAO. Staff members might argue a qualified immunity under the Speech or Debate Clause; however, as discussed above,[242] this freedom from prosecution is limited.[243] Members fear the charge of crime more than staffers do, because even press reports of allegations could be damning.

The continued ability to disclose files concerning an individual's activities is likely to be a significant issue for committees

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[237] *Id.* § 552a(e)(2), (7).
[238] *Id.* § 552a(i).
[239] *Id.* § 552a(j).
[240] *Id.* § 552a(i).
[241] *Id.*
[242] *See supra* part I.C.
[243] United States v. Gravel, 408 U.S. 606 (1972) (holding that staffers are immune only if a legislator would be immune for performing the same act in the course of the legislative function).

and support agencies. In *Doe v. McMillan*,[244] publication of individual education data would have been a punishable activity but for the defense of the Speech or Debate Clause immunity discussed earlier in this Article.[245] Such a dissemination of individual records would probably be a punishable crime for an agency holding the education materials in a Privacy Act system of records.[246] If the Congress were included, it might be argued that the statutory amendment acted as an implicit waiver of the Speech or Debate Clause immunity, since Congress must have intended to reverse the outcome of *McMillan* through its subsequent legislative enactment. This uncertain coverage would probably chill enthusiasm for leaking or publishing personal data in the confirmation and hearings process.

E. *Summary*

The Privacy Act requires major overhaul, not merely a rescoping of its coverage. Congress must consider the views of both the permanent advocacy groups interested in privacy issues and the congressional investigatory employees whose activities the Act constrains. To fix the Privacy Act, Congress must allow sufficient time for considering necessary changes. This is no surprise, given the last minute push at the end of a tumultuous post-Watergate session that resulted in the 1974 Act. The short cut of simply adding Congress to the "agency" definition would transform what has been a dormant, disappointing law into a forum for bitter interpersonal and political conflicts; more specific, considered, and delicate action is required.

V. THE FEDERAL ADVISORY COMMITTEE ACT

Under FACA, government agencies wishing to get routine advice from people outside the government must first justify in writing the creation of a formal advisory committee.[247] FACA does not apply to Congress.[248]

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[244] 412 U.S. 306, 313 (1973) (holding that Speech or Debate Clause shielded members, but not the GPO, from lawsuits after dissemination of individual student test scores).
[245] *See supra* part I.C.
[246] 5 U.S.C. § 552a(b) (1988).
[247] FACA, *supra* note 1, § 9, 5 U.S.C. app. at 1178–79.
[248] *Id.* § 3(3).

Agency advisors cannot be convened on a regular basis without complying with specific FACA prerequisites including: a centrally approved charter, notice, agendas, and other formalities.[249] Exemptions from presumptive disclosure for discussions and for meeting documents are borrowed directly from FOIA.[250]

Congressional use of organized advisory groups is growing; judicial nominating committees, members' informal district advisory committees, political committees, and other advisory panels are part of the outreach techniques members currently utilize. FACA, which currently applies only to Executive Branch agencies, could be amended to include the use of advisors to the Legislative Branch, creating limits to the power of these committees to influence legislation unduly.

When the same types of advisory groups are advising an executive agency and they provide advice to an agency in more than one or two meetings, the rigid controls of FACA apply[251] and as a result diminish the ability of the advisory committee to be responsive to short-term needs.[252] Such a committee cannot schedule meetings until a central Executive Branch entity clears a charter. The committee's meetings must then be publicized and opened to public attendance, unless a narrow set of exemptions applies.[253] This takes time; the advisors are less likely to render timely, stable, and consistent opinions within such an encumbered set of rules. As a result, many of the agencies whose safeguards depend on prompt advisory work have begged for and received exclusions from FACA coverage.[254]

To avoid the FACA statute, some groups of agency advisors are solely composed of government employees and quasi employees, such as the President's spouse, so that the advice need not be made accessible to the public.[255] The Act has been rigidly applied, resulting in some unintended consequences on the ad-

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[249] *Id.* § 10(f).
[250] *Id.* § 10(b).
[251] *Id.* §§ 2–4.
[252] *See* James T. O'Reilly, *Committees and Competition: Restoring Industry Input to Federal Advisory Committees*, 41 Bus. L. 1293 (1986).
[253] FACA, 5 U.S.C. app. § 10(a) (1988).
[254] Health Omnibus Programs Extension of 1988, Pub. L. No. 100-607, 102 Stat. 3121 (1988) (codified at 21 U.S.C. § 393(c) (1988)) (exempting Food and Drug Administration from FACA requirements).
[255] Association of Am. Physicians & Surgeons Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993).

vice-receiving abilities of the agencies.[256] The disclosure requirement, in particular, has become controversial for this reason.[257]

Congress should weigh carefully any suggestion of opening its panels of advisors to FACA's constraints and paperwork requirements. Elected officials are advised and cajoled constantly. Of particular note is the FACA command for "balanced" membership,[258] which in the congressional context raises the intriguing prospect of a conservative Republican's district advisory council's being compelled by a district court to include three Democrats, or a liberal-leaning member's advisory caucus's being forced to accept Rush Limbaugh to balance the views.

A philosophical conflict runs deeper than these issues. The purpose of FACA, it seems, was to remove undue secret influences upon unelected agency officials whose permanence and civil service status insulates them from opposing views. That does not seem to be a problem for elected legislators who are constantly bombarded with advice.

If FACA has a legitimate legislative role at all, it may be for the support entities that advise GAO on accounting issues or advise OTA on technologies to be supported in budget priorities. Balance in those contexts is desirable, but the waiting period, chartering, public and nonpublic sessions, and other consequences of FACA may generate confusion for those entities as they adapt to the new constraints on their advisory functions.

VI. Government in the Sunshine Act and Congress

The Sunshine Act[259] compels open discussion of policy decisions by every multimember decision-making body in the Executive Branch, including the independent agencies.[260] Any interaction of a majority of any decisional body subject to the law must take place in an announced session open to the public.[261]

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[256] *See* Michelle Nuskiewicz, *Twenty Years of the Federal Advisory Committee Act: It's Time for Some Changes*, 65 S. CAL. L. REV. 957 (1992); 2 O'REILLY, *supra* note 38, § 24.03.

[257] James T. O'Reilly, *Advisers and Secrets: The Role of Agency Confidentiality in the Federal Advisory Committee Act*, 13 N. KY. L. REV. 27 (1986).

[258] FACA, *supra* note 1, § 5(b)(2), 5 U.S.C. app. at 1176, *discussed in* 2 O'REILLY, *supra* note 38, § 24.03.

[259] 5 U.S.C. § 552b (1988).

[260] *Id.* § 552b(a)(1). Congress is excluded through reference to the FOIA definitions.

[261] *Id.* § 552b(b).

The exemptions that allow closure of a meeting[262] follow FOIA exemptions. While the FOIA deliberative exemption is left out,[263] additional exemptions for bank regulatory agencies and for litigation-related agency discussions are included.[264]

A. *Scope of the Act*

The fourth and most recent of the open government laws is the 1976 Government in the Sunshine Act, a transplant from Florida's open-meetings law that was tailored to a limited class of perhaps a dozen federal agencies which have multiple-member administrators or boards.[265] The Sunshine Act does not apply to all agencies, as do FOIA, FACA, and Privacy Act requirements, and it does not include Congress.

The Sunshine Act focuses on public attendance (not participation) at predecisional discussions and at voting meetings of selected administrative bodies.[266] Application of the Sunshine Act to Congress would generate little publicly visible benefit, although some subtle attitudinal changes might result from opening congressional caucuses.

Legislative hearings and markup sessions, as well as conference committee meetings, are the principal decision points for legislation. These are virtually always open, so the *need* for imposing this law on Congress is questionable.

Few knowledgeable advocates of openness policy would spend time and effort advocating that the strictures which multimember agencies face under the Sunshine Act should also be imposed on Congress. Doing so could slow the already encumbered pace of the workings of Congress.

B. *Effects on Congressional Caucuses*

The impact of the Sunshine Act would be felt at the caucus level. Because a majority of the members of the committee are

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[262] *Id.* § 552b(c).

[263] 5 U.S.C. § 552(b)(5) (1988) is not present in the Sunshine Act. Instead, portions of meetings that discuss criminal and litigation matters are exempted. *Id.* § 552b(c)(5), (10).

[264] *Id.* § 552b(c).

[265] *Id.* § 552b(a)(1).

[266] *Id.* § 552b(b).

members of the party in control of a particular house of Congress, the Democratic Caucus and the subcaucus meetings for subparts of that house would be a meeting of a majority of the members under the Act,[267] and thus would be forced to be opened to public attendance. To the extent that party discipline is valued, the open caucus could have a negative impact on events such as confirmation decisions discussed among Senate members.

C. *Exceptions to the Act*

Exemptions from required Sunshine Act openness track those of FOIA's pre-1986 exemptions,[268] except that no internal memos exemption is allowed, and exemption is permitted for discussion of criminal matters, subpoena issuance, and agency litigation.[269] These areas would need some adjustment if Congress expanded the Act to apply to Congress and its "meetings." Senate Rule 26.5(b)[270] offers a possible model for closure of such committee discussions, as it opens most hearings unless a committee votes to close all or a part of a hearing for good cause.

D. *Remedies for Violations*

When Congress wrote the Sunshine Act, it equivocated about the remedies for violations.[271] It is possible that, if the Act were imported into the Legislative Branch, challengers would argue that a court could invalidate legislative action for breach of a Sunshine Act duty.[272] The degree of uncertainty that this judicial remedy would produce seems constitutionally undesirable. A court could also enjoin future noncompliance,[273] but this action would invoke the same separation of powers problems discussed earlier.[274]

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[267] *Id.* § 552b(a)(2).
[268] 5 U.S.C. § 552(b) (1982), *amended by* Freedom of Information Reform Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986).
[269] *Id.* § 552(c).
[270] SENATE COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. NO. 1, 102d Cong., 1st Sess. 53–54 (1992).
[271] A court could not reject a final agency action "solely" because of a Sunshine Act violation. 5 U.S.C. § 552b(h)(2) (1988).
[272] *Id.*
[273] *Id.* § 552b(h)(1).
[274] *See supra* part I.A.

VII. Recommendations for Reform

The current political climate requires greater accountability from Congress. Already the federal legislature has increased the openness and paperwork requirements that executive agencies must endure, and now it is time for the legislature to do the same for itself. The right balance between public input and effective decisional processes has not yet been reached in American administrative law; Congress must continue to improve on this sad reality.

The need for a modified FOIA applicable to the institutional and support offices of Congress appears to be open to debate, with the burden of proof on opponents of FOIA to show that what is good for one bureaucratic hierarchy is not good for another. But political considerations rather than policy analysis will most probably determine what actually happens.

The need for a FOIA applicable to the offices of individual members is less evident. Not covering those offices will avoid the great complexities of creating a constitutionally valid method for compelling members to make disclosures. However, including them may be politically necessary. Protections against interference with voting and against harassment, in particular, are needed. Structurally, an Access Commissioner position within the Office of Compliance is the most reasonable means to parallel the Executive Branch system with as little disruption and as low a cost as possible to Congress.

Special attention in the drafting and weighing of policy alternatives must be devoted to waiver and enforcement issues. Waiver powers are a puzzle, constitutionally, for the reasons discussed above. Enforcement is just slightly less vexing since the Speech or Debate Clause seems to immunize a member. The respective houses can use subpoenas against recalcitrant members and then disclose a document, should such a confrontation ever be necessary. Modified judicial review is needed, as discussed above, and the special statutes exemption should be carefully considered in any FOIA adaptation.

Some portions of the Privacy Act should be selectively applied to Congress. The limited-disclosure safeguards for sensitive personal and medical records are most important. Casework by members for constituents should be facilitated, not limited, by this paperwork-heavy system. Confirmation process "leaks" are a symptom of a need for careful adaptation of Privacy Act reme-

dies. A balance of effective legislative roles with sensitive protection of personal privacy is needed. Perhaps the exercise of studying the Privacy Act will expose its warts and lead to updated, improved management of what has been a disappointing statute.

The effectiveness of the application of FACA and the Sunshine Act to Congress has also been insufficient. Each was tailored to a concern not relevant to today's Congress, that is, to restrain concealed and influential policy inputs that escape media and opponent attention. Whatever wisdom these laws may have had, media and opponent scrutiny of today's legislature seems so strong that these laws have little practical relevance. FACA and the Sunshine Act should not be considered candidates for transposition into the Legislative Branch; too much overhaul and too little net benefit would be the result.

At the end of this analytic exercise, the patient reader will discern that this lengthy study shows the truth of the old adage: "anything in Washington that looks simple, *isn't*!" Congress *will* inevitably be held more accountable, but Congress is far from ready to absorb the alterations that some open government laws would impose on its operations. Applying open government to our most open branch should be done with delicate attention to the institution's workings and needs.

NOTE

THE ROLE OF THE LINE-ITEM VETO IN THE FEDERAL BALANCE OF POWER

ANTONY R. PETRILLA*

Rampant federal spending has led to widespread calls for a constitutional amendment enacting a line-item veto, which would give the President greater discretion in curbing the excesses of Congress. While a line-item veto would surely trim the federal budget, it also threatens to upset the delicate balance of power in the federal system.

In this Note, Mr. Petrilla explores the need for a line-item veto as well as different ways in which a constitutional line-item veto amendment might be crafted. Drawing on the experiences of state governments, he notes the dangers of a broad item veto and argues that a limited type of veto, the "reduction only" veto, would best respect the balance of power on the national scale.

A billion here, a billion there, and pretty soon you're talking about real money.

—Sen. Everett M. Dirksen[1]

I. INTRODUCTION

The 1994 federal budget is projected to run a deficit of $322 billion, accounting for only a small portion of the estimated $4.2 trillion owed by the federal government.[2] The President and members of Congress, Republicans and Democrats alike, frequently issue warnings about the massive national debt.[3] Yet

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[1] Steven Erlanger, *Inflation and Unpaid Bills Haunt Russia*, N.Y. TIMES, Feb. 14, 1994, at A9.

[2] OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOV'T: FISCAL YEAR 1994 2 (1993) [hereinafter THE BUDGET]; BUREAU OF THE CENSUS, U.S.A. STATISTICS IN BRIEF 1992: A SUPPLEMENT (1993). Measuring budget deficits is a science in itself. *See* THE BUDGET, *supra*, at 5–8. This figure for the 1994 budget deficit is based on the Clinton Administration's forecast.

[3] *See, e.g.*, David Bauman, *Results Mixed as Lawmakers Urge More Cuts in Spending*, GANNETT NEWS SERVICE, Oct. 12, 1993, *available in* LEXIS, News Library, Curnws file (noting calls by various members of Congress for greater spending cuts); Peter Mitchell, *Mack Says He's More than Just the Opposition*, ORLANDO SENTINEL, June 2, 1993, at A4; Carol Bradley, *Idaho's New Senator is Quietly Making Waves*, GANNETT NEWS SERVICE, May 12, 1993, *available in* LEXIS, News Library, Curnws file; *Michel Urges Reform of 'Arcane' Congressional Budget Process*, DAILY REPORT FOR EXECUTIVES, Mar. 31, 1993, *available in* LEXIS, News Library, Curnws file. Though he is not a public office-holder, Ross Perot has campaigned across the country for reduced spending. *See, e.g.*, Juliana Gruenwald, *Perot Petitions Bearing 2.5 Million*

each year the total debt increases, despite tax hikes and congressional promises to reduce governmental spending.[4] The problem appears to be institutionally driven;[5] Congress prefers omnibus budget bills that facilitate logrolling[6] and discourage a presidential veto.[7] Many participants in the political process advocate the line-item veto as the proper mechanism for balancing the annual budget.[8] The item veto allows the executive to disagree with some parts of a bill passed by the legislature while permitting the remaining parts to become law. The parts or "items" that the executive opposes are returned to the legislature for a possible override vote.

Proponents of the item veto assert that the legislature cannot be trusted to police itself. In the never-ending quest for re-election, members of Congress logroll their pet projects into the budget and shirk responsibility for automatic expenditures built into entitlement programs.[9] The existence of well-organized, ag-

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Signatures Presented to Congress, UPI, June 24, 1993, *available in* LEXIS, News Library, Curnws file.

[4] Fourteen years ago, in 1980, the debt was only $914 billion. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (112th ed. 1992).

[5] DENNIS S. IPPOLITO, CONGRESSIONAL SPENDING 223 (1981) (discussing how members of Congress are driven to satisfy the demands of their constituents).

[6] "Logrolling" describes the practice of members of Congress who exchange votes on each other's pet projects that would otherwise lack majority support.

[7] Through the use of omnibus budget bills, which combine unrelated government spending projects, Congress forces the executive to accept the entire budget or run the risk of shutting the government down for lack of funding. During instances of temporary government shutdown, public consternation focuses on the President's veto, thereby discouraging its use.

Time is also a factor in the veto calculus. Only two budgets between 1974 and 1983 were enacted by the start of the fiscal year. *See generally* HOWARD E. SHUMAN, POLITICS AND THE BUDGET (1984). The President is given very little time to analyze the budget and decide whether to cast a veto that will almost certainly shut the government down. *See* Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389, 399 (1988) (time constraints prevented many members of Congress and President from reading 1988 budget).

[8] The item veto proposal reemerged persistently during the Reagan and Bush presidencies. *See, e.g.*, Ronald Reagan, Address Before A Joint Session of Congress on the State of the Union (Feb. 4, 1986), *in* 1986 PUB. PAPERS 127 (1988); George Bush, Address Before A Joint Session of Congress on the State of the Union (Jan. 28, 1992), *in* 1992–93 PUB. PAPERS 162 (1993). President Clinton also strongly urges the creation of an item veto. *See, e.g.*, *President Bill Clinton Speaks on Nevada Radio Stations Via Conference Call*, FED. NEWS SERVICE, July 29, 1993, *available in* LEXIS, News Library, Curnws file (quoting President Clinton as stating: "I want the line-item very badly.").

[9] Writers favoring the item veto often rely on egregious-sounding examples of pork-barrel politics to argue that congressional spending is out of control. For instance: "'It was a lousy $8 million,' Representative [David] Obey paradigmatically remarked, when asked how Senator Daniel Inouye obtained a grant to build a school for Sephardic Jews in France . . . ." Judith A. Best, *Budgetary Breakdown and the Vitiation of the*

gressive interest groups lobbying for various expenditures makes it difficult for members of Congress to say no.[10] Commentators point to the failure of the Congressional Budget and Impoundment Control Act of 1974 as evidence of Congress' lack of self-control.[11] Arguably, the constitutional balance between parochial interests—members of Congress—and the national interest—the President—has been skewed toward the former. Given the relative ineffectiveness of the existing veto and the President's otherwise limited influence on the congressional budget process,[12] the executive branch seems unable to discipline Congress. As these critics see it, only the enactment of some form of item veto would adequately protect the national interest in reduced deficits from the high-spending tendencies of special interests in Congress.

Item veto advocates may be overstating their case. As critics of the line-item veto correctly note, much of the budget is uncontrollable. A recent estimate reveals that about sixty percent

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Veto, in THE FETTERED PRESIDENCY 121 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) [hereinafter FETTERED PRESIDENCY].

Yet it is undeniable that Congress has traditionally been associated with high spending. As one author has noted:

> It was not entirely coincidental that the push for higher spending accelerated as membership turnover in Congress began to drop dramatically. Between 1875 and 1901, for example, the percentage of first-term House members dropped from 58% to 24%.

IPPOLITO, *supra* note 5, at 44.

[10] For more on interest group pressuring of Congress, see IPPOLITO, *supra* note 5, at 223.

[11] Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in portions of 31 & 42 U.S.C. §§ 1–2 (1988)). The 1974 Act seemed feasible in theory, but was unable to address the political realities of the budget process, including the threat that lower spending poses to congressional re-election campaigns. It sought to impose discipline through the budget process itself, but failed to anticipate that participants in the process would act to suspend the legislation's restrictions. *See* IPPOLITO, *supra* note 5, at 73, 105 (explaining the ways in which Congress gets around the strictures of the 1974 Act).

The much-touted Gramm-Rudman-Hollings Act has also failed to discipline Congress. *See* The Balanced Budget Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) *as amended by* The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 102, § 252, § 103, § 253, 101 Stat. 754, 764–75 (1987)(to be codified at 2 U.S.C. §§ 902–907, 922). The Act faltered because: (1) the Supreme Court declared part of the Act unconstitutional on separation of powers grounds in Bowsher v. Synar, 478 U.S. 714 (1986); (2) the Act required the national economy to be in a state of positive growth; and (3) Congress often suspended the Act.

[12] The President has three primary budget powers: proposing a non-binding budget (*see* Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921) (repealed and replaced by various sections of 31 U.S.C.(1988))); addressing Congress on the State of the Union, U.S. CONST. art. II, § 3; and vetoing the budget. The veto might well be regarded as one of the few presidential powers in the budget arena with any "teeth."

of the budget is "nondiscretionary,"[13] and, as such, is not even addressed by the appropriations process. Of the remaining forty percent that is considered discretionary spending, nearly half is appropriated for defense expenditures,[14] usually at the request of the President. The congressional "pork barrel" spending so commonly criticized thus only constitutes approximately twenty-one percent of the budget.[15] Yet, it would be difficult to cut a substantial portion of this spending because much of this money funds worthwhile projects, such as highway repair or cancer research. These figures demonstrate that even a President armed with the item veto could hardly spare the country from outrageous debt overnight. However, more savings would be achieved with the item veto than without it. A determined President using the item veto might be able to cut from one to three percent of the total annual budget—$14–42 billion.[16] Although such savings sound meager in light of the $4.2 trillion debt, they would equal a reduction ranging from six to eighteen percent of the average national deficit of $229 billion over the next five years (a projected average of estimated deficits from 1993 through 1998).[17] Over the long term, the savings would add up.[18]

The purpose of this Note, however, is not to determine the efficacy of an item veto. Instead, it is directed toward examining the effects of such a device on the balance of power between the President and Congress. Because there is a risk that enhancing

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[13] Forty-six percent of the budget funds entitlement programs, and 14% goes toward paying the interest on the national debt. THE BUDGET, *supra* note 2, at 1.

[14] Defense makes up 18% of the annual budget. *Id.* This figure reflects President Clinton's extensive cuts in response to the end of the Cold War.

[15] The so-called "pork barrel" items fall into two categories of the budget, "Grants to States and Localities" and "Other Federal Operations." Another one percent of the budget goes to "Deposit Insurance," to pay for the savings and loan crisis of the late 1980s. *Id.*

[16] These calculations are based on a 1993 budget of $1,467.6 billion. *Id.* at 2. One indicator that such cuts may be possible is that in 1983, President Reagan presented a budget for $497.9 billion and Congress approved $510.8 billion. That was a 2.5% increase. *See* 129 CONG. REC. S29928 (1983) (statement of Sen. Don Nickles (R-Okla.)). This figure was derived by dividing $12.9 billion by $497.9 billion to get 2.5%. I have estimated that this might give us an average range of one to three percent change. Then, using the 1993 budgetary figure of $1,476.6 billion in outlays, I have computed one to three percent of that figure to give the range of $14–42 billion in potential savings.

[17] This figure for the average deficit from 1993 through 1998 was derived from the Clinton Administration's forecasted deficits during that period. THE BUDGET, *supra* note 2, at 2.

[18] *See* Alan J. Dixon, *The Case for the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 215 (1985) (arguing that savings created by item veto would accrue over time).

the executive's position against the legislature may destroy this already precarious balance, this Note attempts to construct an item veto that would not transform the executive branch into a dominant overseer of the legislature.

Accordingly, Part II analyzes both the nature of the balance of power and its imperfections in the budget arena that have led to the call for the line-item veto. Part III proposes a form of the item veto—called the "reduction-only" veto—that arguably would do the least amount of harm to the balance of power, and it also explains the mechanical and theoretical underpinnings of a much more powerful item veto, designated the "rider item" veto.[19]

Part IV describes the disruption of the balance of power that would result from the enactment of a rider item veto. Because such a veto is designed to delete riders[20] in legislation and requires a traditional two-thirds majority override, it is likely to lead to both presidential dominance over Congress and the perversion of legislative intent. The reduction-only veto would avoid these undesirable results because it cannot be used to strike out riders, and it may be overridden by a simple majority of both houses of Congress.

While Part IV stresses the need to steer clear of a line-item veto explicitly authorized to remove riders from legislation, Part V notes that a careful structuring of the text of an item veto amendment is necessary to prevent the judiciary from implying such a capability. State supreme courts have often extended the reach of governors' item vetoes in this direction—at times, dramatically.[21] Unfortunately, the difficulty these courts have encountered in constructing and applying consistent judicial standards for item veto disputes has played directly into the hands of the executive. When item veto powers have been inadvertently or intentionally expanded by the judiciary, state governors have been able to pervert legislative intent or, at the very least, limit the legislature's role in policy-making. Part V addresses this issue by arguing that the constitutional text creating the reduc-

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[19] The terms "reduction-only veto" and "rider item veto" are my own.

[20] This Note uses the term "rider" to refer to two related yet distinct types of legislative text: (1) provisos and conditions attached to appropriations regulating the way in which that money is spent, and (2) legislative text in major appropriation bills that nearly forms a bill in itself because it is mostly unassociated with the other contents of the large bill within which it appears. The latter kind of rider tends to be more controversial.

[21] *See infra* notes 95–107 and accompanying text (discussing the expansive interpretation of the item veto by the Wisconsin Supreme Court).

tion-only veto is self-limiting and would resist expansion through ambiguous judicial interpretations.

II. The Need for the Line-Item Veto

At first glance, the impetus for the item veto appears to be a desire to save money. Yet item veto advocates claim that outrageous congressional spending is only a symptom of a deeper problem. Annual budget bills are filled with "pork barrel" appropriations only because the balance of power has swayed toward the legislature. This section examines the elements of the balance of power and the nature of its deficiencies that have led to the call for an item veto.

A. *The Elements of the Balance of Power*

The "balance of power" is a frequently used, though often poorly defined, term.[22] The Framers of the Constitution sought to create a balance of power among the branches of government in order to solve the dilemma of accommodating both local and national interests, each of which, they realized, could swallow the other. The dilemma arose because the Framers could not deny local interests without being undemocratic, nor could they suppress the national interest without sacrificing the primary purpose of the Constitution (to fix the Articles of Confederation). Failure to resolve the dilemma, the Framers feared, would result in one of two forms of tyranny: (1) the central government would dominate the localities, or (2) the stronger localities would dominate the weaker ones by suppressing the federal government's influence.[23] The Framers hoped to avoid both ill effects, and instead achieve a balance between the opposing interests, through an elaborate system of checks and balances. The Framers believed that if they

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[22] In modern discourse, the terms "balance of power" and "separation of powers" are often considered synonymous. They are related, but hardly interchangeable. In my opinion, the Framers felt that the separation of powers would help maintain the balance of power. If the branches could exercise each other's functions, they would lack incentives to compromise. As part II.A explains, compromise is necessary for the proper functioning of the balance of power.

[23] Perhaps one way to conceive of the "national" interest is as the set of interests of the weaker localities that would otherwise be ignored. The battle at the Constitutional Convention between the small and large states for greater power on the national level reflects this tension between local and national interests.

equipped the President and Congress—the respective agents of the national and parochial interests—with counter-balancing powers,[24] the interests would eventually compromise. Therefore, if the balance of power functions properly, the branches of government would settle policy disputes by pitting these checks against each other until fighting became counterproductive and compromise emerged. The balance of power is askew when one branch's check is less of a threat to another branch, and, thus, the branches lack incentives to compromise.

It is often said that Congress was granted the power of the purse to offset the President's power of the sword.[25] But, though the President controls the machinery of government (primarily the military and the bureaucracy), the executive also plays a role in the legislative process.[26] The veto is intended to be the executive's main check upon the legislature.

Although Congress officially derives its counterbalancing check from control of the purse strings of government, it normally wields this power through riders attached to appropriation bills.[27] Riders force the President to obey Congress' wishes when spending appropriated monies or to forfeit the use of those funds. The Framers never formally sanctioned this practice, but experience has shown that without riders, the power of the purse is of limited use.[28] Congress' prerogative to withhold funding and desired legislation from the executive is not in itself a sufficient check. It would be difficult to threaten the President with defunding part of the executive branch, when such defunding would threaten programs enjoying a broad base of support among vari-

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[24] In James Madison's conception of the balance of powers, checks were deemed superior to "parchment barriers" because the branches needed to be able to take active measures to contain one another. *See* THE FEDERALIST No. 48 (James Madison).

[25] *See, e.g.*, Neal E. Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993, 998 (1990) (noting that Framers of Constitution "[feared] the consequences of centralizing the powers of purse and sword.").

[26] *See, e.g.*, WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 52 (1885) ("The President [with the veto] acts not as the executive but as a third branch of the legislature.").

[27] Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352 (1988) ("The 'Appropriations' required by the Constitution are not only legislative specifications of money *amounts*, but also legislative specifications of the *powers*, *activities*, and *purposes*—what we may call, simply, 'objects'—for which appropriated funds may be used.").

[28] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984 324 n.55 (1984) (arguing that riders may be an "indispensable" congressional tool); Charles L. Black, *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 100 (1976) ("The rider should be used with discrimination but unabashedly—not as a mere trick, but as a means of restoring constitutional balance.").

ous coalitions of members of Congress. A defunding scheme would give rise to objections that are "external" to the dispute with the President. Put another way, members of Congress would hesitate to anger constituents by voting to disrupt funding because of a feud with the President over an unrelated issue.[29] Thus, an attempt to defund a defense project favored by the President—perhaps the "stealth" bomber—would encounter resistance from Representatives and Senators who are concerned with the effect of such a move on defense contractors, defense workers, and local economies dependent upon defense spending. It is difficult to imagine Congress alienating three different constituencies over a disagreement with the President that is unrelated to defense spending, especially since the public might condemn Congress, and not the President, should such a defunding scheme have negative consequences.

Also, Congress is limited in its ability to withhold desired legislation from the President by the executive's common practice of endorsing only a few high-priority projects each term. Congress certainly receives some favors from the executive when such legislation is under consideration. Yet these occasions are the exception, rather than the rule.

In contrast, the rider mechanism allows Congress to put more consistent pressure on the executive. Because riders usually are associated with the funding to which they are bound, they may generate only protests that are "internal" and hence wholly related to the quarrel with the President. Therefore, debate over a rider would focus on issues similar to those raised by the threat of defunding the appropriation to which the rider is attached. This helps Congress to refine its policy goals and achieve a consensus capable of pressuring the President. Another advantage of the rider, from Congress' perspective, is that it transfers the weight of public pressure onto the executive branch. The Administration may well fear that the public will focus its frustration with the budget process on the President's refusal to sign the legislation. The weight of public opinion thus falls on the President, not Congress.[30]

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[29] The counterargument that defunding certain non-service oriented executive agencies would not irk constituents is flawed. The Drug Enforcement Agency, for instance, doesn't dispense services to any portion of the public, yet members of Congress are likely to object to a move to defund the DEA on political grounds (e.g., the commitment to the "drug war").

[30] Glen O. Robinson, *Symposium on the Theory of Public Choice: Public Choice*

In conclusion, the checking powers of the branches are meant to balance each other. When one branch's check becomes more powerful than those opposing it, that branch possesses fewer reasons to compromise, and the balance of power is askew. Subsection B describes how this imbalance of power exists in the federal budget process.

B. *The Current State of the Balance of Power*

In most situations, the balance of power between the President and Congress is appropriate. Congress seems to bully the executive effectively only during consideration of the annual federal budget. The presidential veto is a reliable mechanism of executive control over non-budgetary policies.[31]

The veto is normally an effective executive tool for several reasons. First, it has proved nearly impregnable—overrides rarely occur. James Madison worried that only requiring two-thirds of both houses of Congress to vote to override a presidential veto would not provide the President with enough protection, and he instead supported a three-fourths override requirement.[32] However, time has shown that getting two-thirds of Congress to agree on anything is extremely difficult. One study reveals 1,419 regular, non-pocket vetoes between 1789 and 1988. Of these, only 103 were overridden—about 7.2% the total.[33] The low number of overrides most likely results from the

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Speculations on the Item Veto, 74 VA. L. REV. 403, 411 (1988) (noting that the President is often blamed for budget impasses). For instance, in July, August, and September of 1982, President Reagan struggled with Congress over a supplemental appropriations bill to fund the salaries of federal workers. Congress proposed several versions of the bill, all of which were vetoed by Reagan. Over 150,000 people were threatened with furloughs. Eventually, Congress overrode the President's veto to keep the government operating. *See Mr. Reagan Loses One*, WASH. POST, Sept. 12, 1982, at B6; Mike Causey, *Furlough Threat Isn't Over Yet*, WASH. POST, Sept. 12, 1982, at C2. Significantly, President Reagan suffered some of his worst approval ratings—at one point dipping to only 41.1%—at the time of this dispute with Congress. Since Reagan's approval rating averaged 52.75% throughout his two terms, the 41.1% figure seems related to his battles with Congress. *See* GEORGE C. EDWARDS III, PRESIDENTIAL APPROVAL: A SOURCE BOOK 95, 176 (1990). For a discussion of the way that Congress pressures the President through restrictions on appropriations, see J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 (1989).

[31] Some scholars argue that the current veto is too powerful. *See* Black, *supra* note 28 (contending that use of veto systematically to control governmental policy runs contrary to its usage by the earliest Presidents).

[32] *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 183–84 (1913); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 629 (1966).

[33] Calvin Bellamy, *Item Veto: Dangerous Constitutional Tinkering*, 49 PUB. ADMIN.

tendency of vetoes to divide Congress along party lines.[34] Members of the President's party often vote against an override as a gesture of party unity. Since it takes only one third of one house plus one member to sustain a veto, the low seven percent figure is not surprising. Though Presidents seek to avoid veto confrontations where the risk of an override is present, the override threat from Congress is not compelling.

The veto is also effective because of what James Wilson called its "silent operation."[35] It is unnecessary for the President to use the veto often for it to act as a restraint on Congress. Representatives and Senators need only believe that the President will not hesitate to employ it when legislation appears that the Administration opposes. Congressional fear of the veto allows the President to bargain effectively, since few members of Congress pushing highly desired legislation are willing to risk the setback of a veto.[36]

The third reason for the strength of the veto power outside the budget arena is that riders are uncommon in general legislation. Congress has learned that Presidents will veto general legislation, even if there is executive support for its primary intent, if an irritating and incompatible rider is attached. Riders have their full coercive effect only when the President's veto will shut down the government.[37]

But in the realm of the federal budget, the President's veto becomes much less potent. The omnibus budget bill forces the President to confront unpleasant alternatives whether or not a veto is cast. No veto would mean that politically controversial riders and appropriations of dubious merit may be signed into law. If the President vetoes the bill, the government may quickly grind to a halt as it runs out of money. In that case, the services

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REV. 46, 47–48 (1989). Bellamy's figures are derived from U.S. GOV'T PRINTING OFFICE, PRESIDENTIAL VETOES, 1789-1976 (1978) and U.S. GOV'T PRINTING OFFICE, PRESIDENTIAL VETOES, 1977–1984 (1985). Another author states that only four percent of presidential vetoes have been overridden. Gary W. Copeland, *When Congress and the President Collide: Why Presidents Veto Legislation*, 45 J. POL. 696, 697 (1983).

[34] Black, *supra* note 28, at 93 ("On a party vote, with defections in equal proportions, override loses heavily in any imaginable House of Representatives.").

[35] Although Wilson's statement was made during debate over an absolute veto, the principle of "silent operation" is the same. MADISON, *supra* note 32, at 63.

[36] *See* ROBERT J. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 100–03 (1988) (arguing that threat of presidential veto usually causes Congress to compromise because vetoed legislation is often never resurrected).

[37] *See* EDWARD C. MASON, THE VETO POWER 47–48 (Albert B. Hart ed., 1967) (1880) (examining President Hayes' successful stand-off with Congress over riders in general legislation).

upon which constituents come to depend are suspended, with the President receiving most of the blame. Statistics show that even when the President chooses to veto, Congress may still have its way. While the override rate is low for most vetoes, budget vetoes have a significantly greater chance of being overridden. During the period beginning with Franklin Roosevelt's first term to the middle of Ronald Reagan's second term, Congress voted to override thirty-five percent of presidential budget vetoes.[38]

The end result is that Congress dominates the budget process and also manages to assert its will on other matters that it inserts in the budget. The balance of power in the budget process is lopsided because Congress lacks incentives to compromise; it wins whether or not the President resorts to the veto. This situation has led many observers and, surprisingly, even members of Congress to endorse some form of item veto as the proper solution.[39]

III. The Conflicting Philosophies

There are two distinct schools of thought among those advocating a line-item veto. One group of thinkers seeks to remedy the current defect in the balance of power through an item veto, but is wary of creating a President who would overshadow and eclipse Congress' role in formulating federal policy. The other group argues for an item veto that would ensure strong executive power, enabling the President to strike down riders in legislation. This Part proposes a type of item veto—the *reduction-only veto*—which satisfies the concerns of the first group.[40] For purposes of comparison, this Part also discusses the kind of item veto preferred by the second group—the *rider item veto*. The rest of the Note explains why the reduction-only veto would lead to a true balance of power and why the rider item veto would tilt the balance of power in favor of the President.

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[38] Dixon, *supra* note 18, at 217.

[39] *See* American Enterprise Institute for Public Policy Research, Proposals for Line-Item Veto Authority: 98th Congress, 2d Session 9 (1984) [hereinafter Proposals] (14 line-item veto proposals were introduced in the Ninety-Eighth Congress alone).

[40] For text of the proposed amendment, *see* Appendix A.

A. *The Reduction-Only Veto*

Designing a limited line-item veto is difficult because bills in Congress are not structured so as to facilitate defining the term "item."[41] The word "line" tends to give a false sense of security, suggesting that there is already a general definition of what constitutes a "line" in the budget. Such a conclusion could not be further from the truth.

Congressional bills are not easily divisible into "items" or "lines." Though the substance of a particular bill may be divided into several sections, these sections often do not firmly delineate boundaries between the subjects of the bill. Nothing requires Congress to organize bills coherently or logically—typically, unrelated issues are addressed in a single section. Sometimes, these sections contain controversial riders; usually, however, such sections are used by legislators merely as a convenient scheme for handling dissimilar topics. While some states have rules regulating the way a bill is written,[42] Congress labors under no such limitations. Congress is the master of the form, style, and content of proposed legislation. If it so chooses, Congress may pass a bill consisting of a single, long and winding sentence.[43]

Naturally, the President would want a line-item veto that allows him to cut out parts of bills in whatever manner that would defeat evasive congressional maneuvers. Consequently, Congress would be unable to manipulate the legislative text to escape the reach of the executive's item veto. However, such a powerful item veto in the hands of the wrong person could have catastrophic results. Though the federal courts might intervene to adjudicate executive-legislative disputes, courts are not infallible in their attempts to fine-tune the balance of power. Indeed, as Part V shows, many states have experienced unwanted expansion of the item veto power, often in the wake of judicial action.

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[41] Robinson, *supra* note 30, at 405.

[42] These include rules on style, form, and even content. *See* Devins, *Budget Reform*, *supra* note 25, at 1012; Nancy J. Townsend, *Single Subject Restrictions as an Alternative to the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 248 (1985) (noting that 42 states have amendments requiring each piece of legislation to embody a single subject); N.M. CONST. art. IV, § 16 ("[g]eneral appropriation bill shall embrace nothing but appropriations . . . ."); ALA. CONST. art. IV, § 71 (same).

[43] On several occasions since 1981, Congress has passed one continuing resolution embodying all terms of the budget. *See* Devins, *Appropriations Redux*, *supra* note 7, at 392 (between 1953 and 1988 Congress passed at least one continuing resolution each year containing a large portion of the budget).

The ideal line-item veto is one that (a) prevents Congress from craftily combining several subjects into one "item"; (b) denies the President the power to pervert legislative intent; and (c) minimizes the occasions when the judiciary must decide whether the legislature or the executive has overstepped its bounds. The reduction-only veto best accomplishes these goals.

1. Defining "Items"

The reduction-only veto conceives of an "item" as a dollar amount appearing in a congressional bill, whether expressed in numbers or in words (e.g., "5" as opposed to "five"). The President may reduce that amount by any degree. A total veto of an appropriation would reduce the dollar figure to zero.

The reduction-only veto is a *non-textual* mechanism; it removes nothing from the bill at issue because it has no effect upon the substantive text of the legislation. The device stands in contrast to the *textual* line-item vetoes that currently exist in forty-three states.[44] Such textual mechanisms grant state governors the power of the proverbial blue pen, enabling them to alter the written text of legislation.

Despite variations in the rules of particular states, when state supreme courts have construed Governors' item vetoes, they have come to the task accepting that a Governor has a right to delete some portion of the legislative text. In other words, it is undisputed that the Governor is permitted to veto some riders. Courts must then confront the question of which portion and which riders may be vetoed. In contrast, the reduction-only veto affirmatively rejects this approach. Legislative text always survives a reduction-only veto. If the text is operable despite the reduced appropriation, it must be enforced by the executive, just like any other piece of legislation that has been signed into law.

Textual line-item vetoes are more powerful instruments than their non-textual counterparts because there is a greater likelihood that they will receive favorable judicial rulings. As will be explained below, this situation results from the subjective nature of the textual item veto. Judges in different states, construing nearly identical item veto constitutional provisions, have allowed Governors to exercise differing levels of veto power—

[44] These terms, "textual" and "non-textual," are my own.

sometimes radically so.[45] This Note argues that the reduction-only veto may avoid this undesirable situation on the federal level.

2. The Override Percentage

The percentage of legislators required to override the proposed reduction-only veto would be a simple majority of those present and voting in both houses of Congress: the customary number of legislators required to pass any piece of legislation.[46] Put another way, the President would need to secure a majority of one house in order to sustain a reduction-only veto.

Item veto architects realize that the power of the executive's line-item veto may be adjusted by varying the override percentage. A powerful item veto could be balanced with weak protection against an override—thus making an executive hesitant to wield the item veto too forcefully. In the case of a line-item veto with limited scope, strong protection against overrides could help to ensure that the executive's item veto power is not eviscerated by the legislature. Obviously, decisions regarding override percentages are made in the context of the executive's existing powers. In other words, it may be appropriate to saddle the line-item veto of an already powerful executive with a weak override requirement. This Note adopts such a strategy in fashioning its item veto proposal for the federal government.

3. The Judicial and Legislative Branch Exemption

By its terms, the proposed reduction-only veto may not be applied to the budgets of the legislature or the judiciary. Many political analysts and members of Congress have suggested this

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[45] *See* part V, *infra.*

[46] Alan Dixon's article, *The Case for the Line-Item Veto, supra* note 18, generated some of the policy arguments for a simple majority override requirement and generally stimulated my own thoughts on the subject.

In the states, the most common override percentage is a two-thirds majority. Thirty-three state item vetoes operate with a two-thirds override requirement. COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES: 1990–91 67–68 (1990).

Four states use a three-fifths majority (Delaware, DEL. CONST. art. III, § 18; Maryland, MD. CONST. art. II, § 17; Nebraska, NEB. CONST. art. IV, § 15; and Ohio, OHIO CONST. art. II, § 16), and four states use a simple majority (Alabama, ALA. CONST. art. IV, §§ 13–14; Arkansas, ARK. CONST. art. VI, §§ 15, 17; Kentucky, KY. CONST. § 88; and Tennessee, TENN. CONST. art. III, § 18).

limitation for any item veto adopted on the federal level.[47] The purpose of this rule is to prevent the executive from trying to blackmail Congress or the judiciary. Analogous safeguards in the U.S. Constitution protecting the finances of the President and members of the judiciary provide precedent for this exemption. The Framers realized that Congress could gain leverage by applying financial pressure to the President or federal judges, just as the colonial legislatures did to the royal governors.[48] Thus, the Framers made the salary of individual Presidents unalterable and the salaries of federal judges immune to reduction during the tenure of a particular judge.[49] At the Constitutional Convention, these clauses were not the source of much debate.[50] They appear in numerous drafts of the Constitution generated by the Convention and seem to have been universally accepted as necessary precautions.[51]

The appropriations for the legislature and judiciary combined compose less than one-half of one percent of the federal budget (i.e., approximately $5 billion).[52] Since they are hardly major components of the budget, there is little need for the executive to have an item veto over the budgets of the other two branches.

B. *The Rider Item Veto*

For purposes of comparison, this Note analyzes the rider item veto, a device that would have vastly different consequences for

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[47] Hawaii is the only state with this limitation. HAW. CONST. art. III, § 16. Of the 14 item veto proposals introduced in the Ninety-Eighth Congress, seven contained clauses providing for such a limitation. *See* PROPOSALS, *supra* note 39, at 9.

[48] *See* WILFRED E. BINKLEY, PRESIDENT AND CONGRESS 4 (3d ed. rev. 1962). Binkley writes:

> Even the governor's salary depended upon appropriation by the colonial legislature and he was consequently compelled to come to terms with the legislators at the same time that he struggled, as best he could, to execute his royal commission as governor. So he was reduced practically to the necessity of coming, hat in hand, to the door of the legislature begging for funds to carry out his duties and legislatures drove many a hard bargain with him.

Id. at 4.

[49] *See* U.S. CONST. art. II, § 1, cl. 7 (President's salary); art. III, § 1 (Judges' salaries).

[50] The issue of whether to allow judges' salaries to be increased during their tenure was debated twice at the Convention, and the present form of the clause (allowing increases) survived both occasions. *See* MADISON, *supra* note 32, at 317, 537–38.

[51] *See id.* at 31–32, 116, 119–20, 383, 392–93, 623–24 (the sections of various drafts of the Constitution that restricted Congress' right to alter Presidents' and judges' salaries).

[52] THE BUDGET, *supra* note 2, at 30.

the federal balance of power than the reduction-only veto. The rider item veto would rely on a textual mechanism that would make it much more powerful than the reduction-only veto. There are two ways to construct a rider item veto on the federal level: by constitutional amendment or through a highly controversial assertion of the device by the President. The following two subsections explore the type of rider item veto that would be produced by each method and the associated rationales for such devices under the balance of power.

1. The Conventional Approach: A Rider Item Veto Amendment

A rider item veto amendment would have two primary features. First, the device would be a textual-item veto, with the ability to reach the legislative text directly. Without such a capability, the device would be unable to strike out riders on a regular basis. Second, the override percentage would be two-thirds of both houses of Congress, thereby helping the President sustain controversial vetoes.

Judith Best, an advocate of this proposal, argues that a rider item veto amendment would remedy the current imbalance of power, which, she claims, has distorted the separation of powers as envisioned by the Framers. She notes that the Framers intended the separation of powers to provide efficient government since no branch was considered qualified to carry on the functions of another branch. But with the presidential veto weakened by congressional omnibus budget bills, the President is unable to defend the constitutional prerogatives of the executive branch against encroachment by Congress, rendering the government inefficient.

Best notes that several of the Framers, including Madison and Hamilton, were suspicious of legislatures and worried that tyranny might result from legislative usurpations of executive functions.[53] But, she maintains, "[t]his legislative trespass on the powers of the executive, as opposed to the rights of the people, would result, not in harshness and cruelty to the people, but rather in quasi-anarchy, not in too brutal a rule, but in failure to rule."[54] Hence, the Framers sought a separation of powers but-

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[53] Judith A. Best, *Legislative Tyranny and the Liberation of the Executive: A View from the Founding*, 17 PRESIDENTIAL STUD. Q. 697, 699 (1987).
[54] *Id.* at 701.

tressed by checks,[55] including a veto usable on "ordinary" occasions. During the Constitutional Convention, she argues, the absolute veto (a veto offering no opportunity for legislative override) was rejected because it would not be exercised on ordinary occasions.[56] Given the nature of republican government and a republican people, most Presidents would hesitate to use an absolute veto that would likely offend the sensibilities of constituents. As Madison wrote in *Federalist* No. 51, "An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness . . . ."[57]

Best contends that Congress has turned the President's veto of the budget into an absolute veto through employment of omnibus bills. Considering the budget is usually presented to the President very late in the fiscal year, a veto entails shutting the government down. Thus, vetoes of the budget are necessarily rare, and consequently the silent operation of the veto has been eviscerated. Congress, knowing that the veto is not a serious threat, finds fewer incentives to compromise with the President and instead packs the budget with pork barrel legislation. The essence of Best's reasoning is that Congress has undermined the separation of powers and a rider item veto is necessary to restore the balance.

2. The Assertionists

Another group of thinkers advances the radical proposition that the President already possesses the line-item veto—it merely needs to be asserted.[58] They argue that the Framers set up the

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[55] According to Best, these other checks include bicameralism (as an internal restraint on congressional action) and election of the President through the Electoral College. *See id.* at 699–700, 704–06. *See also* THE FEDERALIST, No. 51, at 322 (James Madison); No. 62, at 378–82 (James Madison) (Clinton Rossiter ed., 1961) (James Madison's commentary on bicameralism).

[56] Best, *Budgetary Breakdown*, *supra* note 9, at 130–31.

[57] THE FEDERALIST, No. 51, *supra* note 55, at 323.

[58] These commentators include Forest McDonald, *The Framers' Conception of the Veto Power*, *in* PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 26 (1988) [hereinafter PORK BARRELS]; Stephen Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, *in* PORK BARRELS at 9; L. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437 (1990).

balance of power expecting the President to exercise what was in substance, if not in name, an item veto.[59] The evidence for their claim rests on creative interpretations of colonial practices and the Constitutional Convention.

One such theorist, Forest McDonald, makes two contentions: (1) that the Framers were familiar with veto mechanisms under the British and colonial systems that were essentially item vetoes,[60] and (2) consequently, they tacitly granted the President extensive impoundment powers, analogous to an item veto, during the period following the Founding.[61] McDonald argues that a modern presidential assertion of an item veto would do nothing more than recognize the long-suppressed wishes of the Framers.

Another theorist, Stephen Glazier, advances a similar argument. Article I, Section 7, Clause 3 of the Constitution declares that the President's veto is operable against "Every Order, Resolution, or Vote" of Congress primarily because James Madison and Edmund Randolph worried that Congress would evade the veto by using legislative devices of different names.[62] Glazier asserts that the Framers' attempt to prevent congressional evasion of the veto through the "form and name game" justifies a

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Assertion of an item veto would entail a Presidential announcement that some part of a congressional bill would not be enforced. Congress would no doubt resort to the federal courts in this situation. Assertion theorists hope that even if the courts do not validate the executive's action, they will at least declare the issue a political question and refuse to rule, thus tacitly acquiescing in the assertion of the rider item veto.

[59] Unfortunately, one cannot precisely define the boundaries of an asserted item veto, simply because its existence would depend upon a bold usurpation of power by the President. Such usurpations are limited only by counteracting forces in the political environment. However, one fact is certain: an asserted item veto would be able to attack riders.

[60] McDonald contends that the Framers observed item vetoes by three entities—the colonial governors, the Board of Trade (a London-based entity that reviewed all acts passed by colonial legislatures), and the state governors—during the brief period preceding the Constitutional Convention. McDonald, *supra* note 58, at 1–4. However, Charles J. Cooper, Jr., challenges these assertions. Charles J. Cooper, Jr., *The Line-Item Veto: The Framers' Intentions*, *in* PORK BARRELS at 38–39. Cooper claims that McDonald plainly misinterprets his sources. Given Benjamin Franklin's stories of the struggles between the Governor of Pennsylvania and the colony's legislature, one suspects that the Governor lacked an item veto. *See* MASON, *supra* note 37, at 18.

[61] Many anti-line-item veto scholars typically point out that the first appropriation measure passed by the post-Constitutional Convention Congress was an omnibus bill. McDonald replies that, since the President wielded vast discretion over which appropriations to spend and which to ignore, the fact that the first appropriation measure was omnibus serves only as further proof that the Framers conceived of the President as having a type of line-item veto over appropriations. *See* McDonald, *supra* note 58, at 1–2.

[62] Glazier, *supra* note 58, at 9; MADISON, *supra* note 32, at 466. Various colonial governments had opted for such a strategy against the Board of Trade's veto earlier in the century. *See* McDonald, *supra* note 58, at 4.

line-item veto.[63] His argument is that the Framers wanted to ensure that the veto would be operational against anything Congress desired to become law, and he claims that the President can veto any piece of legislative text that was the subject of a separate vote. Thus, controversial riders tacked onto appropriations measures through a majority vote could be surgically removed under this interpretation of the Constitution's veto power. The President, according to Glazier, must simply assert this power. He predicts that the onus would then fall upon the judiciary, optimistically noting: "[w]hatever result the courts might ultimately reach, the President's use of the line-item veto offers everything to gain and nothing to lose. The courts can deliver no worse than the status quo, and any other legal result would be an improvement over current practices."[64]

Two of the more scholarly of the assertion theorists, Gregory Sidak and Thomas Smith, present a forceful challenge to the status quo, if only because their proposals sound reasonably convincing. They suggest two kinds of item vetoes that are arguably constitutionally feasible: "constitutional excision" and the "shield veto."[65]

"Constitutional excision" is premised on the Presidential oath to uphold the Constitution and the President's duty to execute the laws faithfully. Under this view of the item veto, the President has an obligation to prevent unconstitutional legislation from becoming law.[66] A President would exercise constitutional excision by signing a law, but announcing that the portions the President considers to be unconstitutional will not be enforced.[67] If Congress should decide to litigate this decision, the judiciary would then have an opportunity to determine the excised item's constitutionality—potentially vindicating the President in the process.

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[63] Glazier, *supra* note 58, at 10.

[64] *Id.* at 11.

[65] Sidak & Smith, *supra* note 58, at 446–60.

[66] This is essentially the same argument that Chief Justice Marshall used in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to support his assertion of judicial review.

[67] Justice Robert Jackson described a famous instance of presidential behavior similar to constitutional excision that occurred during Franklin D. Roosevelt's presidency. *See* Robert Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953). The Lend-Lease Act, 55 Stat. 32 (1941), contained a provision allowing Congress to rescind its grants of power to the President via concurrent resolution. Roosevelt felt that such an action would unconstitutionally evade the presidential veto, and he directed then-Attorney General Robert Jackson to draft a letter stating the provision's unconstitutionality. Jackson, *supra*, at 1353–55.

Sidak and Smith claim that constitutional excision makes intuitive sense. They argue that there is no reason for the President to sign into law measures that plainly will be struck down as unconstitutional by the courts, when by excising such measures from bills, the President could spare aggrieved individuals the trouble and expense of litigation. The "hypothetical" example[68] offered by Sidak and Smith involves a Congressional decision to re-enact the "fairness doctrine" for broadcasters registered with the FCC.[69] Because Congress realizes the President would never sign a bill reinstating the fairness doctrine, it slips a renovated form of the doctrine into an omnibus appropriations measure. Since the doctrine is probably unconstitutional on First Amendment grounds, Sidak and Smith want the President to be able to excise the rider containing the doctrine from the omnibus bill.

Interestingly, constitutional excision might not permit an override vote by Congress. If part of a bill is unconstitutional, the fact that two-thirds of both houses of Congress support it is irrelevant. The legislation would still be unconstitutional and thus unenforceable by the President.[70]

A "shield veto" targets legislative text that the President considers an infringement upon the prerogatives of the executive branch and a violation of the principle of separation of powers. The device would "shield" the executive branch from legislative encroachments.[71] An example of a rider that would be subject to such a veto was the so-called "concurrent reporting requirement" rider.[72] This congressional rider ordered certain executive branch

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[68] Congress actually did try to re-enact the "fairness doctrine" in 1987. *See* Sidak & Smith, *supra* note 58, at 452. When Congress first passed the Fairness in Broadcasting Act of 1987, S. 742, 100th Cong., 1st Sess. (1987), President Reagan vetoed it. Congress then sought to include an amendment accomplishing the same goal in the omnibus budget bill for that year, but the rider was withdrawn under pressure from President Reagan. Robinson, *supra* note 30, at 410 n.26.

[69] The "fairness doctrine" required broadcasters to give air time to certain individuals, such as political candidates, during which they could respond to media coverage they considered to be biased or unfair. Although the Supreme Court never determined the doctrine's constitutionality—the FCC abandoned it voluntarily—it is likely that the doctrine would have been found to be unconstitutional. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court ruled that a Florida "right of reply" statute for print media similar to the fairness doctrine violated the First Amendment.

[70] Sidak & Smith, *supra* note 58, at 461.

[71] One researcher claims that President Bush used the shield veto over 100 times from November 1989 to October 1991. VIRGINIA A. MCMURTRY, THE PRESIDENT AND THE BUDGET PROCESS: EXPANDED IMPOUNDMENT AND ITEM VETO PROPOSALS 7–8 (1991). It appears that these instances have never been contested by Congress.

[72] Theodore B. Olson, *The Impetuous Vortex: Congressional Erosion of Presidential Authority*, *in* FETTERED PRESIDENCY, *supra* note 9, at 237.

agencies to issue reports to Congress whenever these agencies reported to the President. Congress' intention in enacting this requirement was to ensure equal access to information that the President normally receives from the agencies. Because President Reagan felt that the requirement inhibited his ability to lead the agencies effectively, he ordered his agency secretaries to ignore it. Congress never litigated the validity of Reagan's order.

The preceding assertion theorists advance clever arguments in support of their claim that the President already possesses the line-item veto. However, very few other commentators have accepted this truly radical notion for the simple reason that technically imaginative arguments cannot change history—the President has never openly exercised an item veto-like power. For the President to do so now, in the absence of some specific grant of power, would seem like a usurpation of legislative prerogatives.

IV. The Various Implications for the Balance of Power

Best, McDonald, Glazier, Smith and Sidak share the Hamiltonian view of the executive—they want the executive branch to be the dominant force in domestic politics, and they are prepared to arm the President with the tools necessary for the task.[73] Shifting the balance of power toward the President is their first concern. It is disturbing that these authors devote so little time to discussing their plans' impact on the balance of power. It is hard to say what role, if any, they foresee for Congress in such an executive-oriented system.

The balance of power issue cannot be dismissed so lightly. Any form of the rider item veto could have significant, and perhaps catastrophic, implications for relations between the President and Congress. Obviously, whether the item veto would be the bane of Congress' existence or simply another of the President's bargaining chips will depend on who is wielding it. The worst-case scenario must be examined, however, because there is no guarantee that all future presidents will respect the balance of power.

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[73] Alexander Hamilton's enthusiasm for the executive is well-known and is exemplified by his writing in *The Federalist* No. 70: "Energy in the executive is a leading character in the definition of good government." THE FEDERALIST No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

A. *Congressional Influence on Policy-Making*

1. The Rider Item Veto

In the hands of a power-hungry President, the rider item veto would not only deny the legislature the rider as a check on the executive, but would also tend to curtail congressional influence on policy-making in general.[74] Once established by permanent legislation, government programs could easily stray from their intended policy roles because Congress would lack the ability to discipline them. Program directors would have immense discretion, because they could rely upon the President's rider item veto to halt congressional attempts to supplement the authorizing legislation through the appropriation process. Except for rare occasions where a two-thirds majority could be assembled, Congress would lose the ability to specify how monies that it appropriates are spent,[75] and the American people would suffer government by veto.[76]

Glen Robinson, an advocate of the item veto, contends that Congress' influence on policy-making would be preserved by its ability to withhold legislation sought by the administration. Congress could condition its assent to such legislation on presidential assurances not to item-veto selected portions of the bill.[77] Fear of future reprisals would make the President hesitant to lie to Congress. As a result, Congress' bargaining power would survive the adoption of a rider item veto.

Robinson uses the following hypothetical example to illustrate his point. The President's legislative program includes an appropriation of monies for air pollution regulation, as demanded by certain constituencies. Key members of Congress agree to support the bill only in the event that certain protections for industries within their home states are not item-vetoed. The bill will pass only if the President accepts it with these conditions. By

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[74] 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) (arguing that state item veto is mainly used as a partisan weapon).

[75] Obviously, the Framers of the Constitution would have recoiled at the suggestion that congressional input into national policy be eliminated. *See* Stith, *supra* note 27, at 1356 (observing that the Appropriation power in the Constitution intends for Congress to "define the character, extent and scope of authorized activities").

[76] Black, *supra* note 28, at 100–01 (noting that "government by veto is an undesirable thing in itself").

[77] Robinson, *supra* note 30, at 417.

bargaining with the President, Congress can insulate certain riders from the item veto.[78]

This model is not realistic. True, the President would be unlikely to use any item veto when he is pushing a pet project; Congress would retain some policy-making role in regard to such legislation. The budget, however, is a different matter. Constituents relying upon governmental services would not graciously countenance Congress' withholding the budget and shutting down portions of the government in an effort to avoid item vetoes of various riders. Members of Congress would feel intense pressure to pass the budget, and the President could merely wait Congress out.[79]

Additionally, the rider item veto would allow the executive to operate more independently of the legislature. The President already enjoys extraordinary independence from Congress in the realm of international relations.[80] The rider item veto could replicate that situation on the domestic front, transforming the character of the budget proposed by the executive from a set of suggestions to a list of limitations upon congressional action. As Senator Carl Levin (D-Mich.) observed, an item veto would relieve the executive of "the need to compromise as he participates in the budgetmaking process."[81]

The presidency of Richard Nixon offers a glimpse of the abuses that can occur when a President operates unchecked by congressional input or oversight. In the foreign policy sphere, the Nixon Administration made many secret executive agreements with foreign governments. At the height of the Vietnam War, the Administration secretly initiated the bombing of Cambodia, which continued for over a year before becoming known to Congress or the general public.[82] In domestic politics, Nixon impounded over $18 billion of congressional appropriations, despite objections from Congress.[83] Nixon also asserted an execu-

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[78] *Id.*

[79] *See supra* notes 27–30 and accompanying text (on the feasibility of Congress pressuring the President by withholding legislation).

[80] The President has extraordinary foreign policy powers, including substantial control of the military and the ability to conclude executive agreements with foreign governments without interference from Congress. *See* RICHARD A. WATSON & NORMAN C. THOMAS, THE POLITICS OF THE PRESIDENCY 454–56, 459–66 (1988).

[81] PROPOSALS, *supra* note 39, at 12.

[82] For a discussion of the "imperial President" (i.e., one who combines the war powers with secrecy) see ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

[83] THOMAS E. CRONIN, THE STATE OF THE PRESIDENCY 190–96 (1980). *See also*

tive privilege to refuse to surrender tapes of White House conversations to Watergate investigators, a stance later rejected by the U.S. Supreme Court.[84] Finally, Nixon's relations with Congress became distant by the second year of his presidency; his legislative agenda was composed mostly of blocking proposals that he deemed undesirable, such as consumer protection legislation.[85] Undeniably, Nixon's presidency was characterized by a desire to operate independently of Congress.[86] The prospect of such an administration in possession of a rider item veto raises the specter of a President completely unreceptive to congressional input into policy-making.

2. The Reduction-Only Veto

The reduction-only veto would avert the possibility of an independent President and secure Congress' policy-making role in two ways. On the most obvious level, such a veto would protect the integrity of riders in the budget and allow Congress to assert its authority over federal spending. The President would have to negotiate with members of Congress to keep undesired riders out of the budget. Though a threat to veto the entire budget would not be credible, the President would have a bargaining chip in the reduction-only veto. The administration could trade agreements to leave certain appropriation items untouched for support in removing objectionable substantive riders from the budget. Such negotiations would undoubtedly be heated, for neither side could ignore the other, but each would have incentive to compromise.

Moreover, the simple majority override of the reduction-only veto would lead to greater presidential involvement in the legislative process. The increased likelihood of a successful override would force Presidents to lobby to sustain their reduction-only

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WILLIAM F. MULLEN, PRESIDENTIAL POWER AND POLITICS 67–69 (1976). Impoundments of the magnitude ordered by Nixon were previously unheard of. Nixon also broke new ground by using impoundments to kill entire programs that he disagreed with on political grounds. *Id.* at 67. Nixon's impoundments were declared illegal in Train v. City of New York, 420 U.S. 35 (1975).

[84] U.S. v. Nixon, 418 U.S. 683 (1974).

[85] *See* Black, *supra* note 28, at 95–96 (discussing President Nixon's measures to delay congressional consideration of consumer protection legislation).

[86] Nixon inspired George Reedy to write that it is the nature of the presidency to isolate its occupant. George E. Reedy, *On the Isolation of Presidents*, *in* THE PRESIDENCY REAPPRAISED 119 (Rexford G. Tugwell & Thomas E. Cronin eds., 1974). *See also* GEORGE E. REEDY, THE TWILIGHT OF THE PRESIDENCY (1970).

vetoes just as they would lobby for any piece of legislation. Closer relations with Congress would be essential. If the President were to sustain certain reduction-only vetoes at the cost of enraging a sizeable minority of Congress, other items on the administration's legislative agenda could become targets of vengeful members of Congress. In addition, Presidents would have to ensure that no reduction-only vetoes would be undertaken without sufficient congressional support. The picture that emerges is not one of a President casting reduction-only vetoes to frustrate Congress, but of a President bargaining with Congress to eliminate spending that lacks majority support.

B. *The Perversion of Legislative Intent*

1. The Rider Item Veto

The primary issue of concern with the rider item veto is its propensity to pervert legislative intent in such a way that a majority of Congress would not support the resulting legislation.[87] Whenever the executive can remove a fragment of substantive legislative text from the whole, causing the remaining bastardized text to become law, the resulting legislation may be completely adverse to the purpose of the legislators who voted for it.[88]

For example, suppose that in the annual budget Congress forbids the executive from operating intelligence gathering services, such as the Central Intelligence Agency, if any funds are to be sent to rebels in Nicaragua.[89] The congressional intent is to prevent any monies from being spent on these services in

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[87] Obviously, any veto alters legislative intent; the important question is whether the item veto permits the executive to usurp the legislative function by unilaterally *creating* legislation.

[88] It is not clear whether Congress would have the ability to withdraw its passage of legislation *after* the President has item vetoed it. The legislation resulting from the veto may be such a perversion of legislative intent that Congress would feel that its original approval of the legislation had been voided. In reality, such a view probably would not succeed, and Congress would have to pass new legislation—also subject to the rider item veto—to repeal the old.

[89] Congress actually did restrict the President from sending money earmarked for intelligence services to the contras in Nicaragua through a rider attached to the 1984 continuing resolution. Continuing Resolution, Department of Defense Appropriations Act, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1937 (1984). Known as the Boland Amendment, the rider was a continual source of irritation to President Reagan. Members of his administration attempted to subvert it and were eventually implicated in the Iran-Contra scandal.

Nicaragua. With a rider item veto, the President could surgically remove this legislative policy decision and then be free to disburse funds for the illicit purpose against the express wishes of Congress.

If the President decides to pervert legislative intent in such a way, all that is required is one third of one house plus one member to sustain the usurpation of the legislative prerogative. As a result, the President would effectively be exercising the legislative function expressly reserved to Congress by the Constitution. When the President co-opts the legislative function, compromise is less likely because the administration does not need congressional agreement on the policy matter at issue. The balance of power between the executive and the legislative branches would be substantially undermined, resulting in even more confrontations and stalemates between the President and Congress over the budget and a process even more prone to delay.[90]

2. The Reduction-Only Veto

The reduction-only veto, on the other hand, is non-textual and unable to delete substantive legislative text. Therefore, it would pose less of a threat to legislative intent and the balance of power.[91] In the example above, the President could not strike Congress' restriction preventing foreign aid monies from going to Nicaraguan rebels. The administration could negotiate with Congress in an attempt to soften the restriction, but under no circumstances would the reduction-only veto enable the President to thwart congressional will by making it legal for the administration to conduct a foreign aid program that included monetary support for the Nicaraguan rebels. As Part V will demonstrate, a court would probably not construe the reduction-only veto in such a way as to elude the device's restrictions. Thus, the reduction-only veto would preserve the rider as one of Congress' checks upon the executive.

[90] RONALD C. MOE, PROSPECTS FOR THE ITEM VETO AT THE FEDERAL LEVEL: LESSONS FROM THE STATES 22–23 (1988). Moe draws his conclusions from observation of the item veto in the states. *See also* Louis Fisher & Neal E. Devins, *How Successfully Can the States' Item Veto be Transferred to the President?*, 75 GEO. L.J. 159, 184–85 (1986).

[91] *See supra* notes 44–45 and accompanying text, where the inability of the reduction-only veto to delete legislative text is discussed.

The shorter leash of a simple majority override also preserves legislative intent. Instead of being able to legislate with the help of one-third-plus-one-member of a single house of Congress, the President would need a majority in at least one house in order to sustain reduction-only veto initiatives. With the safety of riders guaranteed, the incidence of confrontations between the executive and the legislature would be diminished.

V. Holding the Courts in Line

The importance of the judicial role in the implementation of both the textual and non-textual line-item vetoes cannot be understated.[92] The judiciary possesses substantial power to interpret the constitutional text defining an item veto;[93] the best intentions of item-veto architects could be laid to waste by the misinterpretations of an errant court. The preferred form of item veto, therefore, should be one that minimizes the opportunities for judges to expand this grant of executive power.

The purpose of this Note is to fashion an effective presidential item veto that nonetheless preserves Congress' check on the executive through the use of the rider. Therefore, it is crucial that such an item veto be explicitly declared non-textual to avoid the risk that a future court might transform the President's item veto into a textual device. The experiences of various states show that such a risk is very real; state supreme courts have been primarily responsible for unwarranted expansion of the gubernatorial line-item veto. This is not to say that state judges have sought to augment the Governor's authority. On the contrary, they often hoped to place limits on the Governor, but have had difficulty enunciating precise standards. This section explores the problems state high courts have encountered in developing consistent standards by which to judge textual line-item veto constitutional provisions.[94] Subsection A is a case study of a jurisdiction that relies on an objective standard to regulate the Governor's textual item veto. Subsection B explores three types of subjective standards that are employed in different jurisdic-

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[92] *See supra* note 44 and accompanying text (explaining the textual/non-textual distinction).

[93] Not surprisingly, the courts play an integral role in the schemes of the "assertion theorists" described in part III.B. *See supra* notes 58–72 and accompanying text.

[94] *See* Fisher & Devins, *supra* note 90, at 168–78 (noting inconsistent judicial treatment of item veto on state level); Devins, *supra* note 25, at 1008–10 (same).

tions across the country. Subsection C argues that the textual item veto naturally lends itself to expansion through judicial rulings because both objective and subjective standards fail to strike an appropriate balance between executive and legislative power. In order to minimize the judicial role and thereby avoid unwanted enhancements of the executive's power, the wiser approach to constructing an item veto is to select a non-textual model such as the reduction-only veto.

A. *The Objective Approach*

Some courts approach the adjudication of item veto disputes by adopting an objective standard, seeking to base their judgments on readily quantifiable factors. For instance, one objective method would be to require that the legislature designate the scope of each "line" in the bills it passes. Then, courts called upon to determine the legitimacy of a particular gubernatorial item veto would simply ask whether the "item" in question was designated a "line" by the legislature. If not, the court would hold against the Governor.

The advantages of an objective standard are twofold. First, such standards render consistent results; contradictory rulings are less likely. Second, courts find it easier to avoid the political fray when they use objective methods. It is more difficult for critics to accuse judges of choosing sides among political partisans when judges rely on standards that produce predictable and uniform results.

The drawback to objective criteria is that they tend to shift power entirely in one direction. In the example above, the size of the "line" selected by the legislature determines whether or not the Governor's item veto is valid. Thus, the legislature dominates the item veto arena. That situation could be no worse than the status quo. But, as Wisconsin's experience demonstrates, much more negative consequences are likely when the executive is the beneficiary of the power shift.

Wisconsin is the only jurisdiction using an objective standard for item veto adjudication. The current Wisconsin standard evolved from the Wisconsin Supreme Court's first ruling on the line-item veto in 1930. In that year, Governor Philip La Follette exercised the item veto against substantive portions of an appropriations bill, leaving the money allotments untouched. Petitioners in *State ex*

rel. Wisconsin Telephone Co. v. Henry[95] claimed that the Governor's line-item veto power was meant only to reach appropriations.[96] In holding for the Governor, the Wisconsin Supreme Court laid the foundation for an objective standard by observing that:

> It is well established that the elimination of even material provisions in an act as enacted, because of the invalidity of such provisions, does not render the remaining valid provisions thereof ineffective, if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the Legislature intended it to be effective only as an entirety and would not have enacted the valid portion alone.[97]

On its face, the test set forth in this statement seems more subjective than objective. Reasonable individuals may differ on what constitutes a "complete law." It even appears that the court granted the legislature a safety valve that would nullify the law if it was meant to operate only in its entirety. But once the Wisconsin Supreme Court established a pro-gubernatorial precedent, only a few more cases were required to distill from *Henry* an objective standard clearly favoring the Governor.

In a later case, the court clarified that the validity of an item veto would be judged by the parts that remain.[98] Should these parts compose a "complete workable law," the executive's action would stand.[99] Though the test still sounded subjective, the court indicated that most left-overs would pass it. Indeed, no Wisconsin court has ever failed to honor a Governor's item veto. In addition, the *Henry* court's safety-valve disappeared from the scene. The stage was set for two extreme rulings that would come down decades later.

The first of these rulings, *State ex rel. Kleczka v. Conta*,[100] arose over a fairly audacious item veto by the Governor. The legislature established a mechanism for taxpayers to add one

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[95] 260 N.W. 486 (Wis. 1935).

[96] The item veto provision in the Constitution of Wisconsin reads: "Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills." Wis. Const. art. V, § 10.

[97] *Henry*, 260 N.W. at 492.

[98] State ex rel. Martin v. Zimmerman, 289 N.W. 662 (Wis. 1940).

[99] *Id.* at 665.

[100] 264 N.W.2d 539 (Wis. 1978).

dollar to their taxes for the creation of an election fund for state candidates. The passage originally read:

> Every individual filing an income tax statement may designate that their income tax liability be increased by $1 for deposit into the Wisconsin Election Campaign Fund for the use of eligible candidates . . . .[101]

Acting-Governor Martin Schreiber removed the key phrases "that their income tax liability be increased by" and "deposit into", thereby transforming the fund into an appropriation of existing state monies. In effect, the Governor unilaterally legislated an appropriation.[102] In *Kleczka*, the Wisconsin Supreme Court sanctioned Acting-Governor Schreiber's action, ruling that, "The power of the Governor to disassemble the law is coextensive with the power of the legislature to assemble its provisions initially."[103] There was no sign of the limited language employed by the court in the past. By this time, the "complete workable law" standard meant that no line-item veto cast by the Governor would be overturned. The standard had achieved true objectivity—at least in terms of guaranteeing consistent, predictable results. Understandably, the reaction among legislators was one of dismay; it was uncertain if the courts would ever act to restrain the Governor.

The legislators' fears were confirmed by the Wisconsin Supreme Court's most recent case on the issue. In *State ex rel. Wisconsin Senate v. Thompson*,[104] the court rose to new heights of deference, allowing the "pick-a-letter" veto. Essentially, Governor Tommy Thompson removed certain letters from a bill so that the remaining letters, when pushed together, formed new words and entirely different policies.[105] For instance, he strategically struck letters from a sentence stating that juvenile offenders could be detained no longer than forty-eight hours. The ensuing decree granted authorities ten days to detain juveniles.[106] The decision in *Thompson* seemed to indicate that there was very

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[101] 1977 Wisconsin Assembly Bill 664, § 51.

[102] After the Governor's partial veto, the passage read: "Every individual filing an income tax statement may designate $1 for the Wisconsin Election Campaign Fund for the use of eligible candidates . . . ." 1977 Wis. Laws 107.

[103] *Kleczka*, 264 N.W.2d at 551.

[104] 424 N.W.2d 385 (Wis. 1988).

[105] *See* Comment, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 WIS. L. REV. 1395.

[106] *Id.* at 1396. This example was just one among many controversial pick-a-letter vetoes by Governor Thompson.

little that the court's objective standard would deny the Governor.

Wisconsin's experience illustrates the dangers of applying an objective standard to a textual item veto. The one-way power shift that is characteristic of an objective standard either energizes the executive—as it did in Wisconsin's case—or it defeats the purpose of having an item veto—such as when the legislature may designate what a "line" is. These dual repercussions result from the nature of a textual item veto. The device itself has potentially boundless power; the ability to carve out portions of legislative text, while signing the remainder into law, provides the executive with innumerable opportunities to pervert legislative intent. It is difficult to design an objective standard for a textual item veto that simultaneously limits the device while preserving its effectiveness.

This is not to say that objective standards are themselves inherently dangerous. On the contrary, they possess several worthwhile traits, including (1) rendering consistent results, and (2) keeping courts out of the political fray and forcing citizens who desire different policies to resort to the ballot box.[107] But judges in other states employing textual item vetoes have generally balked at the price paid by Wisconsin. They have aspired to create a more responsive system to regulate the textual item veto. These efforts have led the courts to perform a complex balancing act intended to maintain a *limited* yet meaningful textual item veto. The various subjective tests invented by these courts are explored in subsection B. Unfortunately, the results only represent a partial improvement on Wisconsin's example. The inconsistency of the subjective tests has often played into the hands of state governors. The real answer to the problem of item veto interpretation lies not just in the kind of test to employ, but also in the kind of item veto selected in the first place. Choosing a non-textual item veto would provide the benefits of an objective standard, while avoiding the drawbacks of a one-way power

[107] It is worth noting that the people of Wisconsin and its legislature responded to the state's Supreme Court ruling by immediately passing a constitutional amendment banning the "pick-a-letter" veto. The Constitution of Wisconsin now contains the following clause: "In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill." WIS. CONST. art. V, § 10, cl. 1(c) (amended 1990). Thus, Wisconsin's objective standard encouraged a democratic restructuring of the state government.

shift. Subsection C, below, explains how the non-textual structure of the reduction-only veto achieves this favorable result.

B. *The Subjective Approaches*

The vast majority of state courts confront adjudication of the textual item veto by attempting to strike a balance between executive interests and legislative prerogatives. These courts generally wish to accord the Governor's line-item veto the "right" amount of power—not so much that the intent of the legislature is perverted, but not so little that the item veto is left impotent. Complicating this decision is the fact that the textual item veto can theoretically delete any portion of legislative text. In other words, the device has no internal constraints on its scope. Courts wanting to impose limitations on the textual item veto have found that they must also formulate their own standards of restraint. Such standards are inherently subjective, and they often lead to inconsistent rulings.[108] By providing inconsistent application of subjective standards, the judiciaries of many states have been primarily responsible for augmenting the power of the gubernatorial item veto. The following subparts describe the use of three subjective tests on the state level and analyze how courts have failed in their task of consistently adjudicating the textual item veto.

1. The Affirmative/Negative Test

The "affirmative/negative" test was devised by courts that sought to ensure that the Governor would not use the line-item veto to create legislation unintended by the legislature. These courts felt that the item veto should only have a "negative" effect on legislation. The test is thought to originate with the Washington State Supreme Court's ruling in *Spokane Grain and Fuel Co. v. Lyttaker.*[109] The case involved a bill that repealed a current law and replaced it with new provisions. The Governor vetoed the replacement provisions, but left the repealing clause intact when

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[108] *See* Fisher & Devins, *supra* note 90, at 173.

[109] 109 P. 316 (Wash. 1910). *See* Note, *Washington's Partial Veto Power: Judicial Construction of Article III, Section 12*, 10 U. PUGET SOUND L. REV. 699, 703–06 (1987); Note, *The Item Veto Power in Washington*, 64 WASH. L. REV. 891, 898–99 (1989).

he signed the bill. In essence, he used the legislature's intent to modify the law as a vehicle to eliminate it. The court overturned this exercise of the item veto, arguing that the Governor's action usurped the role of the legislature. Though the court did not plainly state the affirmative/negative test, later courts inferred its principles from the *Lyttaker* ruling.[110] Seven other state supreme courts have adopted the affirmative/negative test at one time or another.[111]

The principal flaw of this test is its subjective nature: even judges with similar philosophical viewpoints may disagree over whether a particular item veto is affirmative or negative. The following example illustrates the dilemma: Imagine that a bill from a state legislature establishes a state-wide sales tax of six percent. However, a clause in this bill sets a ceiling of $500 on the amount of tax chargeable per article. By arranging for a maximum sales tax, the legislature seeks to avoid discouraging the purchase of so-called "big-ticket" items (cars, boats, etc.). The Governor decides that the state badly needs extra revenue and therefore deletes the $500 ceiling. Is this an affirmative or negative line-item veto?

On one hand, the Governor appears to be unilaterally decreeing a new tax—one more extensive than that envisioned by the legislature. The item veto is affirmative because the legislature's intent was for a limited sales tax. It probably would have preferred no tax to the Governor's alternative. Thus, the governor has perverted the legislative intent of the bill.

On the other hand, the Governor added nothing new to the bill. The line-item veto merely pared away part of the instructions describing the new tax. In essence, it destroyed the $500 ceiling, and item vetoes are supposed to destroy parts of legislation. In this light, the effect of the item veto appears negative.

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[110] The affirmative/negative test was first explicitly applied by the Washington State Supreme Court in Cascade Telephone Co. v. State Tax Commission, 30 P.2d 976 (Wash. 1934). Interestingly, after using the test for 74 years, the Washington State Supreme Court repudiated it in 1984 with its ruling in Washington Fed'n of State Employees v. State, 682 P.2d 869 (Wash. 1984).

[111] These states include: Colorado, Colorado General Assembly v. Lamm, 704 P.2d 1371 (Colo. 1985); Connecticut, Patterson v. Dempsey, 207 A.2d 739 (Conn. 1965); Florida, Thompson v. Graham, 481 So. 2d 1212 (Fla. 1985); Idaho, Cenarussa v. Andrus, 582 P.2d 1082 (Idaho 1978); Illinois, Fergus v. Russel, 110 N.E. 130 (Ill. 1915); Michigan, Wood v. State Administrative Board, 238 N.W. 16 (Mich. 1931); Virginia, Commonwealth v. Dodson, 11 S.E.2d 120 (Va. 1940).

Courts face this kind of dilemma every time they turn to the affirmative/negative test—consistency is elusive, while contradictory rulings are commonplace.

2. The Severability Test

Several state supreme courts have enunciated "severability" tests during adjudication of line-item veto cases.[112] The classic statement explaining this test was issued by the Virginia Supreme Court in 1940:

> [The term "item"] refers to something which may be taken out of a bill without affecting its other purposes or provisions. It is something that can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue, nor should any scar tissue result therefrom.[113]

The elements of a severability test are thus quite simple. The section targeted by the item veto must be discrete and it must be expunged entirely. Its removal must not change the import of any of the remaining clauses in the legislation. For example, if the legislature added a restriction against using radar detectors within the state to an education appropriations bill, the restriction would be susceptible to an item veto under the severability test, on the grounds that an anti-radar detector clause would be sufficiently distinct from the educational funding purposes of the rest of the bill to warrant being vetoed. The provision would operate as a whole unit, easily severable from the rest of the legislation.

However, the severability test is open to many different interpretations, as another Virginia case illustrates. In *Brault v. Holleman*,[114] the Virginia legislature approved an appropriation bill that would contribute monies to the construction of the Metro Bus and Metro Rail system in Northern Virginia, Washington, D.C., and parts of Maryland. Governor Godwin vetoed a $5 million allocation for Metro Rail, while signing into law the appropriations for Metro Bus services and parking facilities connected to Metro Rail. The Virginia Supreme Court held that the Metro

[112] These cases include: State ex rel. Brown v. Ferguson, 291 N.E.2d 434 (Ohio 1972); Opinion of the Justices to the House of Representatives, 428 N.E.2d 117 (Mass. 1981); Welsh v. Branstad, 470 N.W.2d 644 (Iowa 1991).

[113] Commonwealth v. Dodson, 11 S.E.2d 120, 124 (Va. 1940).

[114] 230 S.E.2d 238 (Va. 1976).

Rail funds were sufficiently distinct from the other purposes of the bill and thus severable. The members of the legislature who brought the case argued that the bill envisioned a "unified regional transit system."[115] The parking, bus, and rail services were supposed to be interconnected, and the legislators contended that refusing to fund one of the three would break a link in the chain. The *Dodson* court probably would have agreed with them, but strict formulation of the severability test had softened with the passage of time.

Like the affirmative/negative test, the severability test is too subjective to produce reliable results. The test depends on a definition of the severable item that means different things to different judges. Disputes over an item's severability may conceal deeper political and philosophical divisions among judges. For example, the judges who voted in favor of Governor Godwin's item veto of the Metro Rail funds may have been motivated by a desire that localities bear their own financial responsibilities.[116] Alternatively, their decision might have reflected a pro-executive conception of the balance of power. Of course, any judicial ruling may be the result of unspoken political or philosophical factors—but the severability test is so subjective that it may encourage judges to turn unconsciously to personal beliefs concerning the merit of the item under consideration.

3. The "Executive Managerial Function" Exception

The New Mexico Supreme Court permits the line-item veto to strike provisos attached to bills that seem to infringe upon the executive's managerial function. For example, in *State ex rel. Coll v. Carruthers*,[117] the legislature required the funds appropriated to the Field Services Division of the New Mexico Department of Corrections to remain in that program. The executive could not transfer the money to another program in the absence of new authorizing legislation. The state supreme court ruled that the restriction intruded upon the executive's managerial function and that the executive had the right to remove the offending restriction with an item veto.

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[115] *Brault*, 230 S.E.2d at 241.

[116] The funds for Metro Rail were actually intended to reimburse county governments in Northern Virginia that had already made a commitment to pay for Metro Rail. *Id.* at 240–41.

[117] 759 P.2d 1380, 1389 (N.M. 1988).

One can easily imagine a proviso that appears to intrude upon the executive's managerial function, while at the same time performing the proper legislative duty of formulating policy through appropriations and the restrictions placed upon them. For instance, the New Mexico Supreme Court upheld the Governor's veto of legislative instructions that female inmates undergoing rehabilitation training have the opportunity to take restaurant and hotel management courses.[118] The legislature's decision that such courses should be made available to female inmates seems a natural part of the policy-making function entrusted to the legislature. However, the New Mexico Supreme Court's application of the executive managerial function exception appears to be premised upon a contrary conception of the proper role of the legislature.

Because of its subjectivity, the New Mexico Supreme Court's standard is somewhat confusing, and reasonable judges will continue to espouse different conceptions of the proper role of the legislature under the executive managerial function exception. Just as the affirmative/negative test and the severability test are subjective, the test of the New Mexico Supreme Court fails to give adequate indications of where the legislature's responsibility as guardian of the public treasury ends and where the executive's duty to provide efficient administration begins.

C. *Moving Toward a Non-Textual Item Veto*

A constitutional amendment to grant the President a line-item veto should shun the textual item veto and instead adopt a non-textual model. The textual item veto has proven difficult to control on the state level; state courts have experimented with both objective and subjective standards of review and found that neither adequately prevents the expansion of executive power. As the case study of Wisconsin indicates, an objective standard tends to funnel all of the power in one direction—either toward the executive or the legislature. In the former case, the item veto becomes omnipotent; in the latter, it is worthless. In the context of textual item veto adjudication, objective standards are highly undesirable.

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[118] *Id.* at 1389–90.

The subjective standards applied to the textual item veto have hardly fared better. Judicial application of subjective tests has been so inconsistent that power has been effectively transferred to the executive as a result. The process is circular; because the subjective nature of the tests leads to inconsistent results, any precedent favorable to the executive becomes entrenched in the law,[119] making the tests more difficult for future courts to apply. As time passes, the bad law builds on itself, gradually securing for the executive a preeminent position over the legislature. For instance, in *Brault*[120] the severability test discussed in subpart 2 eventually sanctioned the Governor's dissection of what was plainly a single program. The *Brault* court found appropriations for a subway line to be severable from funding intended for a unified transportation system.[121] It is questionable whether the creators of the severability test, the judges on the *Dodson* court, would have approved of this development. What is certain, however, is that the subjective severability test augmented the reach of the Governor's item veto.

The non-textual reduction-only veto provides a solution to the objective/subjective dilemma. Its simple mechanism would yield the benefits of an objective standard without generating the negative effects of a one-way power shift. The reduction-only veto relies solely on the judge's ability to tell what is and is not a money figure because it only allows the executive to use the veto to reduce dollar figures in number or word form. It has no effect on the text of legislation. Should the executive wish to item veto the entire amount, the dollar figure would be reduced to zero. All of the surrounding text would remain and would be operative if feasible given the zero appropriation.

The reduction-only veto should produce consistent results in a manner that helps courts stay out of the political fray. The judiciary would not be required to concoct its own test in litigation disputing the exercise of the reduction-only veto; the key test (whether the target is a dollar figure in number or in word form) is imbedded in the constitutional text and is completely objective. The test should render judicial philosophy irrelevant, because most courts acting in good faith would arrive at uniform

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[119] The executive benefits more than the legislature from the resulting uncertainty in the law because the executive is a single person who is better able to develop and exploit precedent in a strategic manner.

[120] *Supra* note 114.

[121] *See supra* notes 112–116 and accompanying text (discussing the severability test).

determinations of whether or not the target of a reduction-only veto is a dollar figure.[122] In addition, the impetus to construct subjective tests would be eliminated. In the context of textual item veto adjudication, judges come to their task with the assumption that some amount of text must be cut from the bill at issue. The reduction-only veto affirmatively rejects this assumption. Any test designed to determine which portion of legislative text should be deleted would clearly be immaterial. Under these circumstances, it would be difficult for a court to be accused of ruling in favor of one political faction over another. The executive would also be less able to elicit, and then exploit, contradictory rulings from the courts.

The most desirable feature of the reduction-only veto is that it incorporates an objective test without incurring a one-way power shift, such as the one Wisconsin experienced. Both the legislature and the executive would receive some form of power under this scheme. Congress would retain its traditional weapon, the rider. Yet the President would still be able to pare down the budget and thereby put pressure on Congress. The item veto would not be omnipotent, nor would it be useless. Unlike the textual item veto, the reduction-only veto would occupy a comfortable middle ground between the two extremes.

VI. Conclusion

Some commentators would discount my warnings against arming the President with a rider item veto; they doubt that a President possessing any version of the item veto would actually use it, for such a maneuver would require unusual determination to

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[122] Some suggest that the judiciary might be drawn into creating subjective tests if Congress appropriates money without using numbers in symbol or word form. For example, Congress could legislate that all monies collected from tariffs on agricultural goods are to be used to fund domestic agricultural subsidies. Since such legislation does not mention the dollar amount of the appropriation, it would not be clear whether the President has the power to reduce it. Some courts might think that the spirit of the reduction-only veto permits reduction even in that case, and could, therefore, be led to devise subjective tests to resolve the issue.

While such a development is entirely possible, hopefully the judiciary will read the text of the amendment as it is meant to be read—literally. The text clearly says that the reduction-only veto may not be employed against text that is not a dollar figure in either symbol or word form. *See* Appendix A (amendment stating: "This reduction power applies only to money amounts in the form of number symbols or words which directly represent numbers. This power has no effect over number symbols or words which do not designate the amount of an appropriation.").

weather the resulting political firestorms.[123] In terms of reducing annual budget deficits, they assert that little savings would be realized. Presidents are politicians just as much as members of Congress, and they tacitly accept that high spending, especially on social programs, maintains job security. These writers also argue that the chance of a President using the item veto in a malevolent manner against Congress is even less likely because the backlash would be very severe.

The validity of these criticisms is debatable, and they implicitly suggest the appropriate counterargument. A President armed with the line-item veto would be more accountable to the public. The President could no longer stand by idly, blaming an impotent veto power, while spending programs are enacted that, item by item, lack majority support in Congress. The public would hold the President responsible if the item veto is left unused. Additionally, the accountability of members of Congress would be enhanced. Whenever the reduction-only veto singles out spending measures and subjects them to an override vote, members of Congress would be forced to go on record as supporting or opposing pork barrel spending. It would be more difficult for them to appear innocent.

The desire to enhance the accountability of officeholders probably explains why the item veto proposal, in one fashion or another, has persistently reappeared on the public agenda.[124] As recently as the spring of 1993, the House passed a bill authorizing "expedited rescission."[125] The bill died in the Senate. If it had become law, the President would have been granted a mild form of the item veto.

Political pressures for a federal item veto have made the likelihood of its adoption much less remote. The day may come when Congress passes a resolution for a line-item veto constitutional amendment and sends the issue to the states. While an item veto may serve as an effective tool in managing the gov-

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[123] Robinson, *supra* note 30, at 411–12 (claiming the President won't use item veto for fear of upsetting constituency); and L. Peter Schultz, *An Item Veto: A Constitutional and Political Irrelevancy*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 177 (1985) (discussing lack of political will to halt spending).

[124] *See* Russell M. Ross & Fred Schwengel, *An Item Veto for the President?*, 12 PRESIDENTIAL STUD. Q. 66 (1982) (over 140 item veto proposals had been introduced in Congress as of 1982).

[125] Clifford Krauss, *A Line-Item Veto is Passed, But It Has Key Restrictions*, N.Y. TIMES, Apr. 30, 1993, at A14. The bill would have modified the Budget and Impoundment Control Act of 1974 to allow the President greater freedom in impounding appropriated funds.

ernment's finances, any item veto amendment must be drafted with careful attention paid to the balance of power. There is nothing wrong with an item veto that reduces spending and increases the accountability of politicians in Washington. But there is no need to risk warping the balance of power between the President and Congress. Certainly, it is reasonable to assume that most future Presidents will respect the age-old balance between the executive and legislative branches. Yet such a risk is unnecessary when the primary purpose of an item veto—saving money—could be safely accomplished with the reduction-only veto, leaving the prerogatives of both the President and Congress intact.

Appendix A

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

AMENDMENT ___

The President of the United States may reduce appropriations appearing in any legislation passed by both houses of Congress. This reduction power applies only to money amounts in the form of number symbols or words that directly represent numbers. This power has no effect over number symbols or words that do not designate the amount of an appropriation. In no event is legislative text to be removed from legislation. Congress may override the President's reduction power through a simple majority vote of both houses, within one month of the President's exercise of the reduction power. The reduction power is valid only during the period prescribed for vetoes in Article I, Section 7, Paragraph 2 of the United States Constitution and shall not apply to appropriations for the legislative or judicial branches of the United States Government. Cases disputing the President's exercise of this reduction power shall proceed directly to the Supreme Court of the United States.

BOOK REVIEWS

RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY. By *George Will*. New York: The Free Press, 1992. Pp. xvi, 260. $19.95 cloth, $10.95 paper.

The drive to impose term limits on Congressional members might seem to many to be fueled by little more than a desire to "throw the bums out!" In his book *Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy*, George F. Will attempts to provide the term limit "movement" with a more solid philosophical foundation than the magma of public cynicism. Will vividly describes his perception of the problems that beset Congress and the country as a whole, and then offers a vision of how the Founders intended our government to behave. Unfortunately, Will fails to explain adequately how term limits will cure Congress of its supposed ills and transform it into the deliberative body envisioned by the Founders.

Restoration is at its most entertaining and informative when Will describes his perception of the problems of modern day Washington. The most prominent symptom of Congress' illness, according to Will's diagnosis, is the runaway deficit and the irrational spending that causes it. Will describes and attacks subsidies for mohair, peanuts, a private airline for affluent business travelers, night basketball games for inner-city youths, academic projects, and the Public Broadcasting Corporation—all subsidies targeted at those who supposedly don't need them. As Will says of one such program: "Public television is a paradigm of government's role as servant of the comfortable and defender of the strong at the expense of the future." (p. 71) The underlying reason for these unwise programs, according to Will, is the careerism practiced by most members of Congress. Representatives and senators are using public funds to "buy" votes by gearing programs to interested groups of voters. For example, the mohair subsidy is strongly supported by goat farmers and their well-organized wool and mohair lobby, and no organization of voters exists to counter them. Every member of Congress has vested interests in similar programs, and thus, no one cuts them out. And the federal deficit grows larger.

Will's argument is familiar, but it is undercut by two objections. First, some would quarrel with his assertion that the pre-

viously mentioned subsidies are objectionable regardless of one's political stripe. Indeed, Will's opposition to these subsidies often rests upon ideological assumptions. For instance, his antipathy to extensive funding of midnight basketball leagues rests primarily on his skepticism of current federal support for "any particular good idea," (p. 34) of which he concedes that midnight basketball is one. The fact that Will mentions little in the way of examples of wasteful defense spending further suggests that his analysis reflects a partisan bias.

Second, Will never really does what he claims to do: establish term limits as the solution to these problems. Will's theory is simple; if you install term limits of twelve consecutive years (twelve in the House and twelve in the Senate), legislators will no longer look upon legislating as a career and will therefore cease spending wastefully. In addition, they will stop gerrymandering Congressional districts, end the endless flow of franked mail, and focus only upon the public interest. Will assumes that these results will all follow from the imposition of term limits, but he never proves this. At most, his argument seems superficially plausible; it is far from well-explained or deeply reasoned.

Will's second argument—that legislators who are limited in their terms will have "less incentive to shovel out pork" (p. 36)—rests upon his disdain for unalloyed popular sovereignty. Will argues that the people have been *too* effective in communicating their will to Congress. "What is galling to the public," says Will, "and what makes the public grumpy in a way that suggests embarrassment and an uneasy conscience, is that the government has been doing exactly what the public has demanded and what the government has promised." (p. 107) Instead of being "bound by the 'instructions' issued by [their] constituents," (p. 99) Will argues that the members of Congress should form a deliberative body. Will describes a deliberative body as one in which "members reason together about the problems confronting the community and strive to promote policies in the general interest of the community." (pp. 110–11) Congress, according to Will, is not such a body; it measures public opinion and then acts on that opinion, rather than deliberating upon what is best for the country. In short, legislators are not using their best judgment as to what is good for the whole country; they are pandering to the whims of their local constituencies.

The debate over whether representatives should act according to the will of those they represent or their own conscience has

a rich and storied history. Will's primary support for his side of the argument stems from references to *The Federalist Papers* and its authors. The rhetoric is fitting—government should "'refine and enlarge the public views,'" (p. 104) encourage a "'cool and deliberate sense of community,'" (p. 117) and "'withstand the temporary delusion [of the people], in order to give them time and opportunity for more cool and sedate reflection.'" (p. 119) However, Will and the founding fathers seem to be embracing a paternalism which is never acknowledged or justified. Indeed, Will's whole argument seems to rest on an unmentioned assumption: the people do not know what is best for them, but a deliberative assembly would. Furthermore, Will never squarely confronts the hurdles that even a "deliberative" assembly would encounter. Even if the people do not know what is good for them, Will never specifies how legislators would come to know any better than their constituencies. The idea that reason, deliberation, and judgment would readily produce answers to political questions seems naive in light of the complex and severe ideological divisions that characterize American politics.

Even assuming that a deliberative legislature will better serve the public interest, Will never connects term limits to that notion of deliberative government. Our system of geographical representation provides incentives for wasteful local projects. Will does not argue that the electorate's desires will change with the installation of term limits. Therefore, it seems that voters would continue to elect candidates who procure wasteful funds for their districts. Will assumes that term limits will create a new set of candidates who will no longer cater to the whims of the people. Whatever the candidates may intend, they don't do the electing, and if the voters want pork, someone will offer it to them. Whereas some commentators have argued for term limits to decrease the distance between the government and the governed, Will believes the opposite—that term limits will create *more* distance. Ironically, Will attempts to frame term limits—an often populist appeal against government elites—as a way of giving those elites more distance from the masses.

Will's third line of analysis proposes that term limits will result in a rebirth of classical republicanism, a philosophical notion that has been overshadowed by "John Locke's ideas of individualism, natural rights, and limited government." (p. 153) Will seems to be saying that our modern government does not engage the people in the process of governing, and therefore

does not fulfill its responsibility of promoting the development of civic virtue. This virtue that Will desires is "a tendency to prefer the public good to personal interests; it is a readiness to define the public good as more than an aggregation of private interests." (p. 165) Thus, according to Will, the rise of individualism has encouraged the special interest, "grab-all-you-can" attitude of modern governance, and this individualism must be counterbalanced by a return to a focus upon the attainment of what is best for the community as a whole.

Will's communitarian ideals are widely shared, but how do they relate to term limits? Will's argument seems to proceed something like this: term limits will encourage a greater diversity of involvement in government and restore Congress' respectability, which in turn will result in Americans looking at government as something more than a treasure chest. Once again, however, we must ask how term limits will accomplish this. At most, term limits will enable a marginally larger number of people to get into Congress. If term limits will, as previously suggested, result in nothing more than a larger cast of characters engaging in politics as usual, public esteem for Congress should remain low. Granting more power to state, city, and local government may better achieve the citizen involvement Will seeks.

In his final line of analysis, Will argues that term limits will restore Congress' central role among the three branches and thus recalibrate the machinery of our democracy. Desire to remain in Congress, according to Will, encourages legislators to avoid controversial decisions. "A career legislator is not only risk-averse, he or she lives by a perverse ethic that eliminates—indeed proscribes—any moral misgivings about the policy of avoiding politically risky decisions." (p. 177) Ultimately, legislators shuttle the controversial decisions to the other branches of government, which then exercise their power in ways that distort the proper functioning of government. Thus, the judicial branch defines public policy in terms of "rights," and in doing so, further individualizes society and "multiplies occasions for civic discord." (p. 175) In addition, the judicial branch is more congenial to "agenda-shaping elites" who are "apt to prefer to pursue social change through courts rather than through legislatures," (p. 176) thereby circumventing the democratic process. Moreover, the executive branch's disturbing growth in size and importance is partly due to the deference shown it by Congress. Prior to this century, presidents "communicated primarily with the legislative

branch rather than with the people." (p. 130) The rise of the "rhetorical presidency," in which the president is seen as a symbol of the nation's political aspirations and vision for the future, has siphoned further power away from Congress and upsets the constitutional framework. Will argues that a Congress with term limits will be "less risk-averse and more vigorous," and therefore "will not only leave courts less latitude to act as legislatures, it will more readily risk challenging the president, whoever he is, as the definer of the nation's political agenda." (p. 177)

While Will's general argument makes sense, once again the reader is left without the conviction that term limits would solve this problem. It seems alternatively plausible that term limits would weaken the legislative branch, since legislators probably would be politically inexperienced and unable to assert much clout. Current congressional leaders draw power from their seniority not only in Congress, but in their dealings with the president as well. While it may be true that a committee chairman serving her last term would be less inclined to defer to a president, one must also consider whether a president would deferentially court this same committee chairman, especially given the current power of the executive branch.

Will's argument that term limits will end legislative careerism, restore congressional deliberation, encourage civic participation, and return Congress to prominence seems superficially plausible but without a solid foundation. Even when Will recognizes the arguments against his position, he fails to give them the consideration they deserve. For example, Nelson Polsby, in a passage quoted by Will, argues that term limits will "weaken the fabric of Congress in the political system at large" by shifting power to those with a "greater expertise and better command of the territory"—lobbyists, congressional staffers, and Washington bureaucrats. (p. 56) Will asserts in response that staffers are not career people; lobbyists and bureaucrats feed off the careerism of legislators; and government is not so complicated as to require more than twelve years to master. All of these arguments seem to avoid the thrust of Polsby's contention. How will the power vacuum left by the absence of seniority be filled? What will the new system look like? Will paints his picture in sweeping brushstrokes, but he never goes back to fill in the details. If we are to obtain Will's deliberative democracy through term limits, he should tell us how it will work.

Will also never explores other possible solutions to the problems he elucidates. Campaign finance reform is never discussed. Yet, such reform might directly attack the influence-peddling and manipulative power of special interests currently in the Capitol. In fact, one could argue that much of the pork Will singles out in the first chapter results from the influence of PAC campaign contributions. Even with term limits, congressional candidates will need large sums of money to campaign, and thus may still be dependent on PACs.

The only other solution that Will considers is a balanced budget amendment, and this choice shows where Will's heart really lies. Throughout *Restoration*, Will seems to contradict himself as to the size and spending habits of government. On the one hand, he says that reduction in the size and spending of government is not an argument for term limits. Such a reduction is not "intellectually sound and politically neutral;" (p. 183) indeed, Will says that "my hunch is that a Congress reformed by term limits would be more inclined than today's Congress to spend the large sums necessary for long-term national vigor." On the other hand, Will's argument against the balanced budget amendment is that it would be unnecessary if term limits were in place. Both reforms, Will says, "are attempts to improve government's 'aptitude and tendency' for reasonableness." (pp. 190–91) In fact, Will believes that term limits will better accomplish what the balanced budget amendment would attempt to do. So much of Will's disgust with the current Congress is based on its deficit spending that it seems duplicitous of him to claim neutrality.

When Will claims that term limits are not likely to help Republicans, and that this is an "intellectually trivial" argument regardless (p. 215), he seems to be trying to reach a broad audience, chastising those who would use term limits for partisan advantage. In tailoring his appeal to fit every political persuasion, however, Will waters down his argument too much. Throughout *Restoration*, he constantly avoids questions concerning exactly what the "public interest" should be. He needs to establish a more concrete vision of what government should be doing if he wants to criticize what government is currently doing. Instead, he finesses the issue by portraying the present system as deplorable by any standard, and saying that the new system will somehow serve the public interest. Such a vague vision is intellectually unsatisfying. In the end, the public determines the course of a democracy. Power ultimately rests with

the people, and there is no way around them to ascertain and effectuate the "public interest." If Will believes government has gone seriously awry, he must persuade us (writ large) of the error of our ways.

Will is at his best when his subject allows him to roam freely the intellectual landscape, uncovering nuggets of inspiration and historical fact along the way. That style was appropriate in *The New Season*, his book about the 1988 Presidential campaign. The same style, however, proves inappropriate for a work that advocates a specific and somewhat limited change in the election process for one branch of the federal government. Something more than the exposition of big pictures is required in a book that advocates this reform: namely, detailed explanation of how it will change our country for the better. Because *Restoration* never states either how term limits will bring about this change or why we should want it in the first place, it is ultimately unconvincing.

—Matthew Bodie

SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION. By Peter W. Cookson, Jr., New Haven, Conn.: Yale University Press, 1994. Pp. xv, 138, appendix, index, references. $20.00 cloth.

Failure and hopelessness are anathema to a nation that prides itself on a "can do" philosophy. Yet these words accurately depict current attitudes about American public education, particularly regarding urban schools. These public school systems face incredible and seemingly intractable problems: "dropout rates hover well above 50 percent, truancy is the norm rather than the exception, violence is common, students struggle for basic literacy . . . and the physical condition of the schools is a disgrace" (p. 2). Indeed, the country has reached a consensus on these problems, which can be summed up in the phrase: "Do something!"

Injecting choice into the American educational system now stands as the public's favored policy option for curing the nation's ailing schools. Many newspapers, think-tanks, grass roots organizations, and politicians support "school choice." Current legislative trends demonstrate the increasing popularity of policies providing school choice. Minnesota initiated a ground-breaking statewide choice program in 1988; a handful of other states adopted choice plans by 1989; and through late 1992, some form of choice legislation was introduced in thirty-seven states (pp. 38–39). However, in *School Choice* Peter W. Cookson, Jr.[1] argues that the ongoing debate is misleading because it lacks clarity and precision. Cookson attempts to structure the debate, explaining the history of the choice movement, describing the various types of choice programs, and assessing the success of each. Following a theoretical discussion about the merits of school choice and the market motivations underpinning the policy, the author rejects unrestricted choice as a panacea for the public schools' failure to educate our children. Instead, Cookson would employ managed choice as a "tactic" in a larger proposal for reinventing education.

Cookson argues that school choice was popularized as an answer to educational woes with the emergence of Ronald Reagan and the conservative political movement of the 1980s.[2] The

[1] Peter W. Cookson, Jr., is Associate Dean of the School of Education at Adelphi College.

[2] Conservative intellectuals, civil libertarians, religious groups, and a disenchanted public supported the politicians. The author characterizes this coalition as a "loose

author states that during the 1980s, conservative politicians attacked state power and advocated market solutions to social problems. Reagan's election to the presidency ushered a renewed belief in "eighteenth century capitalism: individualism, competition, and profit" (p. 103) into the policy-making arena. Arguing that materialism and "commodification of life" attained "unprecedented" levels during this period (p. 11), Cookson concludes that it was not surprising for the new conservative establishment to propose consumer-based solutions to the problems plaguing American education.

School reforms initiated in the 1980s arrived in waves, "progressing from traditional to more radical notions" (p. 21). The first plans stressed teacher and student accountability; the second series of programs pushed for parent and student empowerment; and the final wave of reform attempted to break the states' near-monopolies over education. Linking personal liberty with popularized conceptions of market principles, reform proposals culminated with school choice. Reformers believed that "there was virtually no educational problem that could not be solved by choice," and that choice produced many benefits: "structural change to the schools, recognition of individuality, competition, accountability, improved educational outcomes, and enhanced educational opportunities" (p. 35).

Cookson surveys all fifty states and notes that "choice" actually represents a wide range of possibilities and "refers to any student assignment policy that permits parents and children to participate in selecting a school" (p. 14). Choice may be partially restricted and controlled or virtually unregulated. Choice may permit crossing old district lines or remaining within them. Choice may include private schools or it may exclude them. "Magnet" schools offer specialized programs; "charter" schools exist free from direct administrative control by the government; and voucher plans give families money or cash certificates to attend schools of their choosing (pp. 14–16). Cookson examines the implementation of several choice alternatives, concluding that the "results of school choice have been uneven" (p. 69).

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confederation . . . [sharing only] contempt for [current] public education" (p. 6). Libertarians asserted that a "human being is debased when . . . forced to attend a school that he or she might not wish to attend" (p. 22). Protestant evangelicals "characterized public schools as repositories of secular humanism" (p. 29), and Catholic schools are a prime example of "private schools in precarious financial situations that could be alleviated by voucher programs." (p. 32).

Minnesota, for instance, has established a variety of choice programs to redesign and improve public education across the entire state. Options included allowing students in kindergarten through twelfth grade to attend a school outside their district, alternative teaching methods for at-risk learners, and special programs for adults over twenty-one and teenage mothers. Cookson argues, however, that "low participation rates[3] and weak documentation of improved learning opportunities" significantly limit choice supporters' claims of success (p. 45). While acknowledging that some students and schools have improved due to the "market incentives provided by choice," Cookson finds "little indication that educational choice has led to greater equality of opportunity" in Minnesota (p. 47).

In East Harlem, New York, a dynamic superintendent of School District Four developed alternative schools consisting of "minischools . . . designed around curricular themes [such as] science, environmental studies, or the performing arts" (p. 52). Children generally were placed within a school of their choice, and the results of the schooling experiment "offered a glimmer of hope in an otherwise very sad picture of educational despair" (p. 54). Yet Cookson notes that East Harlem has been unable to duplicate the results elsewhere, despite the institution of a citywide choice plan.

Cambridge, Massachusetts initiated a controlled-choice program primarily to avoid resegregation of its schools. The city also intended to provide competition among the schools and enhance educational opportunities for all children (p. 59). Cookson deems the controlled-choice plan successful. Schools remained desegregated, and after four years, "minority students were outperforming white students in math and reading citywide [and the] attendance rate had risen 9 percent" (p. 60). Additionally, similar projects implemented in Fall River, Massachusetts and White Plains, New York reproduced some of the equal access results obtained in the Cambridge experiment. Central to all three of the programs was a commitment to parental involvement through entities known as Parent Information Centers. These centers "compel parents to think about their children's educa-

[3] In the 1989-1990 academic year, "less than one-half percent of Minnesota students participated in the open-enrollment option" or K-12 program that permitted enrollment across district lines (p. 45). One should remember, however, that the program was new and that participation would likely increase over time.

tion, they provide information about the schools in the community, and they prod schools to improve and sharpen their missions" (p. 59).

Cookson also examines the controversial voucher plan established in Milwaukee, Wisconsin. Milwaukee's voucher project permits eligible students to use a state voucher of $2,500 to enroll in any public or private, non-sectarian school within the boundaries of the Milwaukee School District. To be eligible, students must meet strict economic qualifications and schools must achieve particular implementation goals.[4] Critics contend that this plan, unlike the others, threatens the current status of public school systems to the extent that parents and students perceive private schools to be superior to public schools.[5] At the very least, public schools would have to undergo major restructuring in order to compete with private schools. Yet, this is precisely what supporters of the voucher program hope will occur. Cookson notes that Milwaukee's pilot program is too small and too new to assess any impact it might have on redesigning public education.

Having surveyed several of the choice options currently in effect, Cookson next reviews specific studies on the efficacy of choice programs. Almost without exception, Cookson concludes that the studies are inconclusive. The Alum Rock experiment, the "earliest systematic attempt to evaluate school choice," produced no reliable evidence, "not only because the experiment was politically compromised, but also . . . because the relationship between governance and [student] achievement is extremely difficult to document" (p. 76). Cookson also questions private schooling's alleged superiority over public institutions, arguing that whether a school was private or public was statistically insignificant in regards to achievement[6] (p. 81). He then suggests that a choice program that includes private schools, such as the Milwaukee voucher project, would have no real measurable benefit.

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[4] For example, family income cannot exceed 1.75 times the federal poverty level, and 70% of the families must meet parent involvement criteria established by the private school (pp. 66–67).

[5] Vouchers, provided by the state, reduce the amount of money given to the public school system by the amount of the voucher if the student attends a private school. However, the plan would have to be expanded substantially before public schools faced any real threat. The current voucher program is restricted to 1000 students.

[6] *See* Christopher Jencks, *How Much Do High School Students Learn?*, 58 SOCIOLOGY OF EDUCATION 128–35 (1985). *See also* Valerie E. Lee & Anthony S. Bryk, *A Multilevel Model of the Social Distribution of High School Achievement*, 62 SOC. EDUC. 172–92 (1989).

Although the direct relationship between school choice and objective student achievement may have been weak, Cookson identifies a stronger relationship between choice and school culture. Experts on both sides of the school choice issue often agree that choice produces several important, non-performance benefits. Choice provides a sense of ownership to the teachers, parents, and students, thereby restoring morale and renewing commitment and creativity to the educational process. Student aspirations to graduate increase, as do parent and student satisfaction levels with the chosen school. Thus school choice may effectively establish and maintain beneficial school communities and cultures, thereby contributing indirectly to students' academic and personal growth (pp. 87–89).

Despite these benefits, Cookson observes several potential disadvantages to school choice programs, which center on the impact of unequal access to schools. One problem focuses on which parents actively participate in selecting a school when given the option. Cookson fears that poor and minority families may be left behind by being passive or uninformed consumers. If studies validate such fears, then varying degrees of participation could lead to increased social stratification.

Another problem revolves around the "creaming effect," a condition characterized by flight from schools in working class neighborhoods, via choice, to schools with higher socioeconomic status. Again, if this creaming effect were substantiated, an unrestricted choice plan could segregate students by race and socioeconomic class. Although one study[7] noted that "there are no uniformly integrative or segregative effects of public schools of choice," Cookson prefers to avoid the risk that "unregulated open-enrollment policies may create greater class and race segregation" (p. 95).

Cookson's primary objection to school choice rests on a philosophical view of education. He perceives education as a "human service" rather than a commodity to be bought or sold (p. 100). The author argues that market forces cannot be the entire answer to our educational problems because consumerism creates a barrier to intellectual achievement. He states that "[c]ultural norms . . . elevate material acquisition over intellectual curiosity" and prevent "students from realizing their intellectual, artistic, and

[7] Stephen Plank, et al., Choice in Education: Some Effects (1992) (unpublished manuscript).

personal development" (p. 27). Cookson claims that the "pursuit of self-interest requires individuals to view human relationships as a form of exchange" in which the goal is "to receive more than we can give" (p. 106).

Cookson finds this market-based approach an inappropriate foundation for public education. In contrast to the market justification for school choice, the author proffers democracy as a metaphor for shaping public education. Democracy, he contends, describes human interactions as "communal," while the market metaphor reduces such interplay to exchanges among individual consumers (p. 99). Cookson concedes that "there is a place for competition in education," but we must be wary of entrepreneurs with slick advertising "selling designer schools, offering trendy curricula, and utilizing questionable pedagogic strategies" (p. 100). Cookson believes that the democracy metaphor—that the good of the group is better than the good of the individual—constitutes the appropriate philosophy for education.

However, Cookson's attempted contrast between the democracy and market metaphors is misplaced. He objects primarily to the consumeristic connotations of choice, claiming that consumerism fosters acquisition of material items for personal gain and status. He argues that the pursuit of material objects ignores the larger community, and that uncontrolled individualism harms the community's interests. By presenting the metaphors in opposition, Cookson hopes to divorce choice from its market-based, self-interested justifications and embed choice in a more noble, communal context.

This framework misconstrues the true basis for choice. Although choice can lead to self-interested decisionmaking, such decisions do not automatically injure the interests of the group. For example, in economic terms, mutually beneficial trade displaced the belief in mercantilism two hundred years ago by demonstrating that two parties may exchange goods to the benefit of both parties.[8] Exchanges for personal gain need not be at another's expense; by analogy, implementing unrestricted school

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[8] The law of comparative advantages suggests that each group produce those goods that it is most efficient at producing, leaving other groups to produce those goods that it (the first group) cannot produce efficiently. Thus each group may trade for needed goods in a mutually beneficial manner. *See* RICHARD G. LIPSEY, ET AL., ECONOMICS 818–19 (John Greenman, ed. 1993).

choice will not automatically translate into a system of self-interested actions detrimental to the community.

Furthermore, democracy embodies individualism and self-determination, affirming the dignity and worth of each person.[9] Subordinating the individual to the goals and dictates of the group deprives the individual of her uniqueness. In educational choice, the market serves as a format in which individuality is affirmed by permitting people to choose which school to attend based upon their own values and calculations of utility. Democracy and market metaphors do not stand as opposite illustrations of how to approach education. Rather, the two are compatible and support notions of individual effort and determination.

Cookson also assails the market metaphor's "rational-choice" theory, which postulates that "social actors will make choices among alternatives in such a way as to maximize their utility" (p. 107). In economic terminology, Cookson believes market imperfections exist that eliminate the meaningfulness of choice. For example, "any number of unconscious reasons and motivations may impel individuals to make certain choices," and therefore, choices do not necessarily reflect reason alone. Furthermore, Cookson claims that "all choices are situationally bound and can never be 'rational'." Rationality, as one "grand illusion," is "unconvincing" and destroys the basis of the market metaphor and its justification for school choice (pp. 110–11).

Despite this criticism, Cookson fails to acknowledge the rational-choice theory difficulties in his own plan, which advances controlled school choice. If Cookson believes that rational choice is truly just a "grand illusion," then why does choice serve as the essential component of his own proposal? Why base the renewal of the entire public education system on a meaningless choice? Cookson may respond that although rational choices are real, culture, history, and human tendencies to be "impulsive, petty, and stubborn" constrain our thoughts and choices (p. 112). In this case, why should the government or any actor within it be free from these constraints and able to exercise reasoned judgment? Why should any government actor suppose she could

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[9] Republican democracy encompasses these principles just as pure democracy does. American government, dominated by Congress, is a forum in which members of Congress represent the interests of their districts relative to the interests of other districts. Republicanism simply modifies democracy for logistical purposes.

substitute her flawed judgment for that of the affected person? The government actor should be just as susceptible to the vagaries of culture, history, and human foibles. Let the affected person arrive at her own decision though personal valuations of what is important to her.[10] It seems appropriate in a democracy that the affected people should be largely free to make their own decisions.

Cookson concludes with his general proposal to reinvent American public education. The proposal is driven by a "vision of inclusion and democracy, and . . . a caring but rigorous learning environment" (p. 119). As noted earlier, the plan centers on providing school choice and an Educational Trust Fund, from which each legal resident of the United States is entitled to a share in inverse proportion to her family's wealth. The Fund will be financed partially through revision of state property tax levies (in order to equalize amounts of money available across all school districts) and partially through federal revenues and state-sponsored gambling. Generally, current public schools would be required to participate in the plan, and would receive seventy percent of funds through distribution of taxes and revenues. The remaining thirty percent would be obtained from the Trust Fund. The author's plan permits some school choice,[11] but restricts choice to achieve the dual objectives of diversity of student populations and equality of access to education.

Cookson recognizes that massive bureaucracies can stifle the creativity and effectiveness of public education. Under his plan, state regulation is supposed to be minimal. Parental Information Centers would disseminate relevant information to ensure active and knowledgeable decisionmaking by parents in selecting a school for their children. The centers' activities would induce schools to develop educational missions and to be held accountable to the strategies described to the parents. According to Cookson, this system, serving as the "nursery of democracy,"

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[10] Cookson states that people may choose a school based on nonacademic reasons. For example, an African-American parent may desire to send a child to a homogeneous, African-American school of lesser academic quality rather than send the child to a better academic school (p. 109). Cookson claims this would be irrational, but in reality, all that has occurred is a parent valuing a homogeneous school more than the marginal difference between the academic credentials of the schools. Cookson does not provide any justification for substituting the government's valuation of the choices for that of the parent.

[11] Curiously, the plan does not state this explicitly, though it is clearly implied.

would foster our "reinventing democracy and . . . keep the ideals of equality and liberty alive" (p. 138).

This plan has two particular inconsistencies and practical problems embedded within its provisions. First, Cookson disparages the market origins of the choice movement and its popularity within the conservative community. Nevertheless, he employs school choice as a major mechanism for achieving educational justice. The plan calls for the implementation of controlled-choice with special provisions requiring the integration of disadvantaged students into schools with people from advantaged backgrounds. Cookson employs the basic tool of choice to achieve better schools. Despite his earlier claims that choice is only a "tactic for reform, but not an overall strategy" (p. 117), choice stands as the author's primary mechanism for improving schools. Cookson merely works at the margins of a platform based on choice, restricting the program to public school participation[12] and demanding integration.

Second, Cookson places a premium on government involvement despite his best intentions to avoid the intrusive hand of government. The proposal calls for the creation of a formula to award children shares of the Trust Fund. Some government agency would have to be responsible for calculations, corrections, administration, and appeals of share distribution. This organ, like many other government entities, threatens to balloon into a huge bureaucracy. After all, Cookson admits "education is the country's largest business, and education is a social issue that will not go away" (p. 104). I submit that the problems inherent in creating this new agency could be reduced by altering the plan to create a voucher system whereby every child is eligible to receive a voucher of a fixed value.

Notwithstanding these flaws, Cookson delivers a comprehensive book about the origin and rise of school choice as the predominant policy option for revitalizing American public education. He clarifies the nature of the debate over school choice, provides case examples of choice in action, and attempts to sort out the myths and misconceptions surrounding school choice.

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[12] Cookson allows for development of model schools, but their impact on the redesign of American public education is extremely limited given their small size and structure (parent-and-teacher collaborations operating schools independently from the control of school districts.) *See* pp. 131–34.

Cookson presents a broad proposal for reinventing public education, using choice as one mechanism of the reform, and calls upon the nation to respond and save not our schools but our children. Cookson's final analysis—that "choice can be a mechanism for achieving a school system that is just, innovative, and academically productive"—is worthy of further attention and study.

—Kevin Banasik

LETHAL PASSAGE: HOW THE TRAVELS OF A SINGLE HANDGUN EXPOSE THE ROOTS OF AMERICA'S GUN CRISIS. By Erik Larson. New York: Crown, 1994. Pp. 230, index. $21.00 cloth.

Recently, members of Congress and activists have clamored for firearm regulations that go beyond waiting periods. In his book, *Lethal Passage*, Erik Larson joins this chorus. He proposes new federal legislation, which he calls the "Life and Liberty Preservation Act," to regulate more closely the distribution, purchasing, and design of guns. As background to his proposed legislation, Larson tracks a single gun—the Cobray M-11/9—through its lethal, but nearly legal, passage from the enterprising minds of its engineers to the calculating hands of a murderer. The journey of the Cobray exposes the inadequacy of current federal firearms law. The inadequacies of Larson's solutions, however, also emerge. For Larson's legislative proposal cannot deliver what its title promises. Nonetheless, *Lethal Passage* raises vital issues about the control of firearms.

Larson's review of the current licensing procedures of federal firearms dealers provides rich fodder for those who challenge them. Under current federal law, acquiring a federal license to deal firearms is simple. An applicant needs neither knowledge about firearms nor a plan to sell guns. Larson himself secured a dealer's license for a $30.00 fee from the Bureau of Alcohol, Tobacco and Firearms (ATF) by mail in just six weeks (p. 126). Disturbed by ATF's laxity, Larson believes current licensing law encourages gun enthusiasts to become "dealers" regardless of whether or not they actually deal. 245,000 Americans currently hold dealing licenses (p. 97).

Because he believes a gun dealership license should be "the hardest, most expensive professional license to acquire in America, instead of one of the easiest and cheapest," Larson wants to toughen the licensing process (p. 17). His measure would increase the licensing fee for gun-dealership from the current level of $30.00 to $2,500 (p. 218). Furthermore, under Larson's proposal, all prospective gun dealers would be required to take a mandatory firearms course (p. 218). Inspectors would visit the business premises of all prospective dealers (p. 219). A dealer would have to demonstrate annual revenue from gun sales of at least $1,000 (p. 218). Finally, Larson advocates his own version of "three strikes and you're out." After three record-keeping

violations within one year, a dealer would lose his license (p. 218).

Larson's licensing plan deserves limited attention. While the ease with which dealers obtain licenses seems intuitively wrong, there are currently 245,000 dealers operating in a country of 66.7 million guns (p. 19). Larson offers no demonstration or proof that reducing the number of dealers will reduce crime. Furthermore, despite its shining optimism, Larson's plan has a tragic flaw: it ignores cost. Courses, frequent inspections, and toll-free licensing hotlines are expensive. The increased licensing fee will cover some but not all costs. Federal funds for dealer regulation might be better spent on other social programs.

Larson aptly draws attention to the inadequacies of current law in the purchasing procedure of guns but offers questionable replacements. Larson criticizes Federal Form 4473, which ironically relies on the gun purchaser herself to reveal whether she is a drug addict, a convicted felon, mentally ill, or an illegal alien or whether she has renounced U.S. citizenship or been dishonorably discharged from the armed forces. Under current law, Larson adds, the form stays in the records of the dealer unless ATF traces the gun (p. 94). Larson also mildly criticizes ATF but relies on it to enforce his reforms. He regrets that ATF must behave at times like "an indulgent parent" (p. 121) and laments its reluctance to revoke licenses despite the discovery of violations in ninety percent of the 8,471 dealerships inspected in 1990 (p. 144). Implicit in Larson's reliance on ATF in his proposed legislation may be a hope that ATF will change its attitude and enforcement tactics with a new set of laws.

That proposed new set of laws includes a ten-day waiting period for the purchase of a gun, although Larson is skeptical of the Brady Bill. Signed into law on November 30, 1993, the Brady Bill requires each state to enact a five-day waiting period for the purchase of a handgun.[1] Although he prefers ten days, Larson calls the waiting period a "welcome pause in gun transactions" (p. 222). His greater concern is the bill's requirement that the Attorney General develop a national instant criminal background check system in five years to replace the waiting period. "This is an optimistic expectation," Larson writes, "given the complexity of developing any computer system capable of searching the databases of fifty states in any period of time even

[1] 18 U.S.C.S. § 922 (Law. Co-Op 1993 & Supp. 1994).

broadly qualifying as 'instant.'" (p. 222). Preliminary evidence suggests that Larson may be right. In February 1994, only seventeen percent of United States criminal records were ready to go into the system.[2]

By establishing a licensing procedure for gun purchasers, Larson would change existing practice dramatically. Every prospective gun purchaser would have to obtain a license (p. 220). To qualify for the license, a prospective gun owner would take a course certified by ATF in firearms safety and law. Licensees would have to renew their licenses every five years (p. 221). Because it would preclude Form 4473, a license would prevent at least some illegal purchases. Yet licensing involves a trade-off; Larson overlooks the cost of licensing. He admits that ATF would charge a licensing fee. To avoid diverting funds from other sources, however, the licensing fee would have to be high.

Furthermore, the costs of a licensing program would not be solely monetary. The incentive to obtain a gun illegally—exactly what Larson tries to avoid—might actually *increase* if the cost of obtaining one legally goes up. A licensing program for gun owners may represent an invasion of gun owners' privacy. Larson's last book, *The Naked Consumer: How Our Private Lives Become Public Commodity*, analyzed the federal government's cozy relationship with direct mail order companies. Surprisingly, Larson does not even address privacy in *Lethal Passage*.

Larson includes some other questionable measures in his set of proposals. Although he offers no reason, he raises the minimum age for acquiring a rifle from eighteen to twenty-one (p. 221). Larson also endorses federal liability laws to hold parents criminally responsible if their children wound themselves or others with an improperly stored firearm (p. 222). At the state level, however, these laws have been criticized for their ineffectiveness and failure to deter.[3]

Although some of his ideas do not seem to have been thought through thoroughly, one sound recommendation in Larson's purchasing reform proposal limits handgun purchases to one a month. After passing a similar measure, South Carolina dropped to the

[2] *Only 17 Percent of Records Ready for Brady Law*, LEGAL INTELLIGENCER, Feb. 11, 1994 at 31.

[3] Ann Marie White, *A New Trend in Gun Control*, 30 HOUS. L. REV. 1389, 1392 (1993).

bottom of ATF's list of states supplying handguns to New York (p. 210).

In the third part of his proposal, Larson urges various other reforms in gun design. Again, these ideas are doubtless well-intended. He advocates "restriction of the firepower of consumer guns" and demands safer designs (pp. 222–23). He gives few details, however, and specifically mentions only a ban on silencers and a limit on magazine capacity (p. 223). Larson's proposals would likely prove costly. He advocates employing the Consumer Product Safety Commission to monitor firearms accidents and defects and supports more studies on which guns criminals use (p. 223). Yet, he does not explain how to pay for these costly reforms. Moreover, Larson's proposals for design reform may have the opposite effect from what he intends. By increasing the tax on machine guns from $200, set in 1934, to $500, Larson's plan may discourage legal purchases (p. 223).

By requiring police departments to report to ATF the manufacturer, model, and serial number of every gun used in every crime, when only ten percent are traced now, Larson's plan might keep police off the streets and in offices (p. 153). This last criticism indicates a central flaw in Larson's plan—its failure to recognize the role of local law enforcement in the great gun war. His proposal to repeal all existing state, county and city regulations of firearms for a uniform approach, for example, is quite troubling (p. 217). In his quest to "preserve liberty," Larson pierces one of its central tenets—federalism. He misleads the reader by glossing over the impact and effect of various state regulations. He only briefly notes that twenty-two states already have waiting periods for handgun purchases and relegates many state regulations to parentheses. By not covering these regulations more fully, Larson obscures state concerns. By advocating national firearms law only, he assumes Massachusetts and Mississippi, for example, should approach firearms regulation identically. As a result of this uniform, federal bias, experiments and successes in states and localities get short shrift in *Lethal Passage*; Project Detroit, for example, a joint effort by Detroit police and ATF, which led to successful prosecutions of ten federal firearms licensees, is one of the few mentioned (pp. 149, 151). The exclusion of the states in Larson's solution to the gun crisis is its greatest weakness.

For all the flaws in his Life and Liberty Preservation Act, however, *Lethal Passage* merits attention. It provides an excel-

lent background for readers concerned about the current gun crisis. An early chapter entitled the "Lethal Landscape" produces grim statistics to paint a vivid picture of the scope of gun violence (p. 15). In 1992 and 1993, Larson reports, guns killed 70,000 Americans, more than the total of all American soldiers killed in the Vietnam War (p. 17), and wounded 150,000 (p. 18). In Los Angeles County alone, over 8000 people were killed or wounded by guns in a single year (p. 17). The increases in the number of handguns in the country since 1960 are also startling. In 1960, there were 16 million handguns. Just ten years later, that figure jumped to 27 million, and as of 1989, there were 66.7 million (p. 19).

To his credit, Larson pays particular attention to the increasing familiarity of children with guns. Between 1965 and 1990, for example, the number of teenagers arrested for homicide increased by 332% (p. 20). Young people in America are particularly likely to be victims of gun homicides. Larson contrasts the gun homicide rate of young men in America of 21.9 per 100,000 to Canada's 2.9 per 100,000 and Japan's 0.5 per 100,000 (p. 20). Larson also cites a study which compared the role of guns in crime in the 1980s in Seattle, Washington, and Vancouver, British Columbia. Although these cites had similar economies, similar demographics, similar television programs and movies, Vancouver had much stricter gun laws. According to Larson, as a consequence, handguns were eight times more likely to be used in assaults in Seattle, and Seattle's homicide rate was five times higher than Vancouver's (p. 22).

As a useful framework, Larson traces the Cobray M-11/9, a semiautomatic assault weapon, from its invention to its use in a school murder. He explains how the manufacturer of the gun, S.W. Daniel, developed the Cobray, sought approval from ATF, and marketed it as the "Gun that Made the Eighties Roar." Larson makes the industry accessible to readers unfamiliar with firearms terminology. Larson selects an infamous gun but avoids generalizing about all guns. Moreover, even though Larson chooses to trace a particularly ominous gun, he selects an unusually sympathetic gunman. *Lethal Passage* tells the story of sixteen-year-old Nicholas Elliot, who used a Cobray bought for him by his cousin to kill one teacher and wound another at Atlantic Shores Christian School in Virginia Beach, Virginia. Larson evokes sympathy for Elliot, in part, by using the word "boy" to describe him in the first line of the book (p. 1), and in part, by

recounting the testimony of Elliot's psychiatrist, who described the attack on the school as the "accumulation of all of [Elliot's] repressed and suppressed emotions" (p. 10). Larson intentionally portrays Elliot as a victim himself, and does not even attempt to portray him as a representative murderer. Furthermore, by choosing a crime at a Christian school, far from urban unrest, "as sheltered a place as one could possibly find" (p. 8), Larson tries to show that middle-class America also loses in the gun war. We come away believing, however, that perhaps the real problem is that middle America has *not* yet lost much in this war whose battles are fought in low-income communities. Still, although it may not be representative, Larson's narrative adds a human dimension to *Lethal Passage*.

Larson does recognize that America's problems with guns may be symptoms of other societal ills. He places some blame, for example, on the American gun culture. He writes "[r]each out, the culture cries, and kill someone" (p. 5). Movies and television have indeed created a "gun culture," albeit a culture with a distorted view of reality. Homicides in the "Wild West," for example, were much more rare than Hollywood suggests. Larson notes that only forty-five homicides occurred from 1870 to 1885 in the "fabled towns" of Abilene, Caldwell, Dodge City, Ellsworth, and Wichita, only 0.6 killings per town per year (p. 41). Nonetheless, guns themselves became film stars, some even capturing top-billing film titles like "The Gun that Won the West" (p. 49). In spite of these disturbing, yet distinctly Hollywood trends, Larson, ever the journalist, does not advocate regulation of today's television and movie violence. He includes this section merely for intellectual interest, and to support his contention of the existence of an all too real, all too effective, and all too pervasive "gun culture."

Larson decries the role of gun magazines, a vital part of this culture, in providing equipment and literature for enthusiasts. His killer, sixteen-year-old Nicholas Elliot, only had to "turn to the back pages of his treasured gun magazines, where advertisers peddle all manner of lethal know-how," including ammunition, instructions on how to make ammunition, daggers, gun parts holsters, and slings (p. 167). Larson describes Paladin Press, which markets and sells books about land mines, revenge, acquiring a new identity, survival and firearms (p. 168). Larson writes that Paladin's books are "well-known to police, who have found them in the libraries of serial killers and bombers" (p.

169). ATF agents, according to Larson, routinely search for books from this industry when investigating bombing suspects (p. 176). That young children are reading Paladin's books, however, troubles Larson most (p. 177). Larson describes serious accidents—many involving children—resulting from use of these books (p. 177). A scientist who studies the link between such literature and crime told Larson that he had "come to expect bombers, killers using exotic weapons, mass murderers and political-extremist offenders to have a level of familiarity with the violence industry, including Paladin Press, equivalent to the familiarity of sex offenders with pornography" (p. 178). He also interviewed Paladin's owner, Peter Lund, who maintains that readers buy his books as a fantasy escape and refuses to take any responsibility for misuse of information in Paladin books or to take "moral culpability" for crimes committed because of them (p. 173).

Unfortunately, but perhaps inevitably, Larson offers no solution to what he obviously finds troubling about these books and the large industry of which they are a part. He writes that this industry, called the "gun aftermarket," is "nurtured by America's infatuation with violence and sheltered by the free-speech guarantees of the First Amendment." (p. 169). Larson offers no legislative solution because any statute would, of course, clash with the First Amendment. Instead he hints that companies like Paladin Press could and should be prosecuted (p. 180).

Larson recognizes that Congress cannot legislate a mindset or a culture. It would be unfair, however, to dismiss his legislative recommendations for better regulation of gun distribution, purchase, and design for this reason. He does not guarantee an end to crime through gun control and readily acknowledges that solving the gun crisis itself "requires far more fundamental change" (p. 229). Still, he proposes a potentially expensive, national program. With other programs that may reduce crime, like low income housing, education, traditional law enforcement and health care, competing for the federal dollar, Larson's suggestions should be examined with caution. Nonetheless, his recommendations deserve attention and consideration as Congress considers any future firearms legislation.

—Kimberly Stallings

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